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Constitutional Law: Jury Selection--Exclusion of Women from Jury Venire Violates Fundamental Sixth Amendment Right to a Representative Jury

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CONSTITUTIONAL LAW: JURY SELECTION – EXCLUSION OF WOMEN FROM JURY VENIRE VIOLATES FUNDAMENTAL SIXTH AMENDMENT RIGHT TO A REPRESENTATIVE JURY

Taylor v. Louisiana, 95 S. Ct. 692 (1975)

Petitioner was convicted of a felony by a petit jury drawn from a completely male venire.[1] The venire was selected pursuant to provisions in the Louisiana statutes[2] and the Louisiana constitution[3] that automatically exempted from jury service every woman who failed to file a written declaration of her desire to serve as a juror. Petitioner, a male, challenged the constitutionality of the jury selection system on the ground that it systematically excluded women from the jury venire. The trial court rejected the claim, and the Louisiana supreme court affirmed.[4] On appeal, the United States Supreme Court reversed and HELD, a state's automatic exemption of women as a class from jury service, which resulted in almost entirely male jury venires, violated a defendant's sixth amendment right to trial by a jury selected from a representative cross section of the community.[5]

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1. Although 53% of those eligible for jury service in the petitioner's judicial district were women, no more than 10% of the individuals on the jury wheel were women. The venire for the petitioner's trial was composed of 175 men. 95 S. Ct. 692, 695 (1975).

2. La. Acts 1928, No. 2, §1, art. 172 (repealed 1975) provided that "a woman shall not be selected for jury service unless she has previously filed with the Clerk of the Court of the Parish in which she resides a written declaration of her desire to be subject to jury service."

The Court avoided consideration of the Louisiana statutory exemption of women from jury service in Alexander v. Louisiana, 405 U.S. 625, 633 (1972); the issue was not reached because the petitioner's conviction was set aside on grounds of racial discrimination in the jury selection process. In his concurring opinion, Justice Douglas advocated invalidating the statute on grounds that the exclusion of women abridged the petitioner's right to a representative jury venire. *Id.* at 634-44.

3. Former La. Const., art. VII, §41 provided that "no woman shall be drawn for jury service unless she shall have previously filed with the Clerk of the District Court a written declaration of her desire to be subject to such service."

Both the statutory and constitutional provisions were repealed on January 1, 1975. Their recission, however, had no effect on the petitioner's conviction. 95 S. Ct. at 694 nn.1-2.

4. State v. Taylor, 282 So. 2d 491 (La. 1973).

5. 95 S. Ct. 692 (1975). Justice Rehnquist dissented and filed an opinion. *Id.* at 702.

The Louisiana provisions challenged in the instant case were declared unconstitutional by a federal district court in Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *prob. juris. noted*, 415 U.S. 911 (1974), *vacated and remanded*, 95 S. Ct. 2410 (1975). *Healy* was a class action involving three separate classes of plaintiffs: all women in the parishes involved, who contended that their rights to serve on juries were abridged; all men in the parishes involved, who argued that the automatic exemption for women resulted in more onerous jury service for men; and women litigants in pending civil cases, who claimed that they were deprived of a jury of their peers. 363 F. Supp. at 1110. The district court held that the automatic exemption denied all litigants due process and deprived female litigants of equal protection. 363 F. Supp. at 1117. *Healy* was argued before the Supreme Court in tandem with the instant case, but was pending on a jurisdictional issue when the instant decision was rendered. The Court subsequently vacated, per curiam, and remanded to the lower court for a determination whether the case has become moot because of recent changes in the state's constitution, statutes, and applicable rules. Edwards v. Healy, 95 S.

The development of the representative jury concept began with *Smith v. Texas*,[6] where the Court found it "part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[7] The *Smith* Court concluded that the systematic exclusion of blacks from jury service violated a black defendant's equal protection rights.[8] The Supreme Court has since allowed any defendant to challenge the arbitrary exclusion of his or any other class from jury service.[9] Although recent interpretations of the sixth amendment[10] have abandoned various traditional jury features,[11] the principle of a representative jury has received continued emphasis by the Court.[12] In *Peters v. Kiff*,[13] three Justices, stressing the importance of the sixth amendment cross section requirement, recognized that the exclusion of a discernable class from jury service injured all defendants, regardless of whether they were also members of the excluded class.[14]

Ct. 2410 (1975). *See* Comment, *Twelve Good Persons and True*: Healy v. Edwards *and* Taylor v. Louisiana, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 561 (1974).

6. 311 U.S. 128 (1940).

7. *Id.* at 130. Recent interpretation of the sixth amendment has made it clear that the cross section requirement is applied to the panel from which the jury is drawn. It is not necessary for the jury actually selected from the panel to "mirror the community and reflect the various distinctive groups in the population." 95 S. Ct. at 702. See Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Fay v. New York, 332 U.S. 261, 284 (1947). For a discussion of the effect of the peremptory challenge at *voir dire* on the representative nature of the jury itself, see Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOYOLA U.L. REV. (L.A.) 247, 269-70 (1973). *See generally* Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973).

8. 311 U.S. at 132. *See* Pierre v. Louisiana, 306 U.S. 354, 357 (1939); Martin v. Texas, 200 U.S. 316, 319 (1906); Carter v. Texas, 177 U.S. 442, 447 (1900); Strauder v. West Virginia, 100 U.S. 303, 308, 309 (1879). *Cf.* Carter v. Jury Comm'n, 396 U.S. 320 (1970); Brown v. Allen, 344 U.S. 443 (1953).

9. Ballard v. United States, 329 U.S. 187 (1946) (exclusion of women); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (exclusion of daily wage earners); Glasser v. United States, 315 U.S. 60 (1942) (exclusion of women).

10. The sixth amendment right to a jury trial in criminal actions is binding on the states by virtue of the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). *See generally* F. HELLER, THE SIXTH AMENDMENT (1969).

11. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimous jury verdict not essential); Williams v. Florida, 399 U.S. 78 (1970) (twelve-member jury not required). *Cf.* Comment, *Does the Sixth Amendment Require a Jury of the Vicinage for State Criminal Trials? A Functional Approach*, 5 RUTGERS-CAMDEN L.J. 514 (1974).

12. A jury will reach a common sense judgment so long as it "consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt." Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972). The number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970).

13. 407 U.S. 493 (1972).

14. *Id.* at 499-504. The *Peters* Court noted that the alleged systematic exclusion of blacks was clearly impermissible. It reserved ruling on the questions of what interests would justify an exclusion and what standard should be applied in evaluating those interests. *Id.* at 500 n.10. The instant Court, relying on *Peters*, determined that petitioner, a

The instant Court accepted the cross section requirement as "fundamental to the jury trial guaranteed by the Sixth Amendment,"[15] and found a representative jury essential to the jury's dual purposes of protecting a defendant from the arbitrary exercise of power and promoting community participation in the legal system.[16] The purposes of the jury cannot be accomplished if large, distinctive groups are excluded from the venire.[17] The Court concluded, therefore, that "women are sufficiently numerous and distinct from men that if they are systematically eliminated from jury panels, the Sixth Amendment's fair cross section requirement cannot be satisfied."[18]

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male, had standing to challenge the systematic exclusion of women from the jury venire. 95 S. Ct. at 695-96.

15. 95 S. Ct. at 697-98. The Court noted that the declaration of a representative jury as a fundamental right was in accord with recent federal legislation regulating jury selection in the federal court system. *Id.* at 697. For example, the Federal Jury Selection Act of 1968 provides that "all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. §1861 (1970). *Contra,* 95 S. Ct. at 702 (Rehnquist, J. dissenting). Justice Rehnquist argued that "the only 'unmistakable import' of [the prior] cases is that due process and equal protection prohibit jury selection systems which are likely to result in biased or impartial juries." *Id.*

16. 95 S. Ct. at 698. *Cf.* Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). *See generally* Imlay, *supra* note 8, at 259-62.

17. 95 S. Ct. at 698. *Cf.* Ballard v. United States, 329 U.S. 187, 193-94 (1946) (footnote omitted): "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

18. 95 S. Ct. at 698. The concept that women must be represented on the jury is a relatively recent phenomenon. Until 1919, the English common law doctrine of *propter defectum sexus,* a "defect of sex," prohibited jury service for women, except in two limited types of cases. 4 W. BLACKSTONE, COMMENTARIES *362 (Tucker ed. 1803); The Sex Dequalification (Removal) Act of 1919, 9 & 10 Geo. V, c. 71, §2. In the United States, the prevailing view concerning jury service for women was expressed in Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (dicta), which indicated that the Constitution did not bar the limitation of jury service to males. Women were disqualified from jury service in every state, *e.g.,* McKinney v. State, 3 Wyo. 719, 30 P. 293 (1892); Rosencrantz v. Territory, 2 Wash. Terr. 267, 5 P. 305 (1884), until the end of the nineteenth century. UTAH CODE ANN. §§78-46-8, 78-46-17 (1953). After the adoption of the nineteenth amendment some state courts, in states where juror qualification was associated with voting eligibility, treated the extension of voting rights to women as an automatic qualification for jury service. *Compare* People v. Barltz, 212 Mich. 580, 180 N.W. 423 (1920) *with* Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931), *cert. denied,* 284 U.S. 684 (1932). As late as 1947, Fay v. New York, 332 U.S. 261, 289-90 (1947), permitted the exclusion of women from a jury in a state court on the rationale that the idea that women should be on the jury was based not on the Constitution, but rather "on a changing view of the rights and responsibilities of women in our public life." In 1966, White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966), became the first case to hold the exclusion of women from jury service a denial of equal protection. By 1970, all state statutes excluding women from jury service had been repealed. *See generally* Miller, *The Woman Juror,* 2 ORE. L. REV. 30, 30-38 (1922); Note, *Jury Service for Women,* 12 U. FLA. L. REV. 224 (1959).

The present Court found that Louisiana's automatic exemption of women from jury service did operate systematically to exclude women from jury panels.[19] Since the exclusion of women from the jury venire violated a fundamental right[20] of the petitioner, the Court strictly scrutinized the sex-based classification in the automatic exemption.[21] The Court made it clear that Louisiana had not adequately demonstrated any compelling state interest that would justify the classification.[22] The assumption that jury service would substantially interfere with women's distinctive role in home and family life was no longer tenable in light of the role of women in society today.[23] In addition, a defendant's interest in a representative jury far outweighed any state interest in the convenient administration of its jury selection process.[24]

The Court recognized that in *Hoyt v. Florida*[25] it had upheld an exemp-

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19. 95 S. Ct. at 695. The lack of women volunteers is not surprising; "women, like men, can be expected to be available for jury service only under compulsion." Hoyt v. Florida, 368 U.S. 57, 64 (1961). *See* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 30 (1969). *See also* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).

20. A fundamental right is a right "explicitly or implicitly protected by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote, travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate). *See also* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973).

21. The rational basis test is the traditional method for analyzing the validity of most statutory classifications. Under this approach, a classification is upheld on determination that it bears a reasonable relationship to a legitimate state interest. *E.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). In recent years, however, a more rigorous test has been applied in cases where the violation of a fundamental right is alleged, *e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1968), and where the classification is based on a suspect criterion, *e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). Under strict scrutiny, a statute is invalidated unless the state can demonstrate a compelling governmental objective that justifies the classification, 394 U.S. at 634. The importance of which test is chosen to examine a particular classification cannot be over-emphasized. Dunn v. Blumstein, 405 U.S. 330, 363-64 (1971) (Burger, C.J., dissenting: "To challenge such lines by the 'compelling state interest' standard is to condemn them all. . . . [N]o state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."). *See* Note, *Recent Developments in the Area of Sex-based Discrimination — The Courts, the Congress, and the Constitution*, 20 N.Y.L.F. 359, 360-69 (1974). *See generally Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

22. Louisiana contended that the automatic exemption served the governmental objective of providing "stability to the state's own idea of family life." 95 S. Ct. at 699 n.15. Louisiana further argued that the automatic exemption from jury service of all women was justified by the administrative infeasibility of separating those women who should be exempted from those who should serve. *Id.* at 700.

23. *Id.* at 699-700. The Court noted that over half of all women between the ages of 18 and 64 were in the labor force. *Id.* at 700 n.17. *Cf.* Alexander v. Louisiana, 405 U.S. 62, 641-42 (1972) (Douglas, J., concurring).

24. 95 S. Ct. at 700. *Cf.* Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973).

25. 368 U.S. 57 (1961). *See* United States v. Butera, 420 F.2d 564 (1st Cir. 1970) (sustaining a selection system that produced a 30% underrepresentation of women on the

tion statute almost identical to the statute invalidated in the instant case.[26] The female petitioner in *Hoyt* challenged the constitutionality of Florida's automatic exemption of women from jury service, alleging that the systematic exclusion of women from the jury panel violated her fourteenth amendment rights.[27] The *Hoyt* Court reasoned that the automatic exemption of women did not deny fourteenth amendment due process and equal protection rights because there was a sufficiently rational basis for the sex-based classification.[28] In resolving the apparent contradiction between *Hoyt* and the principal case, the instant Court stated:

> *Hoyt* did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community and the prospect of depriving him of that right if women as a class are excluded. The right to a proper jury cannot be overcome on merely rational grounds.[29]

Thus, the instant decision indicated that the degree of scrutiny necessary to review sex-based classifications is higher for sixth amendment purposes than for equal protection purposes.[30] The Court implied that, on equal protection grounds, a provision treating men and women differently for jury selection purposes would be justifiable under the traditional rational basis test, so long as the selection process did not result in practically all male jury venires.[31] Thus, the *Hoyt* rationale was repudiated only to the extent that it upheld an automatic exemption that had the practical effect of an exclusion.[32]

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jury panel because the court found no intentional discrimination by the government). *See also* R. GINSBURG, CONSTITUTIONAL ASPECTS OF SEX-BASED DISCRIMINATION 30-35 (1974).

26. 95 S. Ct. at 699. The Florida statute provided "that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." Fla. Laws 1893, ch. 4122, §1, *as amended*, FLA. STAT. §40.01(1) (1973).

27. 368 U.S. at 58.

28. *Id.* at 61-64. *Cf.* Dandridge v. Williams, 397 U.S. 471, 484-85 (1970); Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948). For a broad discussion of equal protection concepts, *See generally* Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court — A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments, supra* note 21.

29. 95 S. Ct. at 699-700. In his dissenting opinion, Justice Rehnquist criticized the majority's attempt to distinguish *Hoyt* from the instant case. He argued that the two cases presented identical problems. He further contended that "in *Hoyt*, this Court considered a stronger due process claim than is before it today, but found that fundamental fairness had not been offended. I do not understand how our intervening decision in *Duncan* can support a different result. After all, *Duncan* imported the Sixth Amendment into the Due Process Clause only because, and only to the extent that, this was perceived to be required by fundamental fairness." *Id.* at 704.

30. *But see* Frontiero v. Richardson, 411 U.S. 677 (1973).

31. 95 S. Ct. at 701.

32. *Id.* "[W]e think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex *if the consequence is that criminal jury venires are almost totally male.* To this extent we cannot follow the contrary implications of the prior cases, including Hoyt v. Florida." *Id.* (emphasis added). In contrast, the *Hoyt* rationale as a whole was summarily rejected in Healy v. Edwards, 363 F. Supp. 1110, 1117 (E.D. La. 1973).

To rely on a distinction between the sixth amendment right to a representative jury and the fourteenth amendment guarantee of due process and equal protection[33] is to ignore two recent cases specifically prescribing a high degree of scrutiny for sex-based classifications.[34] In *Reed v. Reed*,[35] the Court held unconstitutional a statute that gave automatic preference to men for appointment as estate administrators. In analyzing the equal protection claim,[36] the *Reed* Court rejected the traditional approach of the rational basis test, which called for an evaluation of the alleged discrimination in light of the sex-based classification's purpose. Instead, it measured the validity of the classification against the objective of the statute.[37] Relying on *Reed*,[38] the Court in *Frontiero v. Richardson*[39] invalidated a federal statute that allowed discriminatory treatment against servicewomen in the payment of benefits for dependent spouses. Although noting that the fifth amendment contains no equal protection clause, the Court nevertheless employed an equal protection analysis to ascertain the statute's constitutionality.[40] A plurality of Justices held that statutory classifications based on sex were inherently suspect[41] and therefore subject to strict judicial scrutiny.[42] Considered together, *Reed* and *Frontiero* indicate that once a sex-based classification has been challenged on any grounds, it will be subject to rigid scrutiny. In avoiding a direct confrontation with *Hoyt*,[43] the instant Court took a position that

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33. The Court reiterated the distinction in Daniel v. Louisiana, 95 S. Ct. 704, 705 (1975).

34. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *Cf.* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973). *See also* Note, *Evaluating Sex Classifications: The Search for Standards*, 23 CATH. U.L. REV. 599 (1974).

35. 404 U.S. 71 (1971). *Reed* presented the first challenge to a sex-based classification since *Hoyt*. Comment, *supra* note 5, at 580. Prior to *Reed*, however, state courts and lower federal courts had begun to invalidate classifications based on sex. *Compare* White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) *with* State v. Hall, 187 So. 2d 861 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966).

36. 404 U.S. at 75. Although purporting to apply the rational basis test, *Reed* rejected the state's argument that the statute served to reduce the workload on the probate courts by eliminating one class of persons to be considered as estate administrators. *Id.* at 76-77.

37. *Id.* at 76. *Reed* articulated an intermediate approach to the problem of evaluating sex-based classifications; the *Reed* standard is more exacting than the rational basis test but less stringent than the strict scrutiny test. *See* Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Krauskopf, *Sex Discrimination — Another Shibboleth Legally Shattered*, 37 Mo. L. REV. 377, 387 (1972).

38. The Court in Frontiero v. Richardson found that the *Reed* analysis represented an extension of the traditional rational basis test. 411 U.S. at 684. *But see* Note, *The* Reed *Case: The Seed for Equal Protection From Sex-Based Discrimination or Polite Judicial Hedging?*, 5 AKRON L. REV. 251, 254-59 (1972).

39. 411 U.S. 677 (1973). *Accord*, Quadra v. Superior Court, 378 F. Supp. 605 (N.D. Calif. 1974) (systematic exclusion of women from jury panel).

40. *Id.* at 680 n.5.

41. *Id.* at 690. Other suspect classifications include alienage, Graham v. Richardson, 403 U.S. 365 (1970); race, McLaughlin v. Florida, 379 U.S. 184 (1964); national origin, Korematsu v. United States, 323 U.S. 214 (1944). *See also* Comment, *Plurality of Court Decides That Sex-Based Classifications Are 'Suspect'*, 5 RUTGERS-CAMDEN L. REV. 348 (1974).

42. *Cf.* Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964).

43. See text accompanying notes 25-32 *supra*.

conflicts with recent judicial developments seeking to eliminate the discriminatory effects of sex-based classifications.[44]

The Court's inconsistency on the degree of scrutiny applicable to sex-based classifications[45] leaves unsettled the question of what test will apply to other statutes exempting women from jury service.[46] Typical of such statutes is the Florida provision exempting mothers with children under eighteen years of age, including expectant mothers, if such an exemption is requested.[47] Under the rationale of the principal case, the Court's support of this statute might depend on the nature of the challenge to its constitutionality.[48] In a case concerned with the fundamental right to a representative jury, the classification will presumably be upheld only if it is the most effective means for achieving the statutory objective.[49] Where the challenge is based on equal protection, the serving of any permissible state purpose will allow the Court to uphold the classification if the statute does not operate to exclude women with children under eighteen years of age from jury venires.[50] Under the views expressed in *Reed* and *Frontiero*, however, the classification would be strictly scrutinized[51] and would be struck down if it did not further a compelling state interest in light of the purpose of the jury selection statute.[52]

44. Furthermore, the instant case is based in part on the observation that "women are sufficiently numerous and distinct from men," 95 S. Ct. at 698. A rationale stressing the differences between the sexes is sharply different from the underlying philosophy of the proposed twenty-seventh amendment, which stresses equality of the sexes. This "Equal Rights Amendment," now before the states for ratification, provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). It is likely that, under the Equal Rights Amendment, a sex-based classification would be upheld only if justified by a compelling state interest. *See also* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

45. See text accompanying notes 31-34 *supra*. *See also* Getman, *The Emerging Constitutional Principle of Sexual Equality*, SUPREME COURT REVIEW 1972 157, 162-66.

46. The Court emphasized that a state's broad discretion in prescribing juror qualifications, Rawlins v. Georgia, 201 U.S. 638 (1906), was qualified only by the essential requirement that the jury venires represent a cross section of the community. 95 S. Ct. at 700-02.

47. FLA. STAT. §40.01(1) (1973). *Compare* CODE OF ALA. tit. 30, §21 (1973) ("When any female shall have been summoned for jury duty she shall have the right to appear before the trial judge, and such judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty.") *with* ALAS. STAT. §09.20.030 (1973) (exempting a prospective juror if, *inter alia*, "the health or proper care of his family . . . makes it necessary for him to be excused. . . .").

48. See text accompanying note 31 *supra*.

49. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Under the fundamental interest rationale, the Florida statute might be considered both under- and over-inclusive. The court might order the exemption modified to include fathers who are primarily responsible for children under eighteen years of age and to exclude women with children under eighteen years of age upon whom jury service would not be burdensome. *See Developments*, *supra* note 21, at 1120-24.

50. *See* Foster v. Sparks, 506 F.2d 805, 826-28 (5th Cir. 1975); Marshall v. Holmes, 365 F. Supp. 613 (N.D. Fla. 1973), *aff'd*, 495 F.2d 1371 (5th Cir. 1974), *cert. denied sub nom.*, Marshall v. Gavin, 95 S. Ct. 825 (1975). See text accompanying note 31 *supra*.

51. Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973).

52. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

The instant case, so far as it prohibited the exclusion of women from jury venires, will reduce the injurious effects of unrepresentative juries on criminal defendants of both sexes.[53] The principles used by the Court to rationalize its decision, however, do not accurately reflect the evolving legal and social philosophy of sexual equality.[54] On one hand, the instant decision may demonstrate the Court's propensity to avoid controversial issues; it did not need to reach the issue of sex as a suspect criterion because the injustice could be vindicated on other grounds.[55] On the other hand, the Court's failure to overrule *Hoyt* may indicate a retreat from its recent condemnations of sex-based classifications in *Reed* and *Frontiero*.[56] Whatever its cause, the inconsistency implicit in the principal decision illustrates the need for a uniform test for all sex-based classifications.[57] A definitive guideline in this area, whether it be established by judicial decision, legislative enactment, or constitutional amendment, would be welcome.[58]

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53. For a discussion of the effects of sexual composition on the jury, see Rudolph, *Women on Juries — Voluntary or Compulsory?*, 44 AM. J. SOC. 206 (1961); Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 193-97 (1971); Snyder, *Sex Role Differential and Juror Decisions*, 55 SOCIOLOGY AND SOC. RESEARCH 442 (1971); Strodtbeck & Mann, *Sex Role Differentiation in Jury Deliberation*, 19 SOCIOMETRY 3 (1956).

54. See text accompanying note 44 *supra*.

55. *Cf.* Alexander v. Louisiana, 405 U.S. 625, 634 (1971) (Douglas, J., concurring).

56. Since the decision in the instant case, the Supreme Court has given further indications of its intention to retreat from the rationale of *Reed* and *Frontiero*. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding different tenure schemes for male and female commissioned officers before mandatory discharge); Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a disability insurance program exempting from coverage work loss resulting from pregnancy); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a statute granting widows a $500 exemption from property taxation). For a discussion of the effects of these cases on sex-based discrimination, see the dissenting opinions in the cases cited *supra*. *But see* Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 179-87 (1975), which suggests that classifications that seek to eliminate the effects of past discrimination should be permissively reviewed while purely discriminatory classifications should be strictly scrutinized. *See also* Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 BROOKLYN L. REV. 209, 270-81 (1974).

57. *See* Note, *supra* note 34, at 618-19.

58. Constitutional amendment is the most appropriate method for eliminating discrimination against women in the legal system. The Equal Rights Amendment itself was in part a response to the failure of the courts to deal effectively with the problem under the fourteenth amendment. Krauskopf, *supra* note 37, at 388. *See also* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (three concurring Justices declining to consider whether sex was a suspect classification because the Equal Rights Amendment was still before the states for ratification). Furthermore, both judicial and legislative approaches lack the means to provide a permanent sanction against future discriminatory practices. *Cf.* 95 S. Ct. at 701 ("What is a fair cross section of the community at one time or place is not necessarily a fair cross section at another time or a different place."). *See also* Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225, 228 (1971). *But see* Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 233 (1971).