August 2015

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Recommended Citation
Murphy, John P. Jr. (1972) "The Reed Case: The Seed for Equal Protection From Sex-Based Discrimination, or Polite Judicial Hedging?," Akron Law Review: Vol. 5 : Iss. 2 , Article 4.
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol5/iss2/4

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THE REED CASE:
THE SEED FOR EQUAL PROTECTION FROM
SEX-BASED DISCRIMINATION, OR
POLITE JUDICIAL HEDGING?

As the women's liberation movement became the recipient of increased national publicity, and as many citizens debated the proper role of the female within society, a seed of controversy sown in Idaho was carried by the "winds of justice" to Washington, D.C., where a sex-based statutory classification scheme was put through the test of the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court, in Reed v. Reed,¹ had an opportunity to plant the seed for equal protection from sex-based discrimination; however, the opportunity was not taken.

The cause of action, in Reed, arose due to the untimely death of Richard L. Reed, a minor, who died intestate. Approximately seven months subsequent to Richard's death, his mother filed a petition with the local Probate Court in an effort to secure appointment as administratrix of her son's estate. The father of the decedent thereafter filed a competing petition. The Probate Court held a joint hearing on the two petitions, and rendered a decision in favor of the father.² The Probate Court interpreted the applicable sections of the Idaho Code as compelling a mandatory preference for the father because of his sex.³

In rendering its decision, the Probate Court expressly acknowledged

¹ 92 S. Ct. 251 (1971).
² Id. at 252.
³ Id. The controlling statutes of the Idaho Code were §§ 15-312, and 15-314. Section 15-312 reads:

Priorities in right of administration—Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother [emphasis added].
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. Any of the kindred.
9. The public administrator.
10. The creditors of such person at the time of death.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. Idaho Code, § 15-312 (1864) (repealed effective July 1, 1972). Section 15-314 indicates: "of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females [emphasis added], and relatives of the whole to those of the half blood." Idaho Code, § 15-314 (1864) (repealed effective July 1, 1972).
the equality of the two competing parties under the controlling state statute.\textsuperscript{4} It was further noted that neither party was burdened by any legal disability.\textsuperscript{5} The Probate Court ruled, however, that due to the applicable state statute, male candidates must be given mandatory preference over an equally qualified female candidate.\textsuperscript{6}

Decedent's mother appealed the Probate Court's order to the District Court, and her appeal was treated as a constitutional attack on the state statute which compelled the mandatory preference for a male over an equally qualified female candidate.\textsuperscript{7} The District Court concluded that the applicable state statute violated the Equal Protection Clause of the Fourteenth Amendment and therefore was invalid.\textsuperscript{8} The controversy was remanded to the Probate Court for its decision as to which of the two competing parties was best qualified to conduct the administration of the estate.

The District Court's order was not followed because the father appealed the order to the Idaho Supreme Court. The State Supreme Court reversed and reinstated the original verdict of the Probate Court.\textsuperscript{9} The Idaho Supreme Court concluded that the controlling state statute\textsuperscript{10} was not violative of the Equal Protection Clause of the Fourteenth Amendment, and rejected the argument that the absolute preference given to the male over the equally qualified female candidate was a sufficient basis to strike down the statute as an unconstitutional denial of equal protection.\textsuperscript{11}

The Idaho Supreme Court decision was subsequently appealed to the United States Supreme Court.\textsuperscript{12} The United States Supreme Court held that the arbitrary preference, in favor of the male sex, created by the Idaho Code, was in violation of the Fourteenth Amendment mandate prohibiting a state from denying the equal protection of the laws to any individual within the state's jurisdiction.\textsuperscript{13} The Court noted that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the states from treating different classes of people in different ways.\textsuperscript{14} The

\textsuperscript{4} Idaho Code, § 15-312 (1864) (repealed effective July 1, 1972).
\textsuperscript{5} 92 S. Ct. at 252.
\textsuperscript{6} Id. The Probate Court was referring to § 15-314 of the Idaho Code.
\textsuperscript{7} Id.
\textsuperscript{8} 92 S. Ct. at 253.
\textsuperscript{9} Id.
\textsuperscript{10} Idaho Code, § 15-314 (1864) (repealed effective July 1, 1972).
\textsuperscript{11} 92 S. Ct. at 253.
\textsuperscript{12} The appeal was pursuant to 28 U.S.C. § 1257 (2) (1948).
\textsuperscript{13} 92 S. Ct. at 253.
\textsuperscript{14} The Supreme Court cited the following cases in reference to this constitutional doctrine: McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1968); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885).
Court indicated, however, that the states are restricted in regard to such classifications in that:

The Equal Protection Clause . . . does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."\(^\text{15}\)

The salient issue herein was whether a difference in the sex of the competing parties, who sought appointment as administrator of decedent's estate, was to be deemed as rationally related to the state objective fostered by the operation of the two sections of the Idaho Code.\(^\text{16}\) The Supreme Court of Idaho had held that the objective advanced by one of the constitutionally attacked statutes was to eliminate the conflict that would arise under the other statute when two or more individuals, equally qualified, were seeking a letter of administration. The Idaho court reasoned that this result would spare the Probate Court from determining the issue of whom to appoint.\(^\text{17}\) The Idaho court further concluded that the elimination of females was "Neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives. . . ."\(^\text{18}\)

The United States Supreme Court noted that the state objective, decreasing the workload of probate courts via the elimination of one class of potential contestants, had some measure of legitimacy.\(^\text{19}\) The Court stressed, however, that the ultimate issue was whether or not the state statute advanced such an objective "[I]n a manner consistent with the command of the Equal Protection Clause."\(^\text{20}\) In holding that it did not, the Court stated:

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 of the Fourteenth Amendment; and whatever may be said as to the positive

\(^{17}\) Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).
\(^{18}\) Id.
\(^{19}\) 92 S. Ct. at 254.
\(^{20}\) Id.
values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.\textsuperscript{21}

It was also indicated that the state statute was an unconstitutional violation of the Equal Protection Clause since it provided different treatment for males and females similarly situated.\textsuperscript{22}

Superficially, \textit{Reed} is yet another example of how the Equal Protection Clause may be used to strike down state statutes which embody arbitrary classifications that are neither fairly nor substantially related to the object of the statute, and which bring about the invidious discrimination that is repugnant to the Fourteenth Amendment. It must stressed that the outcome of \textit{Reed} is clearly commendable in terms of justice. What is troublesome is the fact that one may contend that the Supreme Court hedged, perhaps avoided, an excellent opportunity in which to expand the constitutional scope of the Equal Protection Clause. \textit{Reed} afforded the Supreme Court the opportunity to extend the full protection of the Fourteenth Amendment to classifications based solely on sex. The fact that the holding represented the first time the Supreme Court struck down a sex-based classification as violative of the Equal Protection Clause might lead one to conclude that the \textit{Reed} case has in fact expanded the scope of the Equal Protection Clause by including sex-based discrimination with the previously protected areas of race, national origin, and poverty. However, notwithstanding the specific holding in \textit{Reed}, the decision provides only minimum support to sexual equality.

The advocates of equal rights for women had placed much hope and reliance on the possibility that the Supreme Court would totally reject the traditional view as to the female's separate niche within society,\textsuperscript{23} along

\begin{itemize}
\item Id.\textsuperscript{21}
\item Id.\textsuperscript{22}
\item See, e.g., Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (females denied access to the ballot); \textit{Ex Parte} Lockwood, 154 U.S. 116 (1894) (admission to the bar). See also Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) where Justice Bradley's concurring opinion indicated:

\begin{quote}
Man is, or should be, women's protector and defender. The natural and proper timidty and delicacy which belongs to the female sex evidently unfitis it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.
\end{quote}

The Supreme Court, in \textit{Bradwell}, affirmed the exclusion of females from the legal profession.

\end{itemize}
with the traditional “reasonable classification” test\(^ {24} \) that is applied in regard to the Equal Protection Clause. When probable jurisdiction of the Reed case was noted,\(^ {25} \) it was undoubtedly felt that the Supreme Court would render a precedent decision by applying to sex-based classifications the standard of strict judicial scrutiny that has evolved in equal protection theory. One such strict scrutiny standard involves the “fundamental right” doctrine.\(^ {26} \) Upon application of this standard, if a fundamental right is affected, statutes which embody differential classification and treatment are valid only if the government affirmatively manifests a compelling necessity for the operation of the statute.\(^ {27} \) The second strict scrutiny standard is the “suspect classification” formula that initially emerged in cases reviewing statutes that were based on racial differences. The standard under this formula is that certain classifications, for example, those based on race or wealth are “suspect,” and will be upheld only if the statute is needed (a mere rational relationship is insufficient) to effectuate a compelling state interest.\(^ {28} \)

The Supreme Court, in Reed, disappointed the expectations and aspirations of the advocates of equal rights for women. The Court clearly

\(^ {24} \)The reasonable classification test has been labeled by some writers as the restrained judicial review standard. See Comment, Are Sex-Based Classifications Constitutionally Suspect? 66 Nw. U. L. Rev. 481, 485-495 (1971). Under the reasonable classification test, a statute will not be declared as violative of the Equal Protection Clause unless it has no reasonable basis. See, e.g., Morey v. Doud, 354 U.S. 457, 464 (1957). In essence, the traditional Equal Protection Clause test was that if the classification is reasonable, and rested on some ground of difference having a fair and substantial relation to the object of the statute, and treated all people who are similarly situated in the same way, then the statute satisfies the mandate of equal protection of the laws. See generally Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

\(^ {25} \)401 U.S. 934 (1971).

\(^ {26} \)The “fundamental right” test has been labeled as Active judicial review. See Note, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 60-71 (1970); Comment, supra note 24, 66 Nw. U.L. Rev. at 493-495.


\(^ {28} \)See Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Although the “suspect classification” test has been primarily used in regard to reviewing racial classifications, the standard has been used as to differences based on alienage and national ancestry. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); cf. Hernandez v. Texas, 347 U.S. 475 (1954). For recent publications as to this standard see Developments in the Law—Equal Protection, supra note 27, at 1087-1120, 1124-1127; Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment? supra note 27, at 1507-1516. The California Supreme Court has recently invalidated a state statute which had precluded almost all women from tending bar on the grounds that sex-based classifications should be dealt with as suspect. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d. 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). The “suspect classification” standard was used to invalidate the imposition of more severe criminal sanctions for females as opposed to males. United States ex rel. Robinson v. York, 281 F. Supp. 8, 14 (D. Conn. 1968).
did not expand the scope of the Equal Protection Clause to prohibit sex-based discrimination. The opinion rendered was essentially sterile. Such keynote phrases as fundamental rights, suspect classification, strict scrutiny, and compelling state interest were not even mentioned let alone applied in the process of reviewing the controversy.

The holding was not based, either impliedly or remotely, on the standards of strict judicial scrutiny. The "compelling state interest" test was left in the court chambers. The court, in failing to discuss this test within the opinion, has perhaps impliedly recognized that protection from sex-grounded discrimination is not within the scope of those fundamental rights that are to be jealously cherished and preserved by the Equal Protection Clause, and that a statutory classification scheme based on sex is not to be deemed as "suspect." What is most distressing, however, is the Court's failure to overrule or even to mention previous Supreme Court holdings in which sex was deemed as a valid basis of classification.

In arriving at its decision, the Court chose to implement the less rigid "reasonable classification" test. The use of this test is an implication that sex-based discrimination involves a classification held in a lesser degree of constitutional priority, in that this restrained standard of judicial scrutiny is indeed easier satisfied by the state in its effort to uphold the validity of the statute in controversy.

In applying the "reasonable classification" standard, a deciding factor was that the statute in issue was considered to be unreasonably capricious, with a classification differentiation that failed to fairly or substantially relate to the objective of the law. As the Court stated: "[W]e have concluded that the arbitrary preference established in favor of males by section 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny equal protection of the laws to any person within its jurisdiction." (Emphasis added.) It therefore appears as if the state statute was struck down solely because it was not reasonably related to the objective of the statute. One may logically deduce, therefore, that the Reed case has in no way strengthened the viability of the Equal Protection Clause as applied to sex-based discrimination. It may be argued, however, that perhaps the Court, in

29 92 S. Ct. at 254.
30 Id.
31 92 S. Ct. at 253.
32 The Idaho Supreme Court had concluded that the statute was neither an irrational nor arbitrary means in which to effectuate the object of the law. See supra note 17-18. Another indication that the sole basis for invalidating the statute was because it lacked any reasonable basis can be found in the formulation of the issue in dispute where the court asserted: "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314." (Emphasis added.) Reed v. Reed, 92 S. Ct. at 254.
Reed, has in fact politely deterred any short-term possibility of expanding the scope of the Equal Protection Clause so as to remedy the invidious discrimination that is coupled with sex-grounded discrimination. The Reed opinion may very well be subsequently used by the states to support the contention that the court has firmly accepted the constitutional dogma that sex-oriented discrimination is proper and valid as long as reasonably related to a legitimate state interest.

The significance of the Reed result and methodology in regard to future applications of the Equal Protection Clause as to sex-based discriminatory classification is distressing. The opinion seemingly indicates the unfortunate implication that the Supreme Court is unwilling to extend equal protection, as applied to sex-classification, beyond the traditional bounds of the "reasonable classification" standard. By condoning this passive standard of equal protection review, the Court has impliedly granted to the states broad discretion as to the treatment of women's rights. The Court delegates such broad discretion, notwithstanding the fact that such a discretion has been considered intolerable as to other classes within society.33

The use of the restrained standard will surely bring about nominal progress in regard to the equal protection movement for women. It is unrealistic to contend that the traditional "reasonable classification" approach to equal protection can afford the basis for which to achieve any substantial degree of success in the area of sex-based classification. This is so because under the restrained review approach, the classification will be upheld if it is rationally related to a legitimate state objective.34 In considering the rationally related variable, mathematical precision is not required,35 and the statute will survive attack if any state of facts may be reasonably conceived as a justification.36 Therefore, if the purpose behind the statute is in some way conducive to fostering the public welfare,37 and does not chill the exercise of constitutionally

33 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (strict scrutiny review on infringement imposed on ground of race and national origin); Skinner v. Oklahoma, 316 U.S. 535 (1942) (strict scrutiny of state law which infringed man's right of procreation); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (Rutledge, J., dissenting).
36 See, e.g., McGowan v. Maryland, 366 U.S. at 426.
37 See, e.g., Barbier v. Connolly, 113 U.S. 27, 31 (1885).
protected rights, then a legitimate government objective exists. As to the consideration as to whether or not the classification has any reasonable relation to a legitimate state objective or purpose, the plaintiff must show that the classification scheme is arbitrary and without a reasonable relation by demonstrating that the scheme is irrational in light of its object, or due to the discriminatory nature evidenced by the individuals without or within the class scheme. It can be seen, therefore, that the "reasonable classification" standard, at best, is capable of achieving only nominal results in the area of sex-based classification.

The unfortunate aspect associated with the Reed decision is that the Supreme Court, by both its holding and methodology, has, in effect, reassured the States that sex-based classifications are constitutionally proper if the elements of the reasonableness test are met. This is advocacy of the status quo. It would appear to be unlikely that the States, unless enlightened by some extraordinary occurrence, will react to the Reed decision with any degree of urgency in terms of progressive reevaluation of their particular sex-classified laws. Any state reevaluation, based on the Reed case, may in fact be allocated towards the goal of seeing that the particular statute is insulated so as to meet the elements of the reasonableness test.

Another perplexing aspect of the Reed opinion is, without doubt, the most unsettling. The Supreme Court, in Reed, had the opportunity to crush a myth that has prevailed throughout recorded history in almost every known society; namely, that sex is a valid basis for classification schemes. The Court, by remaining silent, has impliedly advocated the status

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39 Discrimination evidenced by those without or within a class scheme is generally known as overinclusive and underinclusive classification. In theory, only those people who have the classified trait at which the law is directed are to be within the classification scheme. See Tussman & tenBroek, The Equal Protection of the Laws, supra, note 24 at 347-353. Underinclusive classifications seem to be easier to uphold than overinclusive schemes. See, e.g., Buck v. Bell, 274 U.S. 200, 208 (1927). But see Rinaldi v. Yeager, 384 U.S. 305 (1966). Overinclusive classifications, due to the heavy burden on those within the classified scheme, are harder to justify, and are thus invalidated with greater frequency. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Carrington v. Rash, 380 U.S. 89 (1965).

40 It must be noted that the Court, in Reed, failed to discuss the issue of whether or not sex can ever be rationally related to any legitimate state objective. Such silence, however, may in fact be an implied admission that sex-based classifications can be reasonably related to legitimate state objectives, and that sex is a valid basis of classification. In any event, the court in Reed has failed to overrule the traditional view that sex is a proper basis of classification. See Muller v. Oregon, 208 U.S. 412 (1908).
quo. The status quo, unfortunately, will encourage the continued confinement of the female to different and, by many standards, inferior status.41

Discrimination involving the American female has been prevalent and diverse. Traditionally, the inferior social, as well as legal, status of women has been passively tolerated. Today, the enlightened female is demanding reform in numerous areas. The women's rights advocates are calling for a reevaluation and redefinition of the women's niche within contemporary society. In short, the liberated woman will no longer tolerate the traditional view as to the woman's proper place. The traditional view will no longer be tolerated because it is unjust, unneeded, devoid of any rational basis, and perhaps most significant, disliked and unwanted.

This writer contends that the American legal system will continue to command and effectuate an inferior status for women, as long as the legal structure condones and permits any differentiation in legal treatment on the basis of sex. Discrimination is inherent in any sex-based law because there will always be a substantial percentage of women who do not fit the stereotype female mold upon which the statute is premised. Also, discrimination in one area must, and does, create discriminatory patterns in other areas. For example, a woman may receive equal treatment as to employment; however, if she is denied equal access to educational facilities, then she will be disadvantaged within the job market area notwithstanding the fact that she receives equal treatment as to employment.

The Supreme Court, in Reed, by failing to utilize the strict scrutiny standard of the "compelling state interest" test, has implied that protection from sex discrimination is not a fundamental right, nor important enough to be within the "suspect" classification category. This is significant in that the "compelling state interest" doctrine is applied so as to cancel the presumption of validity (whereas the reasonableness standard assumes the constitutionality of the challenged statute, and the presumption remains until the plaintiff rebuts it). The strict scrutiny standards place a heavy burden on the government to justify, by demonstrating a compelling state interest, the differential treatment. Thus, the strict scrutiny standards are indeed more powerful tools with which to attack sex-based classifications, as opposed to the less rigid reasonableness test.

The court, in *Reed*, by implying that there is nothing inherently wrong with sex-based classification, if reasonable, has reaffirmed, in a discrete way, the traditional American view towards the female, namely, that there is something about her that necessitates different treatment from her male counterpart. Unfortunately, the differentiation in legal treatment on the basis of sex will support the status quo, and this, in turn, will enable our legal structure to continue to command an inferior status for women. Woman cannot be truly liberated from the inferior status that binds her spirit until the legal system eliminates the archaic equation: different sex = different legal protection.

II. THE REED CASE: WHERE DO WE GO FROM HERE?

"[W]e do not allow ourselves to be obfuscated by medieval views regarding the legal status of women and the common law's reflection of them..." 42

There are, perhaps, three workable means in which to initiate the necessary changes within our legal structure in order to bring about equal rights for women. One method is the extension of the strict judicial review doctrines associated with the Equal Protection Clause of the Fourteenth Amendment to sex-based discrimination. A second is by the ad hoc revision of both the current federal and state laws. The third means is the promulgation of a new constitutional amendment. The ultimate dilemma, therefore, is what method, or combinations thereof, will be most conducive to eliminating sex-based discrimination from the legal structure.

The first method does not appear to be a realistic way in which to effectuate the eradication of sex discrimination from the law. As previously noted, 43 the *Reed* decision reflects what appears to be an unwillingness on behalf of the Supreme Court to extend the strict review doctrines to sex-based classifications. And, as previously indicated, 44 the use of the restrained doctrine does not seem to be conducive to achieving any substantive success or progress in the area of sex discrimination.

Furthermore, even if the Court should subsequently apply the "compelling state interest" doctrine to sex-based discriminatory laws, there would be inherent dilemmas to overcome in that the doctrine is somewhat deficient as a tool for obtaining equal rights for women. The "compelling state interest" test becomes operational only when the particular right allegedly affected is deemed to be a fundamental one or when the classification scheme is "suspect." The Court has been in disagreement as to what types of interests are to be placed within this category of

43 See text at 254 supra.
44 See text at 257 supra.
specially protected constitutional rights. As a result, the "fundamental interest" standard might not be applied to numerous areas where females are treated differently from males, such, as an example, the right to sue for loss of consortium.

The "suspect classification" standard, notwithstanding the fact that it is more rigid than the traditional reasonableness standard, allows the government to justify a "suspect" classification by demonstrating a compelling state interest for the statutory scheme. Thus, this more rigid standard would not bring about the equality which can exist only if all sex-based discriminatory laws are abolished.

The second method by which to achieve the needed change within the legal system in order to eliminate sex-based discriminatory laws is the ad hoc revision of federal and state laws. The piecemeal reformation of existing laws, unfortunately, does not offer a realistic solution to the sex discrimination problem. This method necessitates numerous actions by Congress, fifty state legislatures, the courts and executive agencies within each of these jurisdictions, and by the many political subdivisions within each state. It seems illogical to assume that this great aggregate of governmental machinery could be effectively mobilized to revise and repeal the existing law. Campaigns to change the current laws could in fact lag on for decades, and perhaps in some areas of sex discrimination, the needed change could never be attained.

Even if it should be possible to mobilize America's political machinery, legislative revision would not offer an adequate foundation in which to bring about complete legal equality for women. There is needed a single, unambiguous theory of women's equality under the law, and for a uniform nationwide application of this theory. This is not possible by legislative revision alone in that the formulation of policy would be split between multiple federal, state, and local agencies.

Piecemeal legislative revision, in effect, has been in progress throughout this century. The results have been, at best, nominal and insignificant. In a very realistic sense, this method lacks the coherence


46 The type of and numbers of classification schemes that would be sustained under a "suspect classification" standard would depend on the degree of the burden of justification which the court requires the government to carry. If the court requires the state to show a perfect match between the class scheme and the object of the law, a small per cent of sex-based statutes would be upheld. Conversely, if the court uses a balancing method, and weighs the legislative mismatch with the inconvenience of voiding the law, then a substantial per cent of sex-based classifications would be upheld. See Note, Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?, supra note 27, at 1509-1513.
and sustained political effort that is necessary in order to attain the basic, fundamental change as to the legal status of women.

The third means of obtaining the elimination of sex-based discrimination involves the enactment of a new constitutional amendment. The proposed amendment to the United States Constitution reads as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.47

The fundamental principle of the Equal Rights Amendment is that sex is not an allowable factor in the determination of the legal rights of any citizen, male or female. This would mean, therefore, that the treatment of any citizen by the law must not be based on the sex factor. Sex, in essence, would be a prohibited classification.

The basic theme of the Equal Rights Amendment stems from two fundamental values inherent in the decision to eradicate sex discrimination from our legal structure. First, the amendment incorporates the moral conviction that women, in the collective sense, can no longer be relegated to an inferior status within our society. Women are entitled to maintain an equal status with men. Thus, the decision to end the historically inferior social status of the female necessitates the prohibition of sex classification in law.

The second basic principle of the Equal Rights Amendment is that classification by sex is always an overclassification. In a sex-classified scheme, all males or all females are thereby included or excluded regardless of the degree to which some members of each sex possess the characteristics relevant as to the statutory scheme. The result of such overclassification does indeed conflict with the fundamental concern of our society with the individual. Overclassification, in effect, negates all values as to individual self-fulfillment.

The constitutional mandate of the new amendment must be absolute. The salient issue under the Equal Rights Amendment cannot be equal but different, reasonable or arbitrary classification, suspect classification, fundamental right or interest, or the demands of administrative practicality. Equality of rights, then, mandates that sex should not and must not be a factor as to treatment under the law. The basic legal premise underlying the Equal Rights Amendment, therefore, is that the law shall concern itself

only with the particular attributes of individuals, and not with a classification scheme based on the broad and improper element of sex.

It is undisputed that classifications are an essential element of lawmaking. The Equal Rights Amendment does not require the elimination of all classifications based on the awareness of the differences between people. The Amendment merely prohibits the use of sex as a basis for legal differentiation. It allows the government to continue to classify on the basis of the real differences in the life situations and attributes of individuals.

The fundamental premise behind the proposed Equal Rights Amendment, that differences in treatment under the law must not be based on the sex factor, but rather on the attributes and abilities of the individual that are relevant to the classification differentiation, has a foundation in the basic values of our philosophy.

III. CONCLUSION

The Reed decision is an unfortunate omen for the future progress of the equal rights for women movement. The implication of the Reed decision is that sex-based classification is valid if reasonable. The restrained standard of the reasonableness test is by no means conducive to the eradication of sex-based discrimination. From the aforementioned implications of the Reed result and methodology, it appears as if the Equal Protection Clause of the Fourteenth Amendment is not the remedy for sex-based classification. Reliance on legislative revision, via piecemeal efforts, of the existing federal and state laws is both illogical and unreasonable. The realistic remedy for the elimination of sex discrimination seemingly lies with the enactment of the new Equal Rights Amendment.

The metamorphosis of our legal system to one which establishes equal rights for women under the law is indeed long overdue. The current dual system of legal rights has resulted in relegating over half of the population to an inferior status within society. What was commenced with the Nineteenth Amendment, extending to women the right to vote, must now be completed by securing equal treatment to women in all areas of legal rights.

John P. Murphy, Jr.