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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