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IN THE

Supreme Court of the United States

October Term, 1970

No. 430

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator In the Matter of the Estate of Richard Lynn Reed, Deceased,

Appellee.

BRIEF OF THE CITY OF NEW YORK, *AMICUS CURIAE*

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Statutes:

Treatises, Notes and Other Authorities:

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Statement of the Case

In this appeal from a decision of the Supreme Court of Idaho, appellant Sally M. Reed, mother of an intestate, challenges the federal constitutionality of a state statute under which appellee, intestate's father, was automatically appointed administrator of the estate to her exclusion.

The relevant statutory provisions are as follows:

Idaho Code, §15-312:

> "Administration of the estate of a person dying intestate must be granted to some one or more of the person hereinafter mentioned, and they are respectfully entitled thereto in the following order:
>
> 1. The surviving husband or wife * * *
> 2. The children.
> 3. The father or mother.
> 4. The brothers.
> 5. The sisters."

* * *

Idaho Code, §15-314:

> "Of several persons claiming and equally entitled to administer, males must be preferred over females, and relatives of the whole to those of the half blood."

Section 15-314 is challenged on the ground that it denies to appellant, a woman, the equal protection of the laws in that it creates an unwarranted classification based on sex which results in her detriment.

Issues Presented

1. Is the challenged statute which favors men over women in the matter of granting of letters of administration unconstitutional as in violation of the Equal Protection Clause of the Fourteenth Amendment, in that it erects an irrational classification?

Amicus urges that the above question should be answered in the affirmative. Should it be found, however, that some rational basis may exist for the classification erected in the challenged statute, *amicus* urges this Court to consider the following issue:

2. Is the challenged statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment in that it contains a classification which is suspect because it discriminates against women and the state did not show that the discrimination is necessary to the accomplishment of a legitimate legislative objective?

Amicus urges that this question be answered in the affirmative.

Interest of the *Amicus Curiae*

Amicus, the City of New York, in the recognition that "prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of [the City's] * * * inhabitants and menace the institutions and foundation of a free democratic state," has established the City Commission on Human Rights, empowered to eliminate and prevent discrimination in employment, public accommodation, amusement, housing and commercial space. New York City Administrative Code, Ch. I, Title B. The Commission is the recourse of all of New York City's citizens aggrieved by discrimination in each of these areas.

Each year, through the Commission, the City receives scores of complaints from women who have been victims of discrimination because of their sex. Complaints include fail-

ure of employers to hire women who are as well or better qualified for jobs than the men who are hired; being hired into special categories of "women's jobs" which generally pay less, carry less responsibility and provide less opportunity for advancement than jobs allocated by the employer to men; disparity of pay; forced maternity leave or failure of employers to allow maternity leave; denial of fair and equal opportunity for promotion and for access to company training programs; firing of women for assertion of their rights; exclusion of women from bars or restaurants or certain areas thereof unless in the company of men; inability to obtain loans or commodity trading accounts without the husband's signature; and refusal to issue insurance policies, among others.

It is the experience of the City of New York that the absence of an express finding by this Court invalidating statutes which embody invidious discriminations based on sex, hinders its efforts in enforcing its anti-discrimination law to adequately fulfill its obligation to women. A clear statement by this Court that constitutional protection shall not be denied to more than one-half of our citizens is necessary to insure a more wide-spread recognition of and compliance with the New York City anti-discrimination statute than is the case without a clear national mandate.

Amicus' daily contact with the problems such discrimination creates and the commitment of this City to securing the welfare of all of New York City's inhabitants, have prompted this brief.

POINT I

Statutes, such as the one in question, containing classifications which discriminate against women on the basis of their sex, where arbitrary, irrational and unfounded in fact, deny to women equal protection of the law.

(1)

The Idaho Supreme Court recognized that "it can be argued with some degree of logic that the provisions of I[daho] C[ode] §15-314 do discriminate against women on the basis of sex." *Reed* v. *Reed,* 93 Idaho 511, 465 P. 2d 635 (1970), at p. 638.

However, the Court concluded that the legislature in enacting the statute "evidently concluded that in general men are better qualified to act as an administrator [*sic*] than are women." The Court below also concluded that the assumed legislative objective of the statute, to alleviate the problem of holding hearings by the Court to determine eligibility to administer, was properly served by the classification. 465 P. 2d 635 at p. 638.

It is respectfully submitted that the presumption that women are less qualified to administer estates than men is unfounded in fact and that the classification based on the presumption is therefore irrational, arbitrary and capricious. The presumption is completely refuted by statistics indicating that women are for the most part as well educated as men and have entered as fully into the business life of their respective communities as has been permitted.

The 1969 *Handbook on Women Workers,* published by the United States Department of Labor, Women's Bureau, Bulletin 294, Wages and Labor Standards Administration, United States Department of Labor (1969) (hereinafter "Handbook"), shows that over 29 million women or 42% of all women of working age do in fact work. *Handbook,* pp. 9-10. Women constitute 37% of the labor force. *Handbook,* p. 15. Many of these women work as the sole support of their families or to provide needed second incomes, and manage to do so despite the fact that they have children and few child care centers are yet available. In 1967, 11% of the families in the United States had a woman at the head of the family. *Handbook,* p. 28. Thirty-eight percent of all women workers or 10.6 million working women have children under eighteen years of age. *Handbook,* p. 37.

Of the women in the labor force in 1968, over 18.5 million or 67% had at least a high school education. *Handbook,* p. 178. Thirty-eight percent of all women in the population in 1968 as compared with 30.6% of all men completed all four years of high school. According to a survey made in 1968, of all persons over 18 years of age in the general population, 5.7% of the women and 6.9% of the men were college graduates. *Handbook,* p. 178.

This substantial number of women achieving a high level of schooling contributes significantly to the profile of types of jobs they hold. Of all professional and technical workers employed in 1968, 38.6% were women and of all managers, officials and proprietors in that period, 15.7% were women. *Handbook,* p. 92. In 1968, three-fifths of all employed women, as compared to two-fifths of all employed

men, were working in "white collar jobs", *Handbook,* pp. 87-88, although many undoubtedly work below their qualifications because of widespread job discrimination.

In sum, women, for the most part, are as well educated as men and comprise almost half of the nation's labor force. Women hold a large proportion of white collar jobs. A substantial number of women are heads of households and an even greater number of women who are mothers may be working to earn the second income in their families. It can no longer be said, then that, a woman's place is exclusively in the home. Even when women are wives and mothers, they enter the labor force in large numbers and in responsible positions, working with men to support themselves and their families.

(2)

Moreover, the legislative objective cited by the court below of avoiding hearings as to the relative merits of relations petitioning for letters of administration does not justify the discrimination here present. Hearings are still necessary to determine the relative merits of siblings or other relatives of the same sex who show equal right to the letters. Only the sex distinction is selected by the legislature in its race toward efficiency. Factors such as age, education, and experience in business affairs are ignored. It would therefore appear from the face of the statute that in fact, its object is not efficiency, but rather invidious discrimination against women.

Under traditional equal protection principles, this statute must fall. The cases hold that while a state has broad power to make classifications, it may not draw a line which constitutes an invidious discrimination against

a particular class. "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Levy* v. *Louisiana,* 391 U.S. 68 (1968) at p. 71; *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963) at p. 732; *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) at p. 541-542; *Morey* v. *Doud,* 354 U.S. 457 (1957).

As shown above, the statute here in question has no rational basis. The case is analogous in this regard to *Seidenberg* v. *McSorley's Old Ale House, Inc.,* 317 F. Supp. 593 (1970) where exclusion of women from a licensed premises constituted an invidious discrimination.

POINT II

The challenged statute violates the Equal Protection Clause of the Fourteenth Amendment in that it contains a classification which is suspect because it discriminates against women and the state did not show that the discrimination is necessary to the accomplishment of a legitimate legislative objective.

(1)

Amicus urges that a statute which erects a classification based on sex and whose effect is detrimental to women be treated as suspect, by analogy to cases dealing with racial discrimination, and that the burden of proving the rationality of the classification and its necessary relation to a legitimate legislative objective rest upon the proponent of the legislation. See *Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Oyama* v. *California,* 332 U.S. 633 (1948); *Takahashi* v. *Fish and Game Comm.,* 334 U.S. 410 (1948); *Korematsu* v. *United*

States, 323 U.S. 214 (1944); *Griffin* v. *Illinois,* 351 U.S. 12 (1955).

This treatment is urged because, while historically, discrimination against women like that against blacks has been condoned, we are emerging into an era when more rigorous adherence to equal protection principles by this Court as well as the changed place of women in American society requires fresh justification, if such can be made, of invidious distinctions now recognized as specious. Compare *Plessy* v. *Ferguson,* 163 U.S. 537 (1895) with *Brown* v. *Bd. of Ed.,* 349 U.S. 294 (1954).

Early decisions upholding classifications based on sex (although equal protection grounds were not always considered) rest almost entirely on "judicial cognizance of all matters of general knowledge." *Muller* v. *Oregon,* 208 U.S. 412 (1908) at p. 421. The Court there was candid in its acceptance without proof of the proposition that a woman's physical structure and the functions she performs justified protection as to the number of hours worked. Yet *Muller* has had numerous progeny, all of which have uncritically accepted the assumptions made therein, *e.g., Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Ward* v. *Luttrell,* 292 F. Supp. 162 (D.C., E.D. La., 1968); *Hoyt* v. *Florida,* 368 U.S. 57 (1961).

In *Muller,* the Court was not directly reviewing a statute challenged as a violation of women's rights but rather was considering a due process challenge to an economic regulation which set maximum working hours for women. In 1905, it must be remembered, the Supreme Court had held that maximum hours legislation violated the "freedom of

contract'' of employers and employees which the Court felt was embodied in the ''liberty'' protected by the Fourteenth Amendment's Due Process Clause. *Lochner* v. *New York,* 198 U.S. 45 (1905). Viewed in this light, *Muller's* reliance on the special status of women was clearly designed to distinguish the line of cases, such as *Lochner,* which had invalidated similar state economic regulation.

Muller is important here because it has been interpreted to restrict women, their role and capacities, whereas *Muller* was obviously intended by the Court to serve a very different purpose—the sustaining of limited economic regulation against the claim that such regulation, whether applied to men or women, violated the Fourteenth Amendment.

In light of our current state of knowledge concerning the status and capacities of women, the facts relied on by the Court in *Muller* would be difficult to sustain. For example, the Court stated, ''The legislation and opinions [in Mr. Brandeis' submission] * * * are significant of a widespread *belief* that woman's physical structure, *and the functions she performs in consequence thereof,* justify special legislation'' governing her working hours. (Emphasis added.) *Muller* v. *Oregon, supra* at 420. Reports of committees of statisticians, hygienists, and factory inspectors, among others, were adduced to the effect that women should be protected against working long hours ''* * * primarily because of their special physical organization.'' The Court, combining evidence about physical fact with assumptions about woman's role, found that the physical characteristics of women, their ''maternal functions'', ''the rearing and education of the children'', and ''the maintenance of the

home'' all prove the necessity of the protective labor law. *Muller* v. *Oregon, supra* at 420, n.1.

It must be emphasized, however, that *Muller* considered only the question of whether maximum hour laws for women violated employer's rights to contract with employees. It cannot be controlling on the manifestly different question of whether classifications based on sex can withstand judicial scrutiny under the Equal Protection Clause. That issue was not considered by the *Muller* Court.

Moreover, even if there were adequate proof in *Muller* to sustain the law on the basis of women's physical characteristics, all would agree that the ''special physical organization of women'' is not related to their appointment to administer estates, their admissibility to places of public accommodation, their ability to rent housing, to execute contracts, to hold property in their own names. Yet opinions in cases involving these issues and numerous others regarding the rights of women flow from decisions such as *Muller.*

The reliance on popular notions about women was nowhere more evident than in *Goesaert* v. *Cleary,* 335 U.S. 464 (1948). Without any citation of evidence of scholarly authority, the Court stated, ''Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women.'' *Goesaert* v. *Cleary, supra* at 465-466. The alteration in the role and status of women was likewise acknowledged *ipse dixit* but the Court, in the face of that ''finding'', maintained that the state was not precluded from ''drawing a sharp line between the sexes, certainly

in such matters as the regulation of the liquor traffic." *Goesaert* v. *Cleary, supra* at 466.

Surely the time has come for the Court to re-examine the reasoning upon which their opinions have been premised. Whether the fundamental error in perception of women's status in society stems from a desire to protect her supposed fragile sensibilities or merely from the "selfish" desire to secure some "island on the sea of life reserved for man that would be impregnable to the assault of woman," *State* v. *Hunter,* 300 P.2d 455 (1956) at p. 457, this Court should now refuse to judicially notice as general knowledge, that which has never been proven true.

(2)

While the Court has never precisely articulated the basis for determining that certain classifications are, by their nature, suspect, the elements of that determination emerge from the cases and are applicable here. Simply stated, a classification is suspect:

a. where such classification is pervasively used in many statutes and laws touching on myriad and diverse subjects;

b. where it is justified upon a series of presumptions about the class distinguished which are borne along by prejudice rather than fact; and

c. where it does not reflect merely special treatment for the class in a given instance but rather causes a stigma to attach to its bearer.

At the outset, it should be noted what a suspect classification is not. It is not simply and exclusively a classifica-

tion based upon race. To attempt to characterize the Court's past suspect classification rulings as growing directly out of the specific history of the Civil War Amendments is blinking reality. That line of cases does indeed include a series of decisions relating to the rights of black Americans, *Loving* v. *Virginia,* 388 U.S. 1 (1967), *McLaughlin* v. *Florida,* 379 U.S. 184 (1964), but other suspect classifications touch upon rights of those not remotely connected with the Civil War and the Thirteenth, Fourteenth and Fifteenth Amendments. The war between the States was not fought over the rights of aliens or Japanese ineligible for citizenship. And yet these persons too have come within the protection of the suspect classification doctrine. *Oyama* v. *California,* 332 U.S. 633 (1948); *Takahashi* v. *Fish & Game Comm'n.,* 334 U.S. 410 (1948); *Korematsu* v. *United States, supra; Griffin* v. *Illinois,* 351 U.S. 12 (1955). Nor, as stated above, is a classification suspect when it is beneficial. *Prima facie,* a statute which grants benefits to women cannot be considered to discriminate against them.

a. Invidious sexual classifications, like racial ones, appear in statutes relating to a great diversity of civil and criminal rights. Women, like blacks, have been disabled in the owning or rental of property (compare *Jones* v. *Mayer,* 392 U.S. 409 (1968) with California Codes, Vol. 6, Civil Codes, §161a, *et seq.* (1954)), in the use and enjoyment of public accommodations (compare *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) with *Seidenberg* v. *McSorleys' Old Ale House,* 317 F. Supp. 593 (1970)), in bringing suits in court to vindicate their rights (compare *Dred Scott* v. *Sanford,* 60 U.S. 393 (1856) with California Codes, Vol. 6, Civil Codes §164 (1954)), in entering into valid contracts

(compare *Civil Rights Cases,* 109 U.S. 3, 35 (1882), Harlan, J., dissenting, with *Austin* v. *United Credits Corp.,* 269 S.W. 2d 793 (1954). Women, as were blacks, have been barred from attending public education facilities. Compare *Brown* v. *Board of Education,* 347 U.S. 483 (1954) with *Heston* v. *Bristol,* 317 S.W. 2d 86 (1958), appeal dismissed, 359 U.S. 230 (1959). Women, as were blacks, have been made to suffer different and harsher criminal penalties than men (or Caucasians). Compare *McLaughlin* v. *Florida,* 379 U.S. 184 (1964) with *United States ex rel. Robinson* v. *York,* 281 F. Supp. 8 (1968). The list of State and local laws which contain sexual classifications is staggering. See, generally, L. Kanowitz, *Women and the Law: The Unfinished Revolution* (1969). The examples cited should suffice to reflect the many and varied areas of life in which sex-based classifications affect rights, privileges and immunities of female citizens.

One particularly suspect aspect of invidious sex-based classifications, like racial classifications, is that they do affect such varied rights. Can it be true that inherent traits of femaleness are rationally related to owning property, entering restaurants, receiving an education and serving criminal penalties? To ask the question is to answer it, and this alone should satisfy the Court that invidious sex-based classifications are so pervasive in society as to be viewed as suspect.

b. The only functional, primary description afforded by a sexual classification pertains to physical, biological functions. The presumption that women are inept, uneducated, naive, insulated from civic life and civic affairs,

in need of the protective custody of husbands or otherwise socially incapacited, is simply not provable by a simple equation with their being female. Hence a rule which is intended to distinguish between those competent and incompetent to administer an estate cannot presume that "competent equals male" and "incompetent equals female" unless competency is a function related to male but not female biology.

In the instant matter, the legislature appears to be seeking business acumen obtained through education and/or business experience. If business acumen is the goal and work or education are the criteria, the legislature should so state. To be sure, an argument could be made that even education and/or business experience are not necessarily "primary" ability classifications, and that those standards, too, contain presumptions which may be unfounded in relation to business acumen.

However, the limits of too flexible a classification rule are those imposed by due process. Consonant with flexibility, a classification must be described with sufficient particularity as to avoid attack for vagueness. Certain "classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them." Harlan, J., dissenting in *Levy* v. *Louisiana,* 391 U.S. 68, 81 (1968). And because the consequences which flow from sex-based classifications bear no intelligible or proper relation to legitimate legislative objectives such classifications should be ruled suspect in the context of the Fourteenth Amendment.

c. The erroneous assumptions about women which support sex-based invidious classifications range from patronizing to humiliating and, in their effect, cause a stigma to be attached to the female's status in society. See "Developments in the Law—Equal Protection", 82 Harv. L. Rev. 1065, 1127, *et seq.* (1969). Though the black man was called an "inferior" being, *Dred Scott* v. *Sanford,* 60 U.S. 393, 405 (1856), and the female merely the "weaker" one, the net effect of sexual, like racial classifications is the same: the distinguished class is burdened with a whole range of disabilities imposed not through inherent ability limitations but rather through the pressure of societal prejudice.

The Court, in *Hirabayashi* v. *United States, supra,* stated that a free people with institutions founded on equality should not tolerate invidious distinctions such as were there held unconstitutional. No less invidious are distinctions based on sex. No less should they be viewed as "inherently suspect." *Kramer* v. *Union Free School District, supra* at 628, n.9.

Where the Court is reviewing a suspect classification, "the statute must be subjected to an exacting scrutiny * * *." *Kramer* v. *Union Free School District, supra* at 628, n.9; *Korematsu* v. *United States, supra* at 216; *Takahashi* v. *Fish & Game Comm'n, supra at* 420; *Oyama* v. *California, supra* at 640. The focus of the inquiry is not, then, whether there is any rational basis for the classification, but rather whether "some overriding statutory purpose" requires the discrimination. *McLaughlin* v. *Florida, supra* at 192; *Loving* v. *Virginia, supra* at 11; *Truax* v.

Raich, 239 U.S. 33 (1915), at p. 43. Without such a justification, the "classification * * * is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida, supra* at 192-193.

CONCLUSION

The judgment appealed from should be reversed.

June 24, 1971.

Respectfully submitted,

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