Montana Law Review

Volume 37
Issue 1 *Winter 1976*

Article 10

1-1-1976

In the Army Now: United States v. Reiser

William E. Hileman Jr.

IN THE ARMY NOW: *UNITED STATES v. REISER*

William E. Hileman, Jr.

I. INTRODUCTION

Congress is mandated by the Constitution "to raise and support Armies,"[1] "to provide and maintain a Navy,"[2] "to make rules for the Government and Regulation of the Land and Naval Forces,"[3] and "to provide for organizing, arming, and disciplining the Militia, . . . and training the Militia according to the discipline prescribed by Congress."[4] In order to fulfill these responsibilities, Congress passed the Universal Military Training and Service Act of 1967[5] and declared the following purposes, among others, for the Act:

> (b) . . . that an adequate armed strength must be achieved and maintained to insure the security of this nation.
> (c) . . . that in a free society the obligations and privileges of serving in the Armed Forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.[6]

Exercising this broad constitutional authority to raise armed forces to provide for national security, Congress determined that only male citizens were subject to the draft.[7] Senior District Judge William D. Murray of the United States District Court, District of Montana, has concluded in *United States v. Reiser*[8] that "legislation which limits the military draft to male citizens denies them equal protection of the law"[9] by creating an unjustified sex classification.

In deciding whether or not legislation establishing all male draft is a violation of the Constitution, it is necessary to consider what justification exists for sex-based classifications and what standard the courts have applied in determining the constitutionality of

---

1. U.S.C.A. Const. art. 1, § 8, cl. 12.
2. U.S.C.A. Const. art. 1, § 8, cl. 14.
3. U.S.C.A. Const. art. 1, § 8, cl. 14.
4. U.S.C.A. Const. art. 1, § 8, cl. 16.
5. 50 U.S.C.A. App. § 451 *et seq.*
6. 50 U.S.C.A. App. § 451.
7. 50 U.S.C.A. App. § 453. "It shall be the duty of every *male* citizen of the United States, and every other *male* person now or hereinafter in the United States who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." (emphasis added)
8. United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975).
9. *Id.* at 1069.

such classifications. This note will examine the *Reiser* decision and measure the district court's approach to the problem against the current state of the law.

II. U.S. v. REISER

Defendant George Kenneth Reiser was indicted for failure to submit to induction into the armed forces.[10] As the basis of a motion to dismiss, Reiser contended that the statutory scheme under which the United States had attempted to induct and prosecute him established "a sex-based classification which burdens and penalizes members of one sex and not the other."[11] As a result the defendant maintained that his constitutional rights to due process and equal protection, guaranteed by the Fifth Amendment, were violated.[12] The district court dismissed the indictment against Reiser, concluding that the draft laws were unconstitutional because they created a sex-based classification that was inherently "suspect,"[13] and that the government had failed to show that "national security" required exclusion of women from the draft or that there was any other compelling interest served by such exclusion.[14]

In holding sex a suspect classification, the district court felt that a close examination was warranted "when experience indicates that the correlation between the classification and the performance in question is based on generalities which are not grounded in factual determinations but rather upon stereotyped conclusions."[15] Noting an historical similarity between classifications based on race and those based on sex, the court cautioned that "in view of the misjudgments made about the performances and capabilities of women in the past, any continuing distinctions based on sex (like those of race) should bear a heavy burden of proof."[16]

This burden was then upon the government to establish that the "gender-based classification" employed in the draft satisfied a "compelling state interest."[16.1] Viewing the "highly mechanized" nature of modern warfare, the district court found that this burden had not been met, especially considering the fact that only some 15% of the country's armed forces personally served in combat units during the American participation in the Vietnam war.[17] The court

10. 50 U.S.C.A. App. § 452.
11. United States v. Reiser, *supra* note 8 at 1061.
12. *Id.*
13. *Id.* at 1063.
14. *Id.* at 1067.
15. *Id.* at 1064.
16. *Id.* at 1064-65.
16.1. *Id.* at 1065.
17. *Id.* at 1067, *citing* Bureau of the Census, U.S. Dept. of Commerce, Statistical

felt that women, just as men, could be considered on their qualifications and assigned to noncombat roles if "any justifiable basis existed for excluding them from combat assignments."[18]

III. Equal Protection

The due process clause of the Fifth Amendment sets a standard to which federal legislation must conform. It guarantees to every person security from arbitrary treatment and the equal protection of the laws. In this regard, the Fifth Amendment imposes the same obligation upon the federal government as the Fourteenth Amendment does upon the states.[19] Very early it was recognized that the promise of equal protection of the laws not only meant the enactment of fair and impartial legislation, but also extended to the application of those laws.[20] The United States Supreme Court has indicated that three factors must be examined in order to determine whether a law violates equal protection: 1) the character of the classification; 2) the individual interests affected by the classification; and 3) the governmental interests advanced in support of the classification.[21] When examining laws challenged under equal protection, the Court has evolved more than one standard or test, depending on the interest affected or the classification involved.[22]

IV. Rational Basis Test

The traditional standard of equal protection scrutiny focused solely on the means used by the legislature. Known as the "rational basis" test, it merely required that the means or classification in the statute reasonably relate to the legislative purpose.[23] To meet constitutional challenge, classifications, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[24] If there was a valid reason for the classification, courts would defer to the legislature's judgment. Under this test an act of the legislature is entitled to a presumption of constitution-

---

Abstract of the United States 260 (1970).

18. United States v. Reiser, *supra* note 8 at 1069.

19. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *Cf.* Weinberger v. Wiesenfeld, ___ U.S. ___, 95 S. Ct. 1225, 1228 n.2 (1975).

20. Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886).

21. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

22. *Compare* Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), *with* Williams v. Lee Optical, 348 U.S. 483 (1955); *compare* McLaughlin v. Florida, 379 U.S. 184 (1964), *with* Morey v. Doud, 354 U.S. 457 (1957).

23. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

24. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919).

ality;[25] and one who assails the classification carries the burden of showing that it "does not rest upon any reasonable basis, but is essentially arbitrary."[26] Review of the propriety of the classfication is limited to whether "any set of facts reasonably may be conceived to justify it."[27] Using this test, then, the court need ask itself only two questions: 1) Does the statute have a permissible purpose? 2) Do the classifications drawn have a reasonable relation to this purpose?

V. Strict Scrutiny Test

In addition to the traditional "old" equal protection, a "new" equal protection standard demanding strict rather than deferential scrutiny has evolved.[28] Legislation subjected to strict scrutiny required a closer coherence between classification and statutory purpose. Moreover, rather than regarding only the *means*, courts scrutinized legislative *ends* as well. Legislation in the areas of the new equal protection had to be justified by "compelling" governmental interests.[29] Strict scrutiny is triggered if the statutory classification attacked involves either a "suspect" class or a "fundamental right" explicitly or implicitly guaranteed by the United States Constitution. Suspect classifications have been held to exist when based on race, alienage, and national origin.[30] Classifications involving fundamental rights have included interstate travel, voting and freedom of expression.[31] Strict scrutiny places "a very heavy burden of justification"[32] on the defender of the classification to show not only that it is reasonable, but that it is necessary to promote a "compelling"[33] governmental interest, or there is some "overriding"[34] statutory pur-

25. Flemming v. Nestor, 363 U.S. 603, 617 (1960); McGowan v. Maryland, *supra* note 23 at 425.

26. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911); Morey v. Doud, *supra* note 22 at 464.

27. McGowan v. Maryland, *supra* note 23 at 426.

28. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

29. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

30. Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); *cf.* Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

31. Note the holdings or rationale of Bullock v. Carter, 405 U.S. 134 (1972) (voting); Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972) (freedom of expression); Dunn v. Blumstein, *supra* note 21 (travel, voting); Harper v. Virginia Board of Electors, 383 U.S. 663 (1963) (voting); Kramer v. Union Free School District No. 15, *supra* note 22 (voting); Shapiro v. Thompson, *supra* note 29 (travel).

32. Loving v. Virginia, *supra* note 30 at 9.

33. Shapiro v. Thompson, *supra* note 29 at 634.

34. McLaughlin v. Florida, *supra* note 22 at 192.

pose. Here the courts must ask whether the statute involves either a "suspect" classification or a "fundamental right."

VI. APPLICATION

Equal protection has been increasingly and somewhat aggressively applied to invalidate sex-based classifications in determining whether there exists a rational relationship between the classification and the lawfully permissible object of the statute.[35] Though in form the traditional "old" standard is used, its applications has sometimes invoked scrutiny of a substantial nature. The Supreme Court recently stated: "dissimilar treatment for men and women who are thus similarly situated . . . violates the Equal Protection Clause."[36] In *Reed v. Reed* the Supreme Court held that classifications based on sex:

> . . . must be *reasonable*, not arbitrary, and must rest upon some ground of difference having a *fair* and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[37]

This language was used over fifty years ago in *Royster Guano Co. v. Virginia*[38] to express the traditional scope of review on equal protection clause attacks against legislative classifications. Applying the rational relationship test, the Supreme Court held that Idaho's statutory preference for male applicants for letters of administration of intestates' estates was established solely to eliminate hearings on the merits of "equally entitled" applicants. Because the statute accorded disparate treatment to individuals similarly situated, it violated the equal protection clause of the Fourteenth Amendment.

Most cases invalidating sex-based classifications in sports have also used the rational relationship test.[39] The underlying policy in

---

35. Stanton v. Stanton, ___ U.S. ___, 95 S. Ct. 1373 (1975); Weinberger v. Wiesenfeld, *supra* note 19; Reed v. Reed, 404 U.S. 71 (1971).

It has been suggested that there be recognized a so-called "invigorated" rational relationship test which calls for "modest interventionism." See Gunther, *supra* note 28 at 20-24; also *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264, 1269 (9th Cir. 1974). Mr. Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 102-103 (1973), suggests that the Court openly acknowledge what he considers a "sliding scale" approach: "The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutinty applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."

36. Reed v. Reed, *supra* note 35 at 77. *See also* Healy v. Edwards, 363 F. Supp. 1110, 1113-14 (E.D. La. 1973).

37. Reed v. Reed, *supra* note 35 at 76.

38. Royster Guano Co. v. Virginia, *supra* note 24 at 415.

39. Brenden v. Independent School Dist. No. 742, 477 F.2d 1292 (8th Cir. 1973),

invalidating sex classifications regardless of the test applied is that "eligibility to play in athletic competition must be based upon an individualized determination of ability to play regardless of the sex of the player."[40]

The Supreme Court has exhibited a reluctance, however, to expand the scope of strict scrutiny to include classifications based on sex. Only in *Frontiero v. Richardson*[41] has the Court approached holding that sex-based classifications are suspect and therefore deserving of strict judicial scrutiny. A majority of the Court held that the federal statutes permitting a service*man* to claim his wife as a "dependent" regardless of the wife's financial status, but requiring a service*woman* to prove the dependent status of her husband, violated the due process clause of the Fifth Amendment. However, only four of the Justices held that sex-based classifications are "inherently suspect." Since *Reed* and *Frontiero*, the Supreme Court has had numerous opportunities to examine statutes which have been challenged as sex-based classifications, but the Court has never held that such classifications are inherently suspect.[42]

Even had a majority of the Court deemed sex as "suspect," all classifications based on sex would not thereby necessarily become invalid. Under careful reading, *Frontiero* stands only for the proposition that administrative convenience is not sufficient to substantiate classifications based on sex where such convenience is the *sole* basis.[43]

The district court's holding in *Reiser* that all sex-based classifications are "inherently suspect" is without precedent in the United States Supreme Court or the Ninth Circuit. Numerous courts have considered direct challenges to the Universal Military Training and Service Act on the ground that the Act is sex-based legislation which unconstitutionally discriminates against male citizens. No other federal court has rejected the authority of Congress to adopt different requirements for men as opposed to women.[44] Each of these

---

affirming 342 F. Supp. 1224 (D. Minn. 1972); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Reed v. Nebraska School Activities Ass'n., 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E. 2d 495 (1972). *But see* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974) (sex classification held suspect and subject to strict scrutiny).

40. Brenden v. Independent School Dist. No. 742, *supra* note 39; Darrin v. Gould, ___ Wash. ___, 540 P.2d 882 (1975).

41. Frontiero v. Richardson, 411 U.S. 677 (1973).

42. Schlesinger v. Ballard, 419 U.S. 498 (1975); Stanton v. Stanton, *supra* note 35; Weinberger v. Wiesenfeld, *supra* note 35; Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).

43. Frontiero v. Richardson, *supra* note 41 at 690.

44. United States v. Baechler, 509 F.2d 13, 14-15 (4th Cir. 1974); United States v. Bertram, 477 F.2d 1329, 1330 (10th Cir. 1971); United States v. Camera, 451 F.2d 1122, 1125-

courts has imposed the rational relationship test and has found the Act to be constitutional. At least two courts have ruled that *Frontiero* does not require abandonment of the rational relationship test to determine whether conscription of men only is a violation of the Fifth Amendment.[45]

CONCLUSION

Obviously *Reiser* is more than a draft case; fundamentally the problem is what equal protection standard should be applied to sex-based classifications. Contrary to the district court in *Reiser*, the Supreme Court of the United States has refused to regard sex-based classifications as inherently suspect. Rather, the appropriate standard remains the rational basis approach, which has been applied vigorously. The question then must be whether the induction of males only is reasonably related to the statutory purpose of raising an army to insure national security. Courts have generally shown considerable deference to the power and judgment of the Congress in providing for the armed forces, even to the point of regarding such power as "beyond question."[46] Governmental interest here is seen to be extremely urgent; "national security, in its true sense, is at stake."[47] Societal values and roles may be changing, as is the nature of warfare; but for now the courts generally agree that subjecting males only to the draft is not violative of the Fifth Amendment.

1126 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074; United States v. Fallon, 407 F.2d 621, 623 (7th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969).

45. United States v. Offord, 373 F. Supp. 1117, 1118-1119 (E.D. Wis. 1974); United States v. Yingling, 368 F. Supp 379, 384-386. (W.D. Pa. 1973).

46. United States v. O'Brien, 391 U.S. 367, 377 (1968).

47. United States v. Offord, *supra* note 45 at 1118.