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IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1972

No. 105

MARY EMILY STUART,

Appellant,

v.

BOARD OF SUPERVISORS OF ELECTIONS OF HOWARD COUNTY, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR HOWARD COUNTY
(T. HUNT MAYFIELD, Judge)

APPELLEES' BRIEF

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The Daily Record Co., Baltimore, Md. 21203

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(T. HUNT MAYFIELD, Judge)

APPELLEES' BRIEF

STATEMENT OF THE CASE

Appellant's registration to vote was cancelled, after notice, by the Howard County Board of Supervisors of Elections because she declined to permit herself to be registered using the surname of her husband (E. 33, 46, 47). Appellant appealed the action of the Board by filing Petitions in the Circuit Court for Howard County as authorized by Article 33, Section 3-21(a) of the Annotated Code of Maryland (1971 Replacement Volume)*

* All references to Article 33 are to the Annotated Code of Maryland (1971 Replacement Volume and 1971 Supplement), unless otherwise indicated.

seeking to have her voter registration reinstated in the name of Mary Emily Stuart without including the surname of her husband, *i.e.* to have her registration reinstated in her maiden name (E. 1-9). The petitions were consolidated, and the demurrers of the Board were overruled. The Board answered (E. 10), and on the day of the hearing the State Administrative Board of Election Laws was permitted to intervene without objection as a respondent and to file its answer (E. 13). After an evidentiary hearing and argument by counsel before the Honorable T. Hunt Mayfield, the Court filed a Memorandum and Order concluding, in essence, that the requirement that a married woman be registered to vote using the surname of her husband was reasonable and not unconstitutional and dismissing the petitions (E. 15). It is from these dismissals that appellant appeals. Art. 33, §3-21(d).

QUESTIONS PRESENTED

1. Are the election boards of the State authorized by Maryland law to require a married woman to use the surname of her husband when registering to vote, unless her name has been changed by legal proceedings?

2. Does Maryland have a legitimate State interest in requiring a married woman to be registered to vote using the surname of her husband unless her name has been changed through legal proceedings?

STATEMENT OF FACTS

Appellant's registration to vote was cancelled by the Howard County Board of Supervisors of Elections after she had been notified pursuant to Article 33, Section 3-18(c) that she was required to complete a "Request for Change of Name" form to show the surname of her husband for the voter registration records or the Board would

be required to cancel her registration, and she had refused to comply (E. 23-24, 32-33, 46, 47). The Howard County board of elections did *not*, at any time, deny appellant the right to register to vote. At all times the board stood *ready* to maintain her registration if she would merely use the surname of her husband, which the board considered her legal name, for that purpose (E. 26, 33, 46). In fact, under Maryland law, appellant may reregister to vote for the forthcoming presidential election at any time through October 10, 1972, if she uses the surname of her husband. Art. 33, §§1-1(c), 3-8(a).

Appellant seeks to be registered to vote in her maiden name, Mary Emily Stuart, although she was married to Samuel H. Austell in Virginia in November, 1971 (E. 22-24). Appellant and her husband testified that they agreed before marrying that she would continue to use her own name and that they had consulted counsel, who apparently offered no objection (E. 22, 26-27). However, the understanding between appellant and her huband was oral and was not part of a general antenuptial agreement such as that entered into by Judge Marshall (E. 22, 26, 27, 32). Furthermore, appellant did not herself consult legal counsel, her husband consulted counsel in an unrelated jurisdiction — North Carolina, it was appellant's parents who consulted counsel in Virginia, there is no evidence of the exact questions asked or advice given, and appellant's husband acknowledged that there was *no* specific discussion relating to voting (E. 22, 27, 28). There is thus nothing concrete in the record to indicate that Virginia law is substantively different from Maryland law in the area of voting registration. Compare Art. 33, §3-18(c) and Va. Code Ann., §24.1-51 (Supp. 1971). (See Washington Evening Star, July 29, 1972, p. 1, col. 1, where it was reported that Virginia courts had granted Mrs. Mister's peti-

tion to change her name, but the petitions of two other women had been denied.)

At no time has appellant made any effort to change her name by legal proceedings in Maryland (E. 23). See Md. Rules BH70-BH75.

The action of the Howard County board of elections in cancelling appellant's voter registration because she refused to have her surname changed to her husband's on the registration books was in accordance with its accepted practice and interpretation of the law, supported by an opinion of the Attorney General's office (E. 32-34, 48). It has been the practice of the Howard County board ". . . for a considerable number of years" to require married women to register to vote under the surnames of their husbands (E. 34).

Furthermore, it was in accordance with the uniform Statewide practice of long standing. Mr. Willard A. Morris, State Administrator of Election Laws, testified that the practice of election boards generally in the State was that a married woman must use the surname of her husband when registering to vote (E. 35). His personal experience with the practice dates back to 1963, and his research of the statutes indicated that the practice goes back approximately to 1936 (E. 35). The practice was followed by the Baltimore City board when it sent a change of name card to Judge Marshall nine years ago (E. 30-31).

Mr. Morris further testified that the purpose of the practice was to provide a trail of identification and to prevent voter fraud (E. 35-36). There are approximately 1,762,000 registered voters in Maryland (E. 35). Assuming one-half are female and the majority of them are or will be at some time married, Mr. Morris testified that it is necessary

to have a trail to identify persons and to prevent voter fraud and thus, to protect voting rights (E. 36). If a married woman could register under different names, he testified, the identification trail would be lost (E. 35).

For example, under Maryland registration procedures, when a voter moves from one subdivision to another within the State and seeks to register to vote from his new residence, a cancellation notice is sent to the board of elections at his previous residence, and it is important that the county cancelling the voter's registration have the proper name of the voter for correct identification (E. 36-37). Cancellation is necessary so that voters cannot thereafter vote twice (E. 37). See Art. 33, §§15-5 and specifically 16-14(a) which provide that the only basis upon which a voter may be challenged on election day is identity. Uniformity of practice among the election boards of the State as to what name must be used by married women for registration purposes is, thus, important, and Mr. Morris testified that the opinion of the Attorney General's office that upon marriage a woman must change her surname to that of her husband on the voter registration books or the boards must cancel her registration, was distributed to all election boards in the State to further such uniformity of practice (E. 37-38, 48).

An election board would, of course, permit a married woman to register under a surname other than her husband's if she had her name legally changed by court order, and Mr. Morris testified that he was aware of one instance where a name change was effected in one hour to get on the ballot (E. 36, 40).

Mr. Morris further testified that election boards keep two files of registered voters by name: The first alphabetized by district and precinct and the second by county

or city [Baltimore City] (E. 40). Some boards that now use computers also have an identification number, but a majority of boards in the State are not using computers (E. 40). Furthermore, under some computer systems, the identification number is developed from the name (E. 43). In any event, numbers in the opinion of Mr. Morris would not provide an adequate voter identification trail without the voter's name because a person registering under different names would have different numbers (E. 41).

If two voters apparently have the same name, then addresses are compared to identify them, but addresses are not the initial means of identification (E. 41-42). Nevertheless, regardless of how or whether numbers and addresses are also used in keeping voter registration books, the starting point is always the voter's name (E. 44).

Because it considered the practice of requiring a married woman to register to vote using the surname of her husband throughout the State a vital part of the election process to insure proper voter identification and to prevent fraud, the State Administrative Board of Election Laws has unanimously taken the position that the practice should be continued (E. 37). The State Administrative Board is charged with the duty to exercise supervision over the conduct of elections in the State. Art. 33, §1A-1 (e)(i).

ARGUMENT

I.

THE ELECTION BOARDS OF THE STATE ARE AUTHORIZED BY MARYLAND LAW TO REQUIRE A MARRIED WOMAN TO USE THE SURNAME OF HER HUSBAND WHEN REGISTERING TO VOTE, *UNLESS* HER NAME HAS BEEN CHANGED BY LEGAL PROCEEDINGS.

It is the uniform, Statewide rule in Maryland that a married woman must use the surname of her husband

when registering to vote unless her name has been changed by legal proceedings, and this rule has been followed by the election boards of the State for some time, all as established by the testimony of Willard A. Morris, State Administrator of Election Laws, and Daniel L. Downey, Chairman of the Board of Supervisors of Elections of Howard County.

This rule is consistent with the common law rule as long accepted by virtually all courts of this county and by custom that upon marriage a woman assumes the surname of her husband by operation of law. *People ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945); *Forbush v. Wallace*, 341 F. Supp. 217 (M. D. Ala. 1971) (three judge district court) affirmed *per curiam*, 405 U.S. 970 (1972); *Chapman v. Phoenix National Bank*, 85 N.Y. 437 (1881); *Wilty v. Jefferson Parish Democratic Exec. Comm.*, 245 La. 145, 157 S.2d 718 (1963) (dictum); Annotation, *Correct Name of a Married Woman*, 35 A.L.R. 417 (1925); 57 Am.Jur.2d, Name, Section 9; 65 C.J.S., Names, §3(c). This general rule, as recognized in the United States, was recently summarized in Hughes, Marija Matich, *And Then There Were Two*, 23 Hastings Law Journal 233 (1971):

> "Today, it is almost a universal rule in this country that upon marriage, as a matter of law, a wife's surname becomes that of her husband. While a wife may continue to use her maiden name for numerous purposes (professionally, for example), her name *as a matter of public record* is that of her husband. In order to *retain* her maiden name, the wife must go through court proceedings to *change* her name back to the one with which she was born." *Id.* at 233-34. (Emphasis partially supplied).

The case of *People ex rel. Rago v. Lipsky, supra*, is directly in point. There a woman, who had used her maiden

name as a practicing attorney for more than six years and whose husband "expressly" approved of her plans to continue her practice of law and other business affairs under her maiden name, had her registration in her maiden name cancelled by the election board and was required to reregister in her married name in order to vote. In upholding the action of the election board, the Court stated, 63 N.E.2d at 644:

> "Notwithstanding petitioner's contention to the contrary, it is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname, with which is used her own given name."

This common law rule was recently reaffirmed in the face of a constitutional challenge in *Forbush v. Wallace, supra,* where the refusal of the Alabama Department of Public Safety to issue plaintiff a driver's license in her maiden name because she was married was upheld. The Court stated at the outset of its consideration of the merits, 341 F. Supp. at 221:

> "We may commence our analysis of the merits of the controversy by noting that Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname [citations omitted]. Apparently, in an effort to police its administration of the issuance of licenses and to preserve the integrity of the license as a means of identification, the Department of Public Safety has required that each driver obtain his license in his 'legal name.' Thus, in conformity with the common law rule, the regulation under attack requires that a married woman obtain her license in her husband's surname."

For additional statements of the common law rule in the United States, see, *Chapman v. Phoenix National Bank,*

supra, 85 N.Y. at 449, where a confiscation petition issued in petitioner's maiden name was found invalid; *In re Kayaloff,* 9 F. Supp. 176 (S.D.N.Y. 1934) where the court held that a naturalization certificate must be issued in a woman's married name, even though petitioner was well known as a professional musician under her maiden name and feared financial loss and a discrepancy between her musical union card and her naturalization certificate if it was issued in her husband's surname; *Wilty v. Jefferson Parish Democratic Exec. Comm., supra,* 157 So. 2d at 724, 725 where the court held that a married woman should appear on the ballot using her husband's surname and her given name rather than using her husband's name in its entirety with the designation "Mrs."; *Freeman v. Hawkins,* 77 Tex. 498, 14 S.W. 364, 365 (1890) where service on a married woman in her maiden name was found defective; *Bacon v. Boston Elevated Rwy. Co.,* 256 Mass. 30, 152 N.E. 35, 36 (1926) where an automobile registered in a married woman's maiden name was found not to be registered in her legal name.

In the instant case, appellant's registration was cancelled pursuant to Article 33, Section 3-18(c). That section provides:

> "(c) *Notification to show cause before cancellation.* — Whenever the death, conviction of infamous crime, *change of name by marriage,* change of name by decree, of any registered voter is reported as above provided, the board shall cause to be mailed to the address of such voter, as it appears on the registration books or records, a notification that such death, or conviction of infamous crime, or *change of name by marriage*, or change of name by decree, has been reported to the board, and shall require the voter to show cause within two weeks after the mailing of such notification why his registration should not be cancelled. If no sufficient cause shall be shown, the registration of

such voter shall be cancelled by removing the registration cards or forms of said voter from the original and duplicate files and placing them in a transfer file. . . ." (Emphasis supplied)

Section 3-18(a)(3) requires the appropriate clerks of court to notify the election boards of changes of name by marriage. It states:

> "(3) The clerk of the Court of Common Pleas in Baltimore City and the clerk of the circuit court for each county shall file with said respective boards the former and present names of all female residents of said city or county, as the case may be, over the age of twenty-one years, *whose names have been changed by marriage* since the date of the last such report." (Emphasis supplied)

When construing a statute, the object is always to discover and carry out the legislative intent. *E.g., Barnes v. State ex rel. Pinkney*, 236 Md. 564 (1964); *Casey Dev. Corp. v. Montgomery County*, 212 Md. 138 (1957). The quoted provisions of Section 3-18 on their face are premised upon an assumption by the Legislature that a woman's name does change when she marries, in accordance with the common law rule. Any other conclusion would deprive the provisions of meaning because the only information possessed by the clerk of court is the fact of the marriage. The administrative application of Section 3-18(c) to require every woman voter who has married to change her name on the registration books gives the section meaning. If a married woman could elect whether to adopt her married name for voting purposes, then the purpose of the statute in furthering the State's interests in preventing voter fraud, in providing an accurate trail of identification, and in uniform record keeping would not be served.

Contentions similar to those made by Appellant were argued by the Petitioner in *People ex rel. Rago v. Lipsky*,

supra, as to the proper interpretation of the Illinois statute. The statute at issue in *Lipsky* used language very like that in Section 3-18(c). It provided that "any registered voter who changes his or her name by marriage or otherwise, shall be required to reregister anew and authorize the cancellation of the previous registration." In response to the question whether the name of a married woman was changed within the meaning of the statute by marriage, the court answered affirmatively by referring to the common law rule.

> "[The quoted statute] expressly recognized a change of name by marriage, and since it is only in the case of married women that there is any recognized custom or rule of law whereby marriage effects a change of name, it must logically follow that when the Legislature expressly referred to the fact that the name of a registered voter might be changed by marriage it had in mind the long-established custom, policy and rule of the common law among English-speaking peoples whereby a woman's name is changed by marriage and her husband's surname becomes as a matter of law her surname." 63 N.E.2d at 645.

Further, in answer to the contention that the Illinois statute did not require a woman to change her name for voting purposes upon marriage unless she chooses to regard her name as having been changed by marriage, the court held the section was mandatory and required a woman to reregister upon marriage, because otherwise, the law would become a nullity to be obeyed at the option of the voter.

The requirement that upon marriage a woman must change her name on the voter registration records seems to have originated with Chapter 77 of the Laws of Maryland of 1937, Section 29-0, and coincided with legislative provision for permanent general registration. The statu-

tory requirements of Section 29-0 as enacted in 1937 originally applied only in Baltimore City, but they are the predecessor of those in Article 33, Section 3-18 and were gradually extended to all counties. See Laws of Md. of 1945, Chap. 934, §28; Laws of Md. of 1959, Chap. 287. Prior to the enactment of these provisions there was no requirement that a woman, who was properly registered under her maiden name, change her name on the voter rolls when she married, just as there was no requirement that she or anyone else notify the election board of a change of address. 6 *Opinions of the Attorney General* 188 (1921).

The uniform and long-standing administrative practice and the construction and application of Section 3-18 and its predecessor provisions is entitled to great weight by the Court in determining the proper interpretation and application of Section 3-18(c). ". . . [A] long-continued and unvarying construction applied by administrative officials is strong persuasive influence in determining the judicial construction of the statute, and it should not be disregarded except for the strongest and most urgent reasons." *Smith v. Higginbothom*, 187 Md. 115, 133 (1946), and cases cited therein. See also, *Macke Co. v. State Department of Assessments and Taxation*, 264 Md. 121, 135 (1972). An administrative interpretation which has received the tacit approval of the Legislature is also entitled to great weight. *Comptroller v. Rockhill, Inc.*, 205 Md. 233 (1954); *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603 (1953).

It is important to recognize that the only issue involved here is the requirement that a married woman use her husband's surname on the voter registration rolls. There is no issue in this case concerning the right of a married woman under Maryland law to use her maiden name, or any other

name for that matter, for professional or other purposes. The position of appellees is not contrary to the rule stated in *Romans v. State*, 178 Md. 588, 597 (1940), *cert. denied*. 312 U.S. 695 (1941), that *in the absence of a statute to the contrary* a person may adopt any name by which he may become known and transact business, but it is to be noted that in *Romans* the Court was ruling that a person could be prosecuted in an assumed name and that the Court's statement of the rule was ". . . without regard to his *true* name". *Ibid.* (emphasis supplied).

Appellant relies heavily on the Ohio case of *State ex rel. Krupa v. Green*, 144 Ohio App. 497, 177 N.E.2d 616 (1961), holding that a married woman could appear on the ballot using her maiden name over the objection of a taxpayer, and it may well be that the Ohio rule in this respect is contrary to the Maryland rule. However, there are important factual distinctions between the *Krupa* case and the instant one. First, the woman in *Krupa* had entered into a formal. written antenuptial contract that she would retain only her maiden name, while here appellant and her husband essentially only had an oral understanding which is more like the situation in *People ex rel. Rago v. Lipsky, supra* (E. 27). Second, the Ohio board of elections, having been notified by her that she was married, had permitted the woman to vote in three elections using her maiden name and had accepted her nominating petition in her maiden name. The Maryland rule and practice is to the contrary, and she would not have been permitted to vote or run for office using her maiden name in Maryland unless she had legally changed her married surname.

Under Maryland law there is a simple procedure available to permit a married woman to change her name for *all* purposes. Md. Rules BR 70-BH 75. A true copy of the court decree obtained pursuant to such procedure must

be accepted as sufficient evidence of a person's name. Art. 16, §123. Specifically, State election boards permit, indeed must insist, that a person be registered to vote under his or her legal name when changed by court decree. Art. 33, §§3-18(a)(4) and 3-18(c) (E. 36). As a practical matter the election boards of the State are not in a position to make complicated factual determinations as to whether a married woman voter is not and has never been known by her married surname. Therefore, it is reasonable for the boards, in order to provide uniform record keeping and accurate voter identification and to prevent fraud, to insist always upon use of the surname adopted by marriage unless a married woman has taken the relatively easy step of changing her name legally for all purposes by a court order which can be documented.

In conclusion, it is appellee's position first that the common law rule in the United States is that upon marriage a woman takes the surname of her husband by operation of law. Consequently, when Article 33 requires an applicant to give his "last name" (§3-12(b)) and to answer questions concerning his "name" under oath (§§3-6, 3-13(a)), it means the applicant's legal name; and when a woman's name is changed by marriage, she must change her name on the registration records. Art. 33, §3-18(c). Second, Article 33, Section 3-18(c) properly interpreted in light of the common law, whether rule or custom, and in light of the long-standing and uniform administrative practice, requires that a woman who marries must notify her election board of her change in surname, and if she refuses to do so, the election board must cancel her registration. Third, even if the rule that a wife assumes the surname of her husband upon marriage is based on custom rather than constituting common law, and even if Section 3-18(c) is not by its terms specifically applicable

to the instant case, the long-standing and uniform administrative practice is reasonable in light of custom and Section 3-18(c), is not prohibited by any other provision of Article 33, and thus should be affirmed.

II.

MARYLAND HAS A LEGITIMATE STATE INTEREST IN REQUIRING A MARRIED WOMAN TO BE REGISTERED TO VOTE USING THE SURNAME OF HER HUSBAND UNLESS HER NAME HAS BEEN CHANGED THROUGH LEGAL PROCEEDINGS.

Appellant has not been denied the right to vote. The Howard County Board of Supervisors of Elections was willing to permit her to remain registered when this suit arose and is willing at the date of this writing to permit her to reregister. Art. 33, §3-8(a). It insists only that she use the surname of her husband when doing so unless she has had her name legally changed by other proceedings.

Appellees recognize fully that the right to vote is "a fundamental political right, because preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (dictum). See *Dunn v. Blumstein*, 405 U.S. 330 (1972), and cases cited therein. Therefore, if the *right* to vote had been *denied* by appellees, the State would have the burden of showing it was necessary to promote a compelling State interest. *Dunn v. Blumstein, supra.* However, there is simply no constitutional issue in this case involving a denial of the right to vote because appellant has not been denied that right. It is completely within her power and discretion to register to vote. She is required to do so in her legal name, whether by common law or custom, but no burden was imposed upon her which denied, or even impinged upon, her right to vote.

Even if the Howard County board's action amounts to regulation of appellant's right to vote, the Supreme Court

has recognized that the State is left with broad powers to regulate voting and the conduct of elections. As stated in *Williams v. Rhodes*, 393 U.S. 23, 34 (1968):

> ". . . the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors."

Likewise, it was acknowledged in *Dunn v. Blumstein, supra*, 405 U.S. at ....., 92 S. Ct. at 1000:

> ". . . the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways."

Cf., Bullock v. Carter, 405 U.S. 134 (1972), citing examples of legitimate State interests with respect to the regulation of candidacies.

Some of the legitimate interests of the State in requiring all married women to use the surnames of their husbands when registering to vote were outlined by Willard A. Morris, the State Administrator of Election Laws (E. 35-44). The requirement is necessary to provide a trail of voter identification and to protect against fraudulent voting through multiple registration in different names. Uniform voter identification is particularly important to accurately and efficiently cancel old registrations when voters move from one subdivision to another within the State. The uniform use of every person's legal surname promotes accurate record keeping and provides an accurate and efficient means of locating the registration record of each voter.

The alternative system suggested by appellant based on numbers is unsatisfactory. Most subdivisions do not use computers and thus do not have voters identified by number. Among those that do use numbers, different numbering systems have been adopted. Numbers would not protect against fraudulent voting because a person could be issued more than one number if different names were used. Thus, all systems depend in the first instance upon the proper name of the voter (E. 44). Furthermore, to retrieve the voting record of a voter if numbers were relied upon as the principal means of identification, each voter would be bound to remember his number or carry it with him; and it is less likely that a voter would remember his number than his name. Whether the best method has been chosen to achieve these legitimate State objectives is a matter for legislative determination.

Similar interests were found adequate in *Forbush v. Wallace, supra*, to uphold a constitutional challenge, based on the Equal Protection Clause, that the Alabama requirement that a married woman's driver's license be issued only in her husband's surname discriminated against the plaintiff, a married woman using her maiden name. Administrative convenience was also deemed an important consideration, as indeed it is in keeping voter registration records in this State by surname, including the husband's surname in the case of married women. Contrary to the assertion of amici curiae, the summary affirmance by the Supreme Court in *Forbush* does carry weight as precedent, unlike a denial of certiorari, because it is an affirmance on the merits, although it may carry less weight than an affirmance after argument. Stern and Gressman, *Supreme Court Practice*, 198-199, 223-224 (4th Ed. 1969). For example, the Supreme Court's *per curiam* affirmance in *Snell v. Wyman*, 281 F. Supp. 853 (E.D. N.Y. 1968), affirmed *per curiam* 393 U.S. 322 (1969), was cited by the Court in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

Furthermore, the requirement challenged here is not discriminatory. All voters are required to register using

their legal surname. Art. 33, §§3-6, 3-12(b), 3-13(a). All voters whose names are changed must notify their election board of the change, whether the change be effected by marriage or court decree. Art. 33, §§3-18(a)(3), (4), 3-18(c). See also *Id.* at §§3-8(a), 3-9.

To the extent that the Court may find that a discrimination does exist, it is one based on sex and marriage because of the automatic consequence that, absent a legal change of name, a woman's surname becomes that of her husband upon marriage. If it exists, the discrimination is one caused by the uniform common law rule or custom, applicable to married women, and it is not one involving the extension of the elective franchise. The right involved is the right to assume any name a person wishes. However, the right to assume a name of one's choice does not have constitutional status. Rather it is based on common law. Furthermore, the Supreme Court has yet to hold that discriminations based on sex are inherently suspect and invidious and therefore that they can only be justified by showing a compelling State interest. Even in *Reed v. Reed*, 404 U.S. 71 (1971), which involved an Equal Protection challenge to an Idaho statute giving men preference over women in appointment as administrator of a decedent's estate, the test applied by the Supreme Court was the customary "rational basis" test. As demonstrated previously, the State has demonstrated a rational basis for its requirement that all persons register using their legal surnames, which in the case of a married woman is the surname of her husband.

Finally, whatever inconvenience the State rule may cause appellant is *de minimis* when weighed against the interests of the State in uniform record keeping, in accurate identification of voters, and in preventing voter

fraud, all to preserve the integrity of elections. There is a simple alternative available to her, either use her husband's name for voting purposes or follow the relatively simple procedure to have her name changed. The cases which have applied the "compelling State interest" test to strike down election laws have involved absolute denials of the right to vote to a class of voters. *E.g. Dunn v. Blumstein, supra,* (to new residents); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (to residents who did not own or lease taxable real property and were not parents of public school children); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (to those who were not property taxpayers); *Carrington v. Rash*, 380 U.S. 89 (1965) (to those moving into the State while in the military); *Evans v. Cornman*, 398 U.S. 419 (1970) (to residents of a federal enclave). Here, of course, appellant is not denied the right to vote but is merely required to comply with the State's record-keeping provisions, just as every other voter. The State needs a uniform system for keeping track of registered voters, and recording them by surname is the most accurate and efficient. It requires, however, a uniform system for determining a person's proper surname and that is provided by the common law rule. The various boards of election are not in a position to make uniform value judgments concerning the validity of a name designation other than that made by law, and they are unable to have any assurance as to future name use unless they insist uniformly upon compliance with the common law or custom as it has evolved or received documented evidence of a legal name change in the form of a court decree. This is one reason why Maryland has provided a procedure for a person to change his legal name for all purposes by court determination and decree.

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APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

On April 6, 1972, Mary Emily Stuart, the Appellant, filed a Petition to Correct Registry in the Circuit Court for Howard County, Maryland, in Law No. A-5789, praying, *inter alia*,

that the voter registry of Howard County be corrected to show the name of Mary Emily Stuart as a registered voter and that the Court order the Respondents, Daniel L. Downey, Chairman, Board of Supervisors of Elections for Howard County, and the Board of Supervisors of Elections for Howard County, Appellees herein, to implement such correction without delay. (E. 1)

On April 13, 1972, the Appellant, Mary Emily Stuart, filed an Ex Parte Petition to Restore Name to Registry of Voters in Howard County, (E. 7) together with a Motion to Consolidate Cases No. A-5789 and No. A-5799, and a Motion to Shorten Time for Return and Answer and to Set Hearing on Merits.

The Court thereafter issued an Order Consolidating the cases, and an Order changing the Return Date to April 14, 1972, the Time for Answering to April 20, 1972, and also setting a hearing for April 25, 1972.

The Howard County Board of Supervisors of Elections filed a single demurrer to both petitions. The Court overruled it with leave to answer. The Howard County Board of Supervisors of Elections filed its Answer.(E. 10).

The State Administrative Board of Election Laws, upon reasonable application, was allowed to intervene and filed its Answer to the Petitions.

After a hearing on the merits in open court, the Court filed a Memorandum and Order (E. 15) whereby it dismissed the aforesaid petitions. This appeal directly concerns the propriety of the Order passed by the Trial Court.

QUESTIONS PRESENTED

1. Did the Trial Court err when it concluded that a woman's legal surname – upon marriage – becomes that of her husband by operation of law?

2. Do the laws of Maryland or Virginia require a woman to adopt her husband's surname?

3. Does the requirement that a woman, who upon marriage did not adopt her husband's surname, procure a decree changing her surname from that of her husband to the surname of her choice violate the Fourteenth Amendment to the Constitution of the United States for the reason that it is discriminatory and serves no legitimate interest?

4. Does the requirement that a woman, who upon marriage, did not adopt her husband's surname, procure a decree changing her surname from that of her husband to the surname of her choice abridge her rights to vote and, therefore, violate the Nineteenth Amendment to the Constitution of the United States?

STATEMENT OF FACTS

Mary Emily Stuart has been known all of her life only by the name "Mary Emily Stuart" (E. 2, 7, 22, 24, 27, 28). In accord with an antenuptial agreement, she retained the name of Mary Emily Stuart when she married Samuel H. Austell in Virginia in November 13, 1971 (E. 2, 7, 22, 24). This agreement was confirmed by her husband and was known to others (E. 26, 27, 29).

When Mary Emily Stuart registered to vote on March 2, 1972, she was qualified under the laws of the State of

Maryland to vote (E. 2, 7, 10, 12, 13, 14). Both Mary Emily Stuart and her husband informed the Registrar at the time of registration that Mary Emily Stuart did not change her name when she was married (E. 2, 7, 23, 27). She was allowed to register in the name of Mary Emily Stuart without objection (E. 2, 7, 11, 12, 23, 27).

On March 16, 1972, pursuant to an opinion of the office of the Attorney General of Maryland, dated April 7, 1971, a letter was mailed to Ms. Mary Emily Stuart instructing her to change her name by March 31, 1972, or her registration would be cancelled (E. 3, 7, 8, 23, 46). Mary Emily Stuart then called the Chairman of the Board of Supervisors of Elections and explained that her name had not been changed by marriage (E. 3, 23). Chairman Downey told Mary Emily Stuart that he was sorry but that did not make any difference.

She was told she would have to register under her husband's name or otherwise her name would be stricken from the rolls (E. 23, 32, 33).

On April 4, 1972, the Board sent another letter to Mary Emily Stuart cancelling her registration. (E. 3, 8, 23, 47).

No show cause hearing was offered or held for Mary Emily Stuart, because a hearing would not have changed the situation. (E. 3, 8, 23, 34).

Judge Nellie Marie Marshall, a former Judge of the Orphans' Court of Baltimore City and a member of the Maryland Bar since 1940, testified that after research, she found that the general opinion is that a name only serves to identify one, and as long as one is using the one name only,

not for fraud or misrepresentation, one can use any name he chooses, even though it is not a given name. (E. 29, 31). She found no statute requiring a wife to take her husband's name. (E. 29, 30).

When she married Charles W. Tysko in Maryland, she decided to keep her own name. (E. 29). She and her husband signed an antenuptial agreement covering the use of her name. (E. 32).

Judge Marshall received a notice from the Baltimore City Board of Supervisors of Elections directing a change of name, but upon a show cause hearing, the matter was held sub-curia. No opinion was ever issued and five years later she was still voting under the name of Marshall. She is now registered to vote in Florida in the name of Marshall, has a passport in the name of Marshall, and owns property as tenants-by-the-entireties with her husband in the names of Tysko and Marshall (E. 30).

When Judge Marshall's son filed as a candidate for office, he was informed by the Board of Supervisors of Elections that he could not use the name of M. Jack Marshall, but would have to use his first name. At a court hearing, it was decided he could use the name of M. Jack Marshall. (E. 31).

Testimony produced by the Appellees showed: that the practice of the Election Boards in this State, dating back to 1936, is that married women must use the surname of the husband. (E. 35);that the purpose of the practice is to provide some trail of identification to prevent voter fraud; that if a woman could register either way, the trail would be lost; (E. 35, 36, 37); that the only exception to the requirement that married women register under the husband's name is allowed

when the name is changed by a court order, (E. 36); that it is not the practice of the Board to require any other person, except married women, to change the name with which they enter the State; that some persons changed their names because regulations of the Election Board required the change when a person attempted to get on the ballot by using a nickname, rather than the legal name, because he was better known by the nickname. (E. 39).

Witnesses for the Appellees went on to say that even though Mary Emily Stuart was married in another state where she could retain her name and came to this state and did not change her status while in Maryland, the Board would still require her to change her name. (E. 39); that conceding that there is no fraud on the part of Mary Emily Stuart, the only thing remaining is identification (E. 44).

According to Appellees' testimony, identification of a voter by the Board starts with the name. (E. 44). The Board maintains two files of voters, which are alphabetized by district and precinct in binders and alphabetized by the county or the city in the master files. (E. 40). Some of the Boards that have computers are beginning to use identification numbers and the purpose of the numbers, where they are used, is to identify a voter. (E. 40). Not only names, but districts, wards, and precincts are used to identify voters. (E. 44). The Board can identify people who have the same name by using numbers, such as the precinct number and the address. (E. 41).

A witness for the Appellees volunteered the information that the practice of requiring married women to come in and re-register in Baltimore City has resulted in married women being registered twice, in both maiden and married names;

further, that Baltimore City is now trying to purge its records of some ninety thousand names, of which these names are a portion (E. 44, 46). Notwithstanding this situation, there has never been a case, to the knowledge of the State Administrator of Elections, of a woman having been accused of voting twice in the same election. (E. 45).

ARGUMENT

I.

THE COURT ERRED WHEN IT CONCLUDED THAT A WOMAN'S SURNAME UPON MARRIAGE BECOMES THAT OF HER HUSBAND BY OPERATION OF LAW.

The Constitution of the United States, the Constitution of Maryland and the Annotated Code of Maryland contain no requirement that a woman take the surname of her husband upon marriage.

Nevertheless, the State Administrative Board of Elections contends that Article 33, Section 3-18, Ann. Code of Md. (1971) Repl. Vol.) requires a married woman to register to vote in her husband's surname.

The pertinent parts of Article 33, Section 3-18, read as follows:

> "*Reports to be made by certain public agencies* — Reports to the board shall be made by several officials in Baltimore City at least once each month, and in the several counties, by the last days of January and July in each year, as follows:
>
> The clerk . . . of the circuit court for each county shall file with said representive boards the former and

present names of all female residents of said city or county, as the case may be, over the age of twenty-one years, whose names have been changed by marriage since the date of the last such report.

Notification to show cause before cancellation –Whenever the . . . change of name by marriage . . . is reported as above provided, the board shall cause to be mailed to the address of such voter . . . a notification that such . . . change of name by marriage . . . has been reported to the board, and shall require the voter to show cause within two weeks . . . why his registration should not be cancelled."

The Board predicates its contention upon an opinion issued by the Attorney General of Maryland on April 7, 1971, wherein it was stated that a married woman must use the surname of her husband. However, since the Attorney General's opinion is entitled to no greater weight than an opinion of any other attorney to a client, is this really the case?

The general opinion is that a name serves only to identify one, and as long as one is using a particular name without intending to defraud or to misrepresent, he may use any name that he chooses, even though it is not a given name (E. 31).

Maryland has adopted this opinion and made it a rule. In *Romans v. State,* 178 Md. 588, 597, 16 A.2d 642, 646 (1940), *cert. denied,* 312 U.S. 695 (1941), the court defined "name" as the designation or appellation which is used to distinguish one person from another, and stated,

"If there is no statute to the contrary, a person may adopt any name by which he may become known, and by which he may transact business and execute contracts and sue or be sued."

Other jurisdictions have opened with the Maryland rule,

" . . . A man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as best he can." *Davis v. Lowndes,* 1 Bing. N. Cas. 597, 618; 131 Eng. Reprint 1247, 1255 (1835).

"There is nothing in law prohibiting a man from taking another name if he chooses." *Smith v. U.S. Casualty Company,* 197 N.Y. 420, 424, 425.

"In England, from which came our customs with respect to names, a woman is permitted to retain her maiden name upon marriage if she so desires." *State ex rel. Krupa v. Green,* 114 Ohio App. 497, 117 N.E. 2d 616 (1961) at 619.

M. Turner-Samuels, in his book THE LAW OF MARRIED WOMEN, at 345, states:

"In England, custom has long since ordained that a married woman takes her husband's name. This practice is not invariable, nor compellable by law . . . A wife may continue to use her maiden, married or any other name."

To support his proposition, Turner-Samuels cites the following cases:

Cowley v. Cowley, [1901] A.C. 450; *Davies v. Lowndes, supra. Du Boulay v. Du Boulay,* [1869]L.R. 2 P.C. 430.

The common law rule is that a person may adopt any name he wishes, in the absence of fraud or deceit. Statutes prescribing the method for changing a name are generally held to be in addition to, rather than in derogation of, the common law rule, 57 Am. Jur. 2d *Change of Name* sec. 10-12

(1971); 110 A.L.R. 219 (1937); 65 C.J.S. *Names* sec 11 (1966); Lawrence Green, *How to Change Your Name,* Legal Almanac Series No. 34 (1954); Thomas Falconer, *On Surnames and the Rules of Law Affecting Their Change* (London 1862).

Lord Halsbury, in 23 *The Laws of England,* 555,556 (2d ed. 1936), states:

> "The law prescribes no rules limiting a man's liberty to change his name. He may assume any name he pleases in addition to or substitution for his original name; . . . The law concerns itself only with the question whether he has in fact assumed and has come to be known by a name different from that by which he was originally known.
>
> "As regards surnames, there never was any doubt that, as in the first instance they were arbitrarily assumed, so they could be changed at pleasure. An Act of Parliament, Royal License, or other such formality is not required for the purpose."

As it was at common law, so now is it the option of a married woman to choose the name that she desires to use. Nellie Marie Marshall retained the name of her first husband at the time of her second marriage. (E. 31, 32) Amy Vanderbilt, who has been married four times, says, "I have always used my maiden name." (Daily Record, April 28, 1972, page 4) Lynn Fontanne, of the fabled Lunt and Fontanne acting team, adopted a hyphenated name, Fontanne-Lunt, as her legal name. Lucy Stone, looking upon the loss of a woman's name at marriage as a symbol of a loss of her individuality, consulted several eminent lawyers, including Salmon P. Chase, later Chief Justice of the United States, and was assured that there was no law requiring the wife to take her husband's name, only a custom. She thereupon remained Lucy Stone. *Blackwell, Lucy Stone,*

Pioneer of Women's Rights, (1930) page 171. So recognized has Lucy Stone's action become that *Webster's Dictionary,* 3d ed. unabrid., defines (under "L" for Lucy) a Lucy Stoner as a woman who does not adopt her husband's name but retains her maiden name.

The legal authorities upon which the State Administrative Board of Elections relies can be distinguished from the instant case. The annotation, *Correct Name of Married Woman,* 35 A.L.R. 417 (1925) deals almost exclusively with the matter of service of process on women who had assumed their husband's name, as does 65 C.J.S., *Names*, Sec. 3(c) and 57 Am. Jur. 2d Names, Sec. 9.

Chapman v. Phoenix Nat'l. Bank, 85 N.Y. 437 (1881) has been heavily relied upon for the rule that a married woman's surname is that of her husband. The woman had taken her minister husband's name at marriage and had moved with him from one end of North Carolina to the other. She sought to recover stock she had bought before she was married which had been confiscated under the Civil War Confiscation Acts, on the ground she had no notice whatsoever of the proceedings. These Acts required proof of a person's disloyalty before property could be seized. The Court stated that in view of the confiscatory nature of the action, which bore such faint resemblance to a fair judicial hearing, it would strictly construe the notice requirement. The court found valid objections to the fact that the notice was posted in her maiden name, to the facts that her first name had been abbreviated so no one reading the court house door notice could tell if it be a man or woman desired, no address was listed, and the only description of the person, contained in the complaint, obviously was false. The complaint alleged that Ver. S. Moore had acted as an officer of the rebel forces, as a

member of Congress, and as a judge of one of the Confederate States. The oft-quoted statements: "For several centuries, by the common law among all English speaking people, a woman – upon her marriage takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby." are obiter dicta in purest form, totally unsupported by authority or reason.

Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. N.D. 1971) (3 Judge Dist. Ct.) affirmed, 405 U.S. 970 (1972), 40 L.W. 3428 (1972) concerns a privilege, the matter of issuing a woman's driving license in her maiden name. Driving is considered to be a privilege and so is distinguished from a constitutionally guaranteed right, such as voting. The brief filed on behalf of Wendy Forbush contains this statement: "The Alabama common law rule that the husband's surname is the wife's legal name is the basis for the regulation. See *Bently v. State,* 70 So. 2d 430, (C.A. Ala. 1954) and *Roberts v. Grayson,* 173 So. 38, 39 (Ala. S. Ct. 1937) (A married woman's name consists in law of her own Christian name and her husband's surname.) In the decision of the three-Judge Federal Court at page 221, the Court said:

> "We may commence our analysis of the controversy by noting that Alabama has adopted the common law rule that upon marriage the wife, by operation of law, takes the husband's surname."

This opinion, citing *Bently* and *Roberts, supra,* refers to Alabama Common Law Rule and not to the English Common Law. Furthermore, these two cases treat with matters of

procedure and notice – and do not purport to deal with matters of constitutional right.

In *People v. Lipsky,* 327 Ill. App. 63, 63 N.E. 2d 642 (1945), Antonia E. Rego wished to continue to vote in her maiden name. She had no agreement with her husband that she would continue using her mainden name. The court based its decision on four cases: *Freeman, Bacon, Chapman, and Kayaloff. Freeman v. Hawskins,* 77 Texas 498, 14 S.W. 364, was a case concerning constructive servie in the maiden name of a married woman who had assumed her husband's name. At this juncture, it will be seen that the trial court relied on a case that dealt only with procedure and not with substantive right.

In *Bacon v. Boston Elevated Railroad Company,* 256 Mass. 30, 152 N.E. 35 (1926), the Plaintiff had assumed her husband's name and then tried to resume the use of her maiden name. *In re Kayaloff,* 9 F. Supp. 176 (S.E. N.Y. 1934), is the only federal case touching on the subject, and presents a very different situation. The petitioner, a well-known musician, sought to have her naturalization certificate issued in her maiden name, claiming pecuniary loss if it were not issued in the same name as was her union card. The court gently refused her request, citing *Chapman, supra,* dicta as his reason. Not enough information is supplied in the opinion to know whether the woman had in fact adopted her husband's name and was using her maiden name only for professional purposes. One can surmise that the woman may have been trying to effect a court change of name via a naturalization certificate. One can also conjecture that if the woman had previously been known by her married name, the government would have a legitimate interest in keeping a trail of identification that very probably began overseas.

The legally correct usage of name by a married woman is given in two Ohio opinions.

In *State ex rel. Bucher v. Brower, et al.,* Common Pleas Court of Montgomery County, 1941, 7 Ohio Supp. 51, 21 O. O. 208, the Court held that by custom only the wife assumes the surname of the husband, that a separate and distinct contract made at the time of marriage allowing the wife to retain her family surname is not against public policy or contrary to public morals, and that when a woman does not change her name upon marriage, *the provisions of the statute requiring re-registration do not apply and it is not necessary for her to re-register to vote.*

In *State v. Green,* 114 Ohio App. 497, 177 N.E. 2d, 616, 622, the Court says:

> "By custom, upon marriage, she may acquire the surname of her husband, but this does not prevent her from continuing to use her maiden name for any legitimate purpose so long as it is not fraudulently done or its use continued for a fraudulent purpose.
>
> "If any question of public policy should be advanced seeking to hold that a married woman has been bound by custom to take the name of her husband in all events and for all purposes, *there being no statute requiring it,* it should be noted that the trend against the loss of the identity of a woman by marriage has received common acceptance. *An examination of the statutes shows the trend toward emancipation of married women from the common law rules of bondage, from complete deprivation of all property rights, to that of being accorded the right to contract with her husband and others, to own property separate and apart from her husband, and to have the right of franchise, being limited only to the extent that her marital status cannot be changed or altered*

> *by common consent. From these facts, it must be evidence that many unnecessary restrictive customs have fallen by the wayside . . .* " (Emphasis added)

In each of the Ohio cases, as in this one, the wife contracted with the husband not to assume the husband's surname, did not assume the husband's surname, and continued to use and be known by her maiden name.

In Maryland, under common law, as well as by statute, a person may adopt and use any name he wishes so long as he does so in good faith and with no intent to deceive or defraud, there being no statute to the contrary. *Romans v. State, supra;* Rule BH 70-75, Maryland Rules of Procedure.

Article 45, Section 20, Annotated Code of Maryland, provides:

> "A married woman may contract with her husband . . . "
>
> "Under the Married Women's Act the wife has been placed on the same footing as her husband with respect to her property and personal rights." *Sezzin v. Stark,* 187 Md. 241, 49 A.2d 742 (1946)

It is to be noted that at no time during these proceedings was the suggestion made by any of the Appellees, or by the trial court, that the Appellant should have sued by using her husband's surname rather than the name Mary Emily Stuart, the name by which she has been known all her life. Certainly, as a matter of substance, were there any truth to the contentions made by the Appellees regarding enforcement of the applicable provisions of Article 33, then even more so should the Trial Court have insisted that Mary Emily Stuart sue in her husband's surname. When the Trial Court recognized and permitted the Appellant to use the name Mary

Emily Stuart in this suit, it clearly followed the dictate of Article 5 of the Declaration of Rights of the Maryland Constitution that the inhabitants of Maryland are entitled to the Common Law of England, and thereby effectively precluded a finding such as that from which this appeal is taken.

II.

THE LAWS OF MARYLAND OR VIRGINIA DO NOT REQUIRE A WOMAN TO ADOPT HER HUSBAND'S SURNAME.

The Maryland cases are silent as to any requirement that the laws of Maryland require a wife to adopt her husband's surname as her legal name.

In like manner, Article 45, "Husband and Wife," and Article 63, "Marriages," of the Annotated Code of Maryland also contain no requirement that a married woman adopt her husband's surname. Judge Nellie Marie Marshall testified she had researched the Maryland law before she married Charles Tysko and could find no such compulsory law in Maryland (E. 31).

Since the passage of the Married Women's Property Acts, a married woman has been able to contract and to sue and be sued as though she were a *femme sole.* In Maryland, she may make a contract with her husband and she may sue and be sued on such contract, Art. 45, sec. 21, and spouses may convey property from one to the other, Art. 45, sec. 1.

The philosophy underlying Art. 45 clearly is that a married woman has the same common law right to change her name voluntarily as either a single woman or a man, if in fact she had previously been barred by her coverture.

The only parts of the Annotated Code which appear to deal with the question of whether Maryland compels a woman to take her husband's surname at marriage are the previously quoted sections of Article 66½, Vehicle Laws, and Article 33, Election Code. Article 66½ has to do with licensing and not constitutional rights, and in view of the discussion of Question One, is equally inapplicable, as is Article 33.

The language of Article 33, sec. 3-18 (a)(3) requires only that a report be made by the clerk of the court, but does not compel a woman to change her name, nor does it – nor any other part of Article 33 – authorize any Board of Supervisors of Elections to compel such a change.

Article 33, sec. 3-18 does not apply to this case since it allows the Board to act only on the receipt of those reports specified in the statute, except when the Board has actual knowledge of the death of a registered voter, or when the death of a voter has been established beyond a resonable doubt. In this case, no report was sent to the Howard County Board because Mary Emily Stuart was married in Virginia. Any objections to the registration of Mary Emily Stuart should have been made as required by Art. 33, sec. 3-16 and therefore should have been made at least sixteen weeks prior to the primary election. The primary election in Maryland was held on May 16th, 1972, (E. 9) eleven weeks after Mary Emily Stuart registered to vote, (E. 46) so that timely objection to her registration could not have been made.

If the State contends that Artilce 33, sec. 3-18(a) (3) compels a woman to take her husband's surname as her legal name, then by the same reasoning the State must also content that sec. 3-18(a) (4) abrogates the common law right of a person to change his name without resort to legal proceedings because the language used in the respective sections is essentially the same, sec. 3-18(a) (4) requiring the clerk to

report all changes of name by court decree. This holding would abrogate the practice of allowing a divorced woman to resume use of her maiden name in the absence of any statement to that effect in the divorce decree. Rules BH 70-75 do not by their language preclude the common law method of name change. The quotation from *THE LAWS OF ENGLAND, supra,* that no formality is required to change a name supports the Appellant's answer to this question.

The State's interpretation of the way in which the provisions of Art. 33,sec. 3-18(a)(3) should be applied to married women who do not assume their husband's surnames: (a) makes a nullity of the show-cause provision of sec. 3-18(c); (b) discriminates against these women because it denies their common law right to use any name they wish, and (c) requires them to go to time, trouble, and expense to establish with the State a court record of the name by which they have been known. If the State's position be correct, that the Appellant must obtain a decree changing her name, then we would have this situation: Mary Emily Stuart would file a *verified* petition (Maryland Rule BH 70.a) in the name of Mary Emily Austell – a name by which she never has been known, seeking by such petition to have the court change her name back to Mary Emily Stuart, the only name by which she ever has been known. *Thus, the State would have a law-abiding citizen perjure herself!*

The oath for voting registrants prescribed by Article 33, sec.3-6, requires that a person swear (or affirm) that the information he gives when he registers is true regarding his *name,* residence, etc. Since Article 33 does not define "true name", it would logically follow that the true name would be the name that a person had always used and by which he is be known.

Judge Nellie Marie Marshall testified without objection that when her son M. Jack Marshall desired to run for public office and to have his name appear on the ballot as M. Jack Marshall, the election board denied him the right to run under that name. Instead of applying for a legal name change, he appealed to the court, and the court ruled he did have the right to use that name, (E. 31). Mr. Willard Morris, Administrator, State Administrative Board of Election Laws, testified that a person is required to obtain a name change decree if he wishes to appear on the ballot in other than his legal name because he is better known by another name. (E. 39)

Article III, sec. 33 of the Constitution of Maryland prohibits the General Assembly from passing any special or local laws changing the name of any person. In the instant case, the Office of the Attorney General, the State Administrative Board of Election laws, and the Board of Supervisors of Elections for Howard County, who derive their authority from the statutes passed by the General Assembly, are all attempting to do what the Constitution of Maryland forbids the General Assembly from doing – changing Mary Stuart's name.

Virginia statutes and case law, like those of Maryland are silent on this point insofar as the Appelles' contentions are concerned. Appellant married in Virginia on the advice of attorneys that no statute or rule of law existed in Virginia compelling a woman to take her husband's surname at marriage (E. 22,27). The Virginia statute, "Voting name change – registration," sec. 24.1-50 of the Virginia Code Annotated (1950, 1967 Repl. Vol.) requires that:

> "Whenever the name of a registered voter shall have been changed, either by marriage or order of court, or otherwise, such voter shall notify in writing the general registrar . . . (who) shall enter each change of name upon the registration books."

The language of the statute expressly recognizes that a person can change his name other than by marriage or court order. Thus, if Virginia were to decide that Mary Stuart's name changed by her marriage in that state, she should have been able to change it back to what it had been. The Virginia statute, sec. 8-577.1, "How name of person may be changed", does not abrogate the common law method.

III.

THE REQUIREMENT THAT A WOMAN, WHO UPON MARRIAGE DID NOT ADOPT HER HUSBAND'S SURNAME, PROCURE A DECREE CHANGING HER SURNAME FROM THAT OF HER HUSBAND TO THE SURNAME OF HER CHOICE VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT IT IS DISCRIMINATORY AND SERVES NO LEGITIMATE INTEREST.

The right to vote is a "fundamental political right . . . preservative of all rights," *Reynolds v. Sims,* 377 U.S. 533, 562 (1964); *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972). In *Dunn v. Blumstein,* the Supreme Court proclaimed clearly and unmistakedly that a substantial and compelling state interest must be shown in order to uphold a statute that places a condition on the right to vote. The "compelling state interest test" is triggered by any classification that serves to penalize that right, as the Supreme Court explained at 336:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This 'equal right to vote' is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But as a general matter before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny. (citations omitted.)"

At page 343, the Supreme Court also said:

> "And, if there are other reasonable ways to achieve the state goals with a lesser burden on constitutionally protected activity, *a state may not choose the way of greater interference."* (Emphasis added.)

Certainly Maryland has a legitimate interest in protecting the integrity of the registration lists and the purity of the ballot box. The State insists that married women must register in their husbands' surnames unless they have a court decree granting them another name because the state needs a trail of identification to prevent possible voter fraud (E. 35). (Implicit in this requirement is the rampantly speculative suggestion that married women who do not adopt their husbands' surnames are more apt to commit fraud than other members of the voting community.) The State has shown no compelling state interest to support its contention that re-registered Appellant. Convenience of a State agency is neither to be achieved nor maintained at the expense of the citizens that the agency is supposed to serve.

When such a fundamental right as the right to vote is at issue, the presumption of a suspect classification is raised, and the substantial and compelling state interest test is to be applied, *Shapiro v. Thompson,* 394 U.S. 618 (1969).

To like effect, and with greater precision, is *Dunn v. Blumstein, supra,* where the Court said at 343:

> "It is not sufficient for the State to show that ... requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutional protected activity. Statutes affecting constitutional rights must be drawn with 'precision; ... and must be "tailored" to serve their legitimate objectives ... And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' ..." (Citations omitted)

IV.

THE REQUIREMENT THAT A WOMAN, WHO UPON MARRIAGE DID NOT ADOPT HER HUSBAND'S SURNAME, PROCURE A DECREE CHANGING HER PURPORTED NAME TO THE SURNAME OF HER CHOICE ABRIDGES HER RIGHT TO VOTE AND, THEREFORE, VIOLATES THE NINETEENTH AMENDMENT TO THE CONSTITUTION.

The State Administrative Board of Election Laws contends that requiring a married woman to register in her husband's name is necessary (1) to identify the voter, (2) to keep proper records and (3) to prevent possible voter fraud, and (4) that the requirement is reasonable.

The Supreme Court of the United States has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote" is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But, as a general matter, before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close scrutiny. A more exacting test is required for any statute which places a condition on the exercise of the right to vote. If a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.

"... A heavy burden of justification is on the State, and ... the statute will be closely scrutinized in light of its asserted purposes." *Dunn v. Blumstein, supra.*

Requiring a woman to register in the surname of her husband serves no legitimate purpose, and this is proved by the evidence adduced by the State Administrative Board.

In actual practice, the Board keeps the names of voters by location first and then the names within that location are alphabetized (E. 40). Although a voter is usually identified by name, he or she can be identified by a voter identification number, by precinct and district number, and by address (E. 41). In some jurisdictions where there are computers, voters are only identified by a number (E. 40, 41). The Board can identify prople who have the same names by using precinct numbers and addresses (E. 41).

Where a woman (1) by contract, (2) in another state where she had a right to, and had retained, her maiden name upon marriage and, thereafter (3) moved to Maryland to

reside, it is elemental that the requirement that she register and vote in the surname of her husband violates her right to contract, the full faith and credit clause of the Constitution of the United States and the Constitutional right to travel. This requirement by the State Administrative Board of Election Laws applies only to women, creating a suspect classification.

Rather than insuring proper record keeping, the requirement that a married woman register in her husband's name instead, in the instance of Baltimorr City, has helped create a situation where some ninety thousand surplus names are on the books as voters (E. 44, 45). Women married in the City of Baltimore were told to come in and re-register and did. The cards in their maiden names were not removed by the Board, resulting in double registrations (E. 44, 45). Thus the benefits of bureaucratic cranial malfunction – 90,000 female voters, all of whom had complied with the Board's wishes, each entitled to vote twice! And the City of Baltimore, also privileged to pay twice for the same thing!

The prevention of voter fraud in Maryland today is by a system of voter registration, Ann. Code of Maryland, art 33, sec. 3-1 *et seq.* The qualifications of the would-be voter in Maryland are determined when he or she registers to vote. His or her qualifications, including *name,* are established by oath. Ann. Code of Md., Art. 33, sec. 3-6. Since false swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications, such as requiring a married woman to register in her husband's name, cannot prevent corrupt users of false names from fraudulently registering and voting. As long as the State relies on the oath-swearing system to establish qualifications, a requirement that a woman adopt her husband's surname adds nothing in the effort to stop fraud. The alias-user intent on committing election fraud will as quickly and effectively swear that his alias was his name as he

would swear that another name was his. Cf. *Dunn v. Blumstein, supra.*

Further, more than nine separate sections of the Maryland Code define offenses dealing with voter fraud, and some of these sections, as are Sections 24-1, and 24-2 of Article 33 include as many as twelve separate offense. To register or attempt to register to vote in or under the name of any other person, or in or under any false, assumed or fictitious name, or in or under any name not his own is a crime punishable by not less than six months nor more than five years in jail or in the penitentiary. Ann. Code of Md., Article 33, Section 24-1 (b). Cf. *Dunn v. Blumstein, supra.*

In addition to any criminal penalties, the Code provides in Article 33, sec. 16-14(a):

> "No person's right to vote shall be challenged at the poll on any ground but identity."

When a person can be challenged at the poll on the ground of identity, this surely is effective to prevent the type of fraud which the State fears. Where a State has available such remedial action to supplement its voter registration, it can hardly argue that broadly imposed political sexual disabilities, as requiring a wife to use her husband's surname before she may vote, are needed to deal with the evils of fraud. That this requirement is not necessary to prevent fraud is further shown by the fact that despite situations like that existing in Baltimore City, no woman, to the knowledge of the State Administrator of Elections, has ever been accused of voting twice in the same election. Cf. *Dunn v. Blumstein, supra.*

The requirement that a married woman must assume her husband's name to register and to vote is not reasonable, but places her in equal status with infants, lunatics, and convicted felons.

The Court in its opinion pointed out that Mary Emily Stuart could change her name by a "comparatively easy" procedure in the courts. The Court did not however mention either the time element nor the expense in a change of name proceeding.

Court costs, publishing costs, and an attorney's fee would have to be paid. The minimum fee suggested in the schedule of the *1971 Maryland Lawyers' Manual,* page 236, for an unopposed proceeding is $75.00. The court costs and publications costs would bring the total to more than One Hundred Dollars.

In an ordinary change of name proceeding, without some special intervention of the Court, it takes at least 36 days to complete the change. If Mary Emily Stuart had filed for a change of name on the day she received the first notice, she could not have received the order before the books were closed. BH 70-75, Maryland Rules of Procedure.

> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution ... Constitutional rights would be of little value if they could be ... indirectly denied ..." *Harman v. Forssenius,* 380 U.S. 528, 540-541 (1965).

Having no necessary purpose in actuality, the requirement that a woman must assume her husband's name to register and to vote cannot be reasonable. It is in direct violation of a married woman's statutory right to contract with her husband. It imposes a financial burden only on married women who seek to register and to vote in the surname of their choice. There is no similar requirement for men who marry and assume the name of the wife, although men have on occasion assumed the wife's surname. This practice of the

Board is not based on intelligence, ability, or biological difference between the sexes. It is sexual discrimination against married women.

"Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior status without regard to the capabilities or characteristics of its individual members. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

"Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts." *Sail'er Inn, Inc. v. Kirby,* 3 CCH Employment Practices Decisions, s. 8222, at 6756-57 (Calif. Sup. Ct. May 29, 1971).

The requirement that married women must assume their husbands' names to register and vote has resulted in the

IN THE

Court of Appeals

OF MARYLAND

SEPTEMBER TERM, 1972

No. 105

MARY EMILY STUART,

Appellant,

v.

BOARD OF SUPERVISORS OF ELECTIONS FOR HOWARD COUNTY *et al.*,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR HOWARD COUNTY
(T. HUNT MAYFIELD, JUDGE)

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus Curiae*

The American Civil Liberties Union is a nationwide, non-partisan organization dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus* believes that this

case concerning the right of a married woman to retain or resume her birth name poses a significant issue of practical as well as symbolic importance to the achievement of full equality under the law between the sexes.

ARGUMENT

Introduction

Appellant, Mary Emily Stuart, registered to vote in her birth name rather than in the surname of her husband, a surname she has never used; she was thereupon denied the right to vote because of the Attorney General's misunderstanding of the common law and his consequent misinterpretation of Art. 33 Sec. 3-18(a)(3) and (c) of the Maryland Code. Beyond the issue of the appropriate interpretation of Maryland's common and statutory law is the further question whether compulsory voting registration of married women in their husbands' surnames, prohibiting their exercise of the common law right "to adopt and use any name chosen in the absence of fraudulent intent or purpose" (E. 17), constitutes arbitrary and unequal treatment proscribed by the Fourteenth Amendment to the United States Constitution.

The common law right of all persons, including married women, to establish or change their names by constant use without resort to court proceedings, has not been abrogated by statute in Maryland. Married women in both England and the United States have utilized their common law right to retain or resume their birth names. While English common law recognizes the custom that a married woman may, and traditionally has chosen to, acquire her husband's surname, this custom is regarded as voluntary.

A married woman may retain or acquire a name other than her husband's by reputation as appellant did, by consistently using a name different from that of her husband.

A name is the expression of one's identity. To prohibit women who marry and not men similarly situated from using a surname of their own choice singles out women as a class, solely because of their sex, for different treatment. Thus the misconception of the common law, and misinterpretation of the requirements of Art. 33 Sec. 3-18(a)(3) and (c) of the Maryland Code by the Attorney General and the court below transgress constitutional limitations.

It is the position of *amicus* that Art. 33 Sec. 3-18(a)(3) and (c), properly construed, permits appellant to register to vote in her birth name, the only name she has ever used to identify herself. Assuming *arguendo* that the court below correctly determined the common law and construed the legislation here at issue, *amicus* contends that Art. 33 Sec. 3-18(a)(3) and (c), so construed, creates a suspect classification for which no justification can be shown and deprives a class of women of their fundamental right to vote.

I.

Consistent with the common law right of all persons to determine for themselves the name by which they are identified, Art. 33 Sec. 3-18(a)(3) and (c) of the Maryland Code, properly construed, permits appellant to register to vote in her birth name.

The custom whereby a married woman adopts the surname of her husband is closely intertwined with the now discredited notion: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 Blackstone, Commentaries 442 (4th ed. 1899). This court rejected the archaic notion that married women have no identity independent of their husbands' when it reconsidered whether a married woman may sue for loss of her husband's consortium. "The present opprobrium in which the old rule is generally held is based on repugnance for the medieval concept that, during the marriage, the legal existence of the wife is suspended or incorporated into that of the husband." *Deems* v. *Western Md. Ry.*, 247 Md. 95, 107, 231 A.2d 514, 518 (1967). Kin to *Deems,* this case presents another facet of the basic question whether the law now in force in Maryland treats husband and wife as individuals of equal status or, still tuned to bygone days, continues to cast the wife in a subordinate position.

The court below succinctly stated the basis of its decision: "use by the wife of the husband's surname following marriage, while the same may have been initially based upon custom and usage, is now based on the common law

of England, which law has been duly adopted as the law of this State" (E. 18).[1] This conclusion should astonish English jurists who have stated plainly that "the common law of England" permits a married woman to retain or resume her birth name. Having erred as to the content of "the common law of England," the court below went on to attribute this "law" to the State of Maryland, thus compounding its initial error.

A. *The Common Law of England.*

As English jurists view the matter, it has become customary for a married woman to adopt her husband's surname, but the custom is in no sense a legal requirement. Thus, in C. Eiven, *A History of British Surnames* 391 (London 1941), this observation is made: "In England (followed by the United States of America) practice has crept in, though apparently comparatively recently, for a woman upon marriage to merge her identity in that of her husband, and to substitute his name for her father's acquiring the new surname by repute." The surname of a woman becomes that of her husband as a result of marriage only if she in fact ceases to use her birth name and adopts his. It is the choice made by an individual woman to use her husband's name continuously, not the marriage ceremony, that effects the change by operation of the common law.[2] As summarized in 19 *Halsbury's Laws of England* 829

[1] E. refers to the Joint Record Extract.

[2] A conspicuous example of the English view that acquisition of a husband's surname is optional, not obligatory, is a former M.P. and now Member of the House of Lords, Dr. Edith Summerskill, long married to a Dr. Samuels. M.P. Dr. Shirley Summerskill, a married woman, is the daughter of Dr. Edith Summerskill and Dr. Samuels.

(3d ed. 1957): "When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage."

B. *Reasoned Opinion in the United States.*

In a case indistinguishable from the one at bar, *State ex rel. Krupa* v. *Green,* 114 Ohio App. 497, 177 N.E.2d 616 (1961), the Ohio Court of Appeals correctly discerned and applied common law derived from England. In *Krupa,* a female attorney continued after her marriage to practice law in and otherwise use her birth name, rather than the surname of her husband. She voted in her own name and filed nomination papers for election to office in that name. Relator claimed that, pursuant to Ohio statutory requirements similar to the Maryland provisions here at issue, the woman had to reregister in her husband's surname. Holding that the statutory registration requirements were to be applied consistent with the common law, the court rejected relator's challenge explaining:

> It is only *by custom,* in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. The state of Ohio follows this custom but there exists no law compelling it. 39 Ohio Jur. 2d 463 Names, Section 3. The statutes of Ohio include chapters on the subjects of Marriage (Chapter 3101) and Husband and Wife (Chapter 3103). Significantly, the General Assembly omitted any mention of names in such chapters. Under common law and by statute, however, a person in Ohio may adopt and use any name he wishes so long as he does so in good faith and with no intent to deceive or defraud. . . . In England, from which came our customs with respect to names, a woman is permitted to retain her maiden surname upon marriage if she so desires. M. Turner-Samuels, in his book on "The Law of Married Women," at page 345, states: "In England, custom has long since ordained that a married woman takes her husband's name. This practice is not invariable; not compellable by law. * * * A wife may continue to use her maiden name, married, or any other name she wishes to be known by * * * ." 114 Ohio App. at 501, 177 N.E.2d at 619.

Maryland, like Ohio, has enacted statutes on the subjects of Marriage (Art. 62) and Husband and Wife (Art. 45). Significantly, the Maryland legislature, like the Ohio legislature, omitted any reference to names in these provisions. If the legislature intended to require a married woman to adopt her husband's surname, it could have said so expressly, but it did not. Further, in Maryland, as in Ohio, it is a well-established principle that any person may effect a name change merely by adopting a name and using it consistently and continuously in good faith and with no intent to deceive or defraud. *Romans* v. *State,* 178 Md. 588, 16 A.2d 642, *cert. denied,* 312 U.S. 695 (1941). Statutory provisions for changing one's name, in effect in Ohio and in Maryland (Ann. Code Md. Rules BH 70-75 (1957)), are merely an affirmance of this common law right and thus supplement rather than displace it. *Accord, In Re Useldinger,* 35 Cal. App.2d 723, 96 P.2d 958 (1929); *In Re Cohen,* 142 Misc. 852, 255 N.Y.S. 616 (1932).

Other similarly enlightened jurisdictions in the United States have read the common law in the same way: identification of a married woman by her husband's surname is an optional custom, a usage rather than a legal obligation. For example, it has been settled in Michigan since 1923 that married women may continue to vote in their birth names and are not required to reregister. Biennial Report of Atty. Gen., Mich. 1923-24 p. 138. Asked specifically whether a married woman who has never used her husband's surname may run for public office in her own name,[3] the Michigan Attorney General said:

> There can be no doubt that a woman, upon marriage, has the right to take the surname of her husband, and such is customary, but there is no law which forbids a woman from continuing to use her maiden name in all business dealings as you have done.
>
> Assuming, however, that by marriage a woman's name is changed, there is nothing in our law which forbids her from changing her name to her maiden name, or any other name, provided it is not done with a fraudulent intent. Mich. Op. Atty. Gen. No. 93, pp. 254, 255 (1935-36).

As in Maryland, excepting the decision below, in Wisconsin, no statutory or case law requires a woman to

[3] *Cf., e.g.,* Op. Atty. Gen., Minn. 1942 No. 65, p. 103 (married woman may run for office in her birthname so long as she files for candidacy in that name); Ind. Ann. Stat. 29-3428 (1969) (professional woman may vote or run for office under the name used by her in the practice of her profession). In the 1972 New York primary Judge Nanette Dembitz ran for the Democratic nomination to the Court of Appeals in her own name and won; Judge Dembitz has always used her own surname rather than her husband's.

assume the surname of her husband upon marriage. As long ago as 1889, the Wisconsin Supreme Court said that a married woman may use her birth name for legal purposes. In *Lane* v. *Duchac,* 73 Wis. 646, 41 N.W. 962, a married woman had executed a mortgage in her birth name as was her custom. Rejecting the respondent's claim that a fictitious mortgagee was named in the note, the court held that a married woman is "entitled" to use her husband's name, but that there was no law prohibiting her from using her own "baptismal" or birth name. 73 Wis. at 654.

Close to the turn of the century, when woman's status in the United States could not fairly be characterized as "emancipated," a Texas court was nonetheless concerned that the law reflect the right of a woman to retain her own name after marriage. It overturned a rape conviction because of a flaw in the indictment: the charge did not negate marriage between the defendant and the victim, although the two had different surnames:

> There is nothing in our statutes requiring or compelling the woman to take or assume the name of her husband. While this is generally the case, yet the woman might retain her own name. . . . It is said, the husband being the head of a family, the woman and children adopt his family name—by custom, the woman is called by the husband's name; but whether marriage shall work any change of name at all is after all, a mere question of choice, and either may take the other's name, or they may join their names together. *Rice* v. *State,* 38 S.W. 801, 802 (Tex. Crim. App. 1897).

Whatever may be said of the Texas court's views on precision in indictments, its expression on name choice is of particular interest in light of the early date of the opinion.

C. *Misplaced Reliance by the Court Below.*

In the instant case, the court below plainly indicated the basis on which it went astray. It relied on two cases: *People ex rel. Rago* v. *Lipsky,* 327 Ill. App. 63, 63 N.E.2d 642 (1945), and *Forbush* v. *Wallace,* 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem. without hearing argument and without opinion,* 405 U.S. 970 (1972).

Lipsky reached a conclusion opposite to the one reached sixteen years later by the Ohio court in *Krupa, supra.* It did so largely on the basis of precedent cursorily considered, and in fact not in point: *In Re Kayaloff,* 9 F. Supp. 176 (S.D.N.Y. 1934); *Bacon* v. *Boston Elevated Ry.,* 256 Mass. 30, 152 N.E. 35 (1926); *Freeman* v. *Hawkins,* 77 Tex. 498, 14 S.W. 364 (1890); *Chapman* v. *Phoenix Nat'l Bank,* 85 N.Y. 437 (1881). None of these cases involved married women who consistently exercised their common law right to use their birth names without intent to defraud. Rather, all of them involved atypical situations—women who were generally known by their husbands' surnames but who used a different name, exceptionally, in connection with the particular matter in controversy in the litigation.

In *Forbush* a married woman applied for a driver's license in her birth name. A three judge court upheld as constitutional Alabama's "common law" rule that a woman's surname becomes that of her husband upon marriage. Of course, Alabama's erroneous view of the common law does not set the pattern for other states. The custom

elevated to law in Alabama has been codified in only a few jurisdictions (E. 17-18). More careful inspection of the common law would have revealed Alabama's misapprehension. However, the plaintiff in *Forbush,* anxious to pursue a federal question and probably considering it inappropriate to press a federal forum to fresh examination of a question of state common law, virtually conceded the common law issue. As to equal protection, the district court in *Forbush* rejected plaintiff's claim of injury as *de minimis.* Since the Supreme Court did not have the benefit of briefs or argument, and wrote no opinion, its disposition of the federal question in *Forbush* must be regarded as "the substantial equivalent of a denial of certiorari," which implies no adjudication of the merits. *Serrano* v. *Priest,* 5 Cal.3d 584, 615-18, 487 P.2d 1241, 1264 (1971). Moreover, on the principal issue before this Court, definition of Maryland's common law, the Supreme Court's *Forbush* disposition is totally irrelevant, for no question of state common law was tendered to it. Significantly, in an opinion dated May 18, 1972, the Attorney General of Wisconsin distinguished the law of that state from the custom considered Alabama law in *Forbush*: "In Wisconsin there is no law that requires a woman to assume the surname of her husband, even for an instant."

Although the district court in *Forbush,* in a passage quoted by the court below (E. 17), referred to other "western civilizations," it made no effort to confirm its impressions. Had it done so it might have discovered, for example, that in Canada, "there is no legal compulsion on a married woman to adopt her husband's name." W. K. Power, *The Law and Practice Relating to Divorce and Other Matrimonial Causes in Canada* 358 (2d ed. 1964). *See*

Re Dalgleish Estate, (1956) 18 W.W.R. 519. Under the civil law in force in France, a woman is permitted to retain her own name after marriage.[4] In Louisiana, consistent with the French civil law from which its legal system derives, a married woman retains her birth name in law and bears her husband's name only as a matter of custom. *Succession of Kneipp,* 172 La. 411, 134 So. 376 (1931); *Wilty* v. *Jefferson Parish Democratic Executive Committee,* 245 La. 145, 157 So.2d 718, 727 (1963) (Sanders, J., concurring).

In sum, many American jurisdictions as well as European nations accord married women the right to use their birth names. The court below misapprehended the common law and wrongly assumed that its decision would serve the interest of uniformity. As the preceding discussion indicates, uniformity of the kind envisioned by the court below could be achieved only if the several states that have interpreted their common law consistent with England's, and with the view that married women are not subordinate to their husbands, were to abandon sound decision and embrace a retrogressive judgment.[5]

In *Deems* v. *Western Md. Ry.,* 247 Md. 95, 231 A.2d 514 (1967), this Court properly resolved a state law question, obviating the need to rule on an equal protection challenge:

[4] In some European countries, *e.g.,* Norway and Sweden, the right of married women to retain their own names is explicitly recognized in Name Laws. See generally Ginsburg ed., Symposium on the Status of Women in Various Countries, —— Am. J. Comp. L. —— (to be published October, 1972).

[5] In the very unlikely event that states were motivated to achieve such uniformity, they would be required to effect an abrupt about-face assuming, as appears most probable, that the Equal Rights Amendment is ratified. See note 8 *infra.*

"When the construction of a statute is before us, it is well established law that the enactment will be construed so as to avoid a conflict with the Constitution whenever that course is reasonably possible." 247 Md. at 113, 231 A.2d at 524. *Cf. Siler* v. *Louisville & Nashville R.R.,* 213 U.S. 175, 191-93 (1909) ("Where a case can be decided . . . without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."). Similarly, in the instant case, this Court, as final arbiter of the law of Maryland, should declare the common law and construe the relevant statutory provisions in the reasoned and enlightened manner exemplified by the Ohio court in *State ex rel. Krupa* v. *Green,* 114 Ohio App. 497, 177 N.E.2d 616 (1961), thus avoiding a conflict with the Constitution.

II.

Conditioning the right of a married woman to vote on registration in her husband's surname contravenes the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, which proscribes sex-based classifications unrelated to any biological differenee between the sexes.

A. *The Construction of Art. 33 Sec. 3-18(a)(3) and (c) by the Court Below Creates a Suspect Classification and Impinges Upon a Fundamental Right.*

Although the awakening has been slow,[6] both federal and state courts have begun to view with keen skepticism lines drawn or sanctioned by government authority on the

[6] See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. Rev. 675 (1971).

basis of sex.[7] Absent the strongest of justifications, sex-based distinctions in the law no longer survive constitutional scrutiny.

A recent decision of the California Supreme Court exemplifies the current approach. In *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal.3d 1, 485 P.2d 529 (1971), that Court explicitly denominated sex a "suspect classification":

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between the characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.
>
> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. . . .
>
> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment. 5 Cal.3d at 18-19, 485 P.2d at 540-41.

[7] Cf. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 669-70 (1966): "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. [Citations omitted.] Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

With increasing frequency federal and state courts are reaching the same conclusion: women and men are entitled to equal treatment under the law. See *Deems* v. *Western Md. Ry.,* 247 Md. 95, 231 A.2d 514 (1967) (right to sue for loss of consortium available only to husband and wife jointly and not to either individually); *Mengelkoch* v. *Industrial Welfare Commission,* 442 F.2d 1119 (9th Cir. 1971) (maximum hours law applicable to women only presents substantial federal constitutional question); *Paterson Tavern & Grill Owner's Ass'n* v. *Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from employment as bartenders); *Kirstein* v. *Rector and Visitors of University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's "prestige" college); *Bray* v. *Lee,* 337 F. Supp. 934 (D. Mass. 1972) (higher admission standard for females in Boston Latin Schools violates equal protection);

White v. *Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (exclusion of women from jury service violates Fourteenth Amendment); *Mollere* v. *Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969) (invalidating a requirement that unmarried women under 21 live in college dormitories when no such requirement was imposed on men); *Commonwealth* v. *Daniel,* 430 Pa. 642, 143 A.2d 400 (1968) and *United States ex rel. Robinson* v. *York,* 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for males and females discriminate against women in violation of the equal protection clause); *Matter of Patricia A.,* —— N.Y.2d ——, —— N.Y.S.2d —— (July 7, 1972) (declaring unconstitutional sex/age differential for "supervision" of young persons).

In 1971, in *Reed* v. *Reed,* 404 U.S. 71, the Supreme Court, for the first time in its history, declared a sex line challenged solely by a woman unconstitutional. In *Reed,* the Court did not reach the question whether sex constitutes a suspect classification, for it regarded the statute before it as lacking any rational basis. *Reed* involved an Idaho statute establishing a mandatory preference for men in estate administration appointments. The Court held that the preference failed to meet even the minimum equal protection requirement, that a statutory classification "must be reasonable, not arbitrary, and must rest upon some ground having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. at 76 (quoting from *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920)). In *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the Court similarly invalidated a statute under the "reasonable relationship" test specifically noting that,

as in *Reed,* it was unnecessary to consider application of a stricter review standard because the statute involved did not satisfy even the more lenient equal protection standard. 405 U.S. at 447 n. 7. Thus *Reed* signalled that sharp lines drawn by law between the sexes are no longer tolerable, but deferred for determination in a more difficult case the designation of sex as a suspect classification.

The trend is clearly discernible. Governmental discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with governmental discrimination based on race, and merits no greater judicial deference. Each exemplifies a "suspect" or "invidious" classification. *See* Note, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nw. U.L. Rev. 481 (1971).

Forbush v. *Wallace, supra,* in light of the Supreme Court's summary disposition without briefs or argument, is not properly regarded as a rejection of a claim to equal protection in the present context. Moreover, this case entails, as *Forbush* did not, a roadblock impeding the exercise of a fundamental right. In *Sail'er Inn, supra,* the California Supreme Court stressed that, in addition to the suspect criterion employed, the legislation there in question affected the fundamental right to work. *Cf. Thorn* v. *Richardson,* —— F. Supp. —— (W.D. Wash. 1971) (federal regulations giving men priority over women for voluntary training under the Work Incentive Program lack "rational basis," "create a suspect classification based on sex," and encroach upon "fundamental rights" in violation of Title VII, Executive Orders (11375 and 11478) and the Constitution). Here, the most basic political right is implicated—the right to vote.

It is well-settled that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972). Any regulation that denies some citizens this "equal right to vote" will be closely scrutinized to determine if it is "necessary to promote a compelling state interest." *Kramer* v. *Union Free School Dist. No. 15,* 395 U.S. 621, 627 (1969). *See also Bullock* v. *Carter,* 405 U.S. 134 (1972); *Evans* v. *Cornman,* 398 U.S. 419 (1970); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

In sum, Art. 33 Sec. 3-18(a)(3) and (c) of the Maryland Code, as construed by the court below, creates a suspect classification and impinges upon a fundamental right; the construction below cannot stand absent a showing that it advances a compelling governmental interest.

B. *Application of Art. 33 Sec. 3-18(a)(3) and (c) to Married Women Who Are Not Known by Their Husbands' Surnames Advances No Legitimate Governmental Interest and Is Arbitrary and Irrational.*

The Court below justified requiring registration of a married woman in her husband's surname, although she never identifies herself by any surname other than the one she acquired at birth, on the grounds that (1) it is necessary "for proper recordkeeping" and constitutes the "most expedient way of identifying the person who desires to vote" (E. 21), and (2) it prevents "fraudulent duplication of registration" (E. 17). Yet it is hardly "proper record keeping" or an aid in identification to require a woman to register to vote in a name by which she is not known and which she does not use. In fact, it makes her identification more difficult and the records incorrect, thus defeating the very purpose of the statute.

But even assuming *arguendo* that application of Art. 33 Sec. 3-18(a)(3) and (c) as interpreted by the court below would expedite voting and registration,[8] administrative convenience does not supersede the fundamental right of individuals to even-handed application of the law. The Supreme Court's decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), spoke directly to "administrative convenience" as a basis for establishing the rationality of sex-based classifications: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." 404 U.S. at 76-77. While the mandatory preference for males over females involved in *Reed* did serve the convenience of the state, this factor did not deter the Court from concluding that the statute was conspicuously unconstitutional.

The statute in *Reed* was based on the legislature's evident conclusion that, in general, men are better qualified to serve as administrators than women. Similarly, the construction of Maryland's statute by the court below

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[8] Much more likely the result would be administrative inconvenience within the next several years; voter registration changes made now would be changed back should the Equal Rights Amendment become effective. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 872, 940 (1971):

> The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name.

rests on the general custom that most married women use their husbands' surnames. In both cases the woman's status as an individual human being is disregarded; she is categorized in accordance with assumptions made about most members of her sex, with no opportunity to show that her situation does not fit the assumed general pattern. This is exactly the type of overinclusiveness the equal protection clause prohibits.

In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Supreme Court declared unconstitutional legislation based on the administratively convenient assumption that unwed fathers do not wish responsibility for children. Significantly, in *Stanley,* legal procedures were available by which the unwed father could obtain custody of his children; he could affirmatively prove his qualifications in an adoption or guardianship proceeding. But the Court held that he should not be subjected to a standard more onerous than that applicable to other parents. Similarly, in the case at bar, a married female voter should not be required to incur the burden and expense of legal proceedings,[9] in order to register to vote in a name that would be recognized as hers without question were she a married male voter.

Contrary to the opinion below, neither fraudulent registration nor fraudulent voting is prevented by requiring a woman in appellant's situation to register in her husband's surname. Indeed, undercutting one of the props

[9] Apart from the considerable expense and inconvenience involved in obtaining a name change by court order, a woman who has never used any name other than her own would undoubtedly agree with Mr. Bumble's characterization of the law were she told, "In order to retain your name you must change it by court decree."

it offered for its decision, the court below acknowledged that in this case "there is a complete absence of fraudulent intent or purpose" (E. 17).

To prevent fraud the legislature has enacted an entire section entitled Offenses and Penalties (Ann. Code Md. Art. 33 Sec. 24-1–31). Included specifically are detailed provisions on false registration (Sec. 24-1), false voting and other willful acts (Sec. 24-2), and perjury (Sec. 24-12). These provisions, not application of Art. 33 Sec. 3-18(a)(3) and (c) as interpreted by the court below, serve the state's legitimate interest in preventing fraudulent registration and voting.

While prevention of fraud is a legitimate state concern, this justification for legislation will not serve as an umbrella for the most remote contingencies. "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." *Dunn* v. *Blumstein,* 405 U.S. 330, 351 (1972) quoting from *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965) (both cases invalidating administratively convenient voter residency requirements).

Application of Art. 33 Sec. 3-18(a)(3) and (c) of the Maryland Code to require appellant to register in her husband's surname would neither aid voter identification nor prevent fraud. Such a requirement serves no legitimate, much less "compelling" state interest.

CONCLUSION

The recent overwhelming approval of the Equal Rights Amendment to the United States Constitution indicates an absolute commitment by the Congress to end discrimination based on sex. The State of Maryland, in ratifying this amendment, has similarly endorsed the right of all persons to equal treatment under the law, without distinctions as to sex. However, the legislative history of the Equal Rights Amendment makes clear the view of Congress that the Fourteenth Amendment, properly construed by state and federal courts, would amply secure equality of rights and responsibilities for men and women. Senator Tunney stated the general view as follows:

> If courts were to move forward with regard to interpreting the fourteenth amendment to afford true equal protection for women, the new amendment could be redundant. Even so, enactment [of the Equal Rights Amendment] . . . would symbolize and emphasize this country's dedication to providing true equality for all. 118 Cong. Rec. S4564 (daily ed. Mar. 22, 1972).

The resolution of this case urged by *amicus* would accurately reflect the common law and, at the same time, be geared to the present and toward the future.

For the reasons stated above, the judgment of the Circuit Court for Howard County should be reversed and the lower court directed to grant Mary Emily Stuart the relief sought in her petitions.

Respectfully submitted,

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