CONSTITUTIONAL LAW—EQUAL PROTECTION: SEX DECLARED TO BE A SUSPECT CLASSIFICATION SUBJECT TO EQUAL PROTECTION ANALYSIS OF STRICT SCRUTINY

United States v. Reiser[1]

The government prosecuted the defendant for refusing to submit to military induction,[2] charging Reiser with violation of the Selective Service laws of the United States, and specifically those sections applying to "Registration" [3] and "Persons liable for training and service." [4] Reiser was indicted under the section of the Code dealing with "Offenses and Penalties." [5] He filed a motion to dismiss, contending that the Selective Service laws requiring induction of men only were unconstitutional, since they established a classification based exclusively on sex. Consequently, he alleged, these laws denied him his rights to due process and equal protection guaranteed by the fifth and fourteenth amendments; such a classification based on sex "burdens and penalizes

1. 394 F. Supp. 1060 (D. Mont. 1975). Opinion of the court delivered by Senior District Judge Murray.

2. *But see* United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968) (compulsory draft of men and voluntary service for women was not arbitrary and did not violate male defendant's rights to due process); *see also* United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970) (military Selective Service Act does not violate rights guaranteed by fifth amendment and does not discriminate against males by excluding females from compulsory service).

3. 50 U.S.C. App. § 453 (1970).

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States . . . to present himself for and submit to registration at such time or times and place or places, and in such a manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

4. 50 U.S.C. App. § 454 (1970). "[E]very male citizen of the United States and every male alien admitted for permanent residence . . . shall be liable for training and service in the Armed Forces of the United States."

5. 50 U.S.C. App. § 462 (1970). Persons found guilty in any district court of the United States of competent jurisdiction shall be "punished by imprisonment for not more than five years or a fine not more than $10,000, or by both such fine and imprisonment. . . ."

members of one sex and not the other." [6] *Held,* sex was a "suspect classification" under the strict scrutiny/compelling state interest test applied by the United States Supreme Court in cases dealing with equal protection.[7] As such, the court concluded that the government did not present justifiable grounds for the gender-based classification.[8] Therefore, the court held that the Selective Service laws, which limit the draft to male citizens, deny that class of persons the equal protection of the law.[9]

Reiser is the first federal case to declare, without reservation, sex as a suspect classification, thus bringing it fully within the scope of the "strict scrutiny" test of the fifth amendment in equal protection cases where class discrimination is established.[10]

Prior to *Reed v. Reed,*[11] in order to have a statute upheld, the state needed only to exhibit some minimal rational basis for discriminating against a particular class (the rational basis test) when fundamental rights of the individual in relation to the statutory purpose were not involved. Such a test made the outcome of litigation against the state predictable. On the other hand, *Reed* added an extra dimension to the traditional rational basis test. An indecisiveness existed among members of the court in *Reed* as to which equal protection test should apply—compelling interest or rational basis. As a result, a hybrid of the two tests was applied and the state was required to demonstrate

---

6. United States v. Reiser, 394 F. Supp. at 1061.
7. *Id.* at 1063, and cases cited by the court.
8. *Id.* at 1068.
9. *Id.* at 1069.
10. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973), where the United States Supreme Court struck down a statute requiring a female member of the armed forces to demonstrate her spouse's dependency while no such requirement was made of male members. This statute allowed the spouses of male members to receive benefits (which included increased quarters' allowance, and medical and dental care) when they were less than half dependent upon their husbands for support, whereas the male spouses of female members must have been more than one-half dependent upon their spouses in order to qualify for the same benefits. The Court issued a plurality opinion; the Justices were split over which equal protection test to apply—compelling interest, the traditional rational basis, or the *Reed* rational basis tests. Reed v. Reed, 404 U.S. 71 (1971). Under the latter test, the state must demonstrate some rational correlation between the classification and the statutory goal. Note, 7 CREIGHTON L. REV. 69, 71 (1973). See further discussion of *Reed, infra.* The result of the controversy was a plurality of four, two separate concurring opinions of one and three Justices, respectively. Mr. Justice Rehnquist had the single dissenting opinion.

See also Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex labelled a "suspect" classification).

11. 404 U.S. 71 (1971), where an Iowa statute was ruled unconstitutional because of arbitrary selection of the male applicant as administrator of a decedent's estate where two similarly situated individuals, male and female, had applied for the position. An irrebuttable presumption that the male was better qualified existed for the sake of administrative convenience and was held to be invalid in light of the fact that the state had adequate alternative means to make a competent determination.

some reasonable correlation between the established classification and the statutory goal.[12] *Frontiero v. Richardson*[13] subsequently failed to devise a solution as to which was the proper sex discrimination test to be applied. A plurality opinion was the result of this obfuscation, with several Justices relying on the method applied in *Reed* and the plurality citing strict scrutiny as the proper test where administrative convenience had no place.[14] The *Reiser* decision resolved the dilemma by expanding the equal protection analysis to include sex as a suspect classification requiring strict judicial scrutiny along with race, religion, and national origin.[15]

Reiser reflects a decisive departure from the 19th-century view of women's status and function in society. In *Bradwell v. Illinois*,[16] the Supreme Court, in an accurate reflection of our society's view toward women, declared "[t]hat God designed the sexes to occupy different spheres of action . . . that it belonged to men to make, apply and execute the laws was regarded at common law as an almost axiomatic truth."[17]

In the instant case, the government implicitly argued that because some women are not fit for military service, all women may be automatically excluded from the draft based upon an ill-conceived, overinclusive presumption that all women are incapable of attaining satisfactory standards which would allow them to perform effectively in the armed forces.[18] The government argued that conscription of women would jeopardize the national security. The court challenged this contention and buttressed its position by holding such a conclusion on the part of the government to be an irrebuttable presumption.[19] Further, the degree of mechanization of today's military brands such

---

12. Note, 7 CREIGHTON L. REV. 69, 75 (1973).

13. 411 U.S. 677 (1973).

14. The district court in *Frontiero* had applied the traditional equal protection analysis whereunder gender-based classification was viewed under the rationality test. Under this test a statutory classification is upheld if any state of facts reasonably may be conceived to justify it. However, the basis of the plurality's analysis in the Supreme Court decision was that sex is a suspect classification demanding strict judicial scrutiny to which the doctrine of administrative convenience is repugnant. Comment, 87 HARV. L. REV. 1, 117-18, 121 (1974).

15. Once discrimination is proven to be gender-based under suspect classification standards, the burden shifts to the government to prove a compelling state interest and that the challenged statute is not overbroad or overinclusive. In *Reiser*, the federal government did not sustain this burden and as much as conceded that its only justification for such a classification was "administrative convenience." 394 F. Supp. at 1068.

16. 16 Wall. 130 (1872).

17. Rewalt, *The Equal Rights Amendment*, 57 WOMEN LAWYERS J. 7, 8 (1971).

18. 394 F. Supp. at 1066-68.

19. Vlandis v. Kline, 412 U.S. 441, 446 (1973), wherein the Court remarked, "statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."

statements as groundless.[20] Recent Supreme Court judicial history reflects that other statutes based on irrebuttable presumptions have been held unconstitutional.[21] For such irrebuttable presumptions to pass constitutional muster, they must be "necessarily or universally true in fact." [22] Under the due process clauses of the fifth and fourteenth amendments, the "universal truth" test requires a near-perfect to perfect correlation between the state statute and its objectives.[23] A general statement labelling women as inadequate with regard to the military amounted, in the court's opinion, to nothing more than an administrative convenience.[24]

In sex discrimination cases under the due process clauses of the fifth and fourteenth amendments, the Supreme Court has employed the "universal truth" test to invalidate pertinent statutes. This test resembles the strict scrutiny imposed by equal protection upon legislative acts rather than procedural due process. The universal truth doctrine says if the challenged statute is "not necessarily or universally true in fact," then the irrebuttable presumption made by that statute denies the individual members of the group, classified by the statute, due process of law.[25] The Supreme Court, in cases involving irrebuttable presumptions, requires a near-perfect to perfect correlation between the purpose of the statute and the means used to accomplish that purpose, thereby making it a formidable and almost insurmountable obstacle for government to overcome any challenges to class legislation.[26]

---

20. In reference to the war in Viet Nam, the court commented that only 15 per cent of the armed forces personnel were in combat units.

21. *Compare* Stanley v. Illinois, 405 U.S. 645 (1972) *with* Vlandis v. Kline, 412 U.S. 441 (1973) *and* Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). In these cases "the statutes involved contained rules denying a benefit or placing a burden on all individuals possessing a certain characteristic." For a discussion of the conclusive presumption doctrine, see Comment, 87 HARV. L. REV. 1534 (1974).

22. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

23. Comment, 87 HARV. L. REV. 1534, 1536 (1974).

24. Reed v. Reed, 404 U.S. 71 (1971), *Frontiero, Vlandis,* and *La Fleur* illustrate that when a statute creates a conclusive presumption as to a particular class, where the state possessed the means to ascertain the validity of that presumption, then the statute would collapse as merely being "administrative convenience" under both the "universal truth" test of due process and the "compelling interest" test of equal protection. In *Vlandis,* the Court said:

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, *when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.*

412 U.S. at 452 (emphasis supplied).

25. For an analysis of an irrebuttable presumption problem, see 87 HARV. L. REV., *supra* note 23, at 1534 n.7; for a brief discussion of the Warren two-tiered equal protection test, see 87 HARV. L. REV. at 1535 n.9.

26. On the other hand, "strict scrutiny" requires no such perfect or near-perfect correlation of statutory means and purpose.

The problem with the "universal truth" test, perhaps, rests with the remedy afforded the plaintiff under the procedural aspects of due process.

> Invalidation on equal protection grounds directs the legislature to draw distinctions more accurately, but meanwhile requires equal treatment of those within and without the unconstitutional classification. The remedy for those disadvantaged by an unconstitutional irrebuttable presumption, however, is not equality of treatment, but rather the provision of a hearing at which a tribunal can determine whether denying benefit to, or imposing a burden on an individual is consistent with the statutory purpose.[27]

The district court in *Reiser* placed a good deal of reliance on *Frontiero* and *Reed* but found increased support from subsequent Supreme Court decisions. Judge Murray found that, with the addition of Justice Stewart's concurring opinion [28] to that of the plurality decision in *Frontiero*, a majority of the Supreme Court considered sexual classifications for administrative convenience unconstitutional.[29]

Underlying the *Reiser* decision is the view that along with equal rights exist the attendant duties and obligations required of American citizenship. Service in the military is an obligation to be shared by all citizens, men and women, if women wish to enjoy their fullest rights on an equal par with men.[30]

REISER'S IMPACT ON ERA

With the Equal Rights Amendment [31] presently before the states for ratification, the *Reiser* decision is likely to be regarded as an omen of

---

27. 87 HARV. L. REV., *supra* note 23, at 1539.

28. Mr. Justice Stewart concurred with the plurality's *Frontiero* judgment in one sentence stating that "the statutes before us work an invidious discrimination in violation of the Constitution." 411 U.S. at 691 (concurring opinion).

29. United States v. Reiser, 394 F. Supp. 1060, 1068 n.12.

30. Those advocates of the Equal Rights Amendment insist that the principle of equal treatment under the law embodied in the basic language of the amendment requires men and women not only to be accorded equal rights and privileges, but also to be subjected to the same responsibilities, burdens, and duties of citizenship. Hale and Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199, 210 (1971). In addition, Hale and Kanowitz see military service for women as a means of upgrading the educational attainment of women, providing them with basic self-defense, access to contraception devices, and an alternative to early marriage situations. Thus, women obtain both benefits and burdens in serving their country.

31. The proposed twenty-seventh amendment [hereinafter referred to as the ERA] states:

> 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.

H.R.J. RES. 208, 92d Cong., 1st Sess. (1971); S.J. RES. 8, 92d Cong., 1st Sess. (1971).

things to come should the necessary three-fourths of the state legislatures adopt the constitutional amendment. Further, lest the *Reiser* decision be regarded by some as obviating the need for the ERA, should the decision be followed, several points for consideration are offered herein. Nevertheless, proponents of the ERA will no doubt take pleasure in the ruling in *Reiser*. It offers a blending of state and federal decisions on the proposition of sex as a discriminatory classification and thus provides a solid foundation from which the Supreme Court may expand conclusively the gamut of the equal protection clause to include sex as a suspect classification.[32] However, the *Reiser* ruling does not necessarily obviate the need for or even the desirability of ratifying the ERA. There are reasons deserving of attention as to why *Reiser* does not eliminate the need for the ERA.[33]

First. It does not appear that the universal truth approach, mentioned above, is a tool which could effectively eliminate the need for an equal rights amendment. A ruling under this doctrine that a statutory classification based on sex was unconstitutional would only result in a decision that an individual would be entitled to a hearing to determine if that individual is properly within the affected group with respect to the statutory purpose.[34] "[F]ocus is on the treatment of particular persons than on the overall accuracy of legislative classifications." [35]

Second. Successful strict scrutiny litigation under the equal protection clause is questionable as a means of lessening the necessity for the Equal Rights Amendment. Even should *Reiser* be followed in subsequent cases, establishing sex as a suspect classification, without a constitutional amendment compelling the use of the equal protection clause in sex classification cases courts would still be free to choose from a variety of tests to arrive at judgments ranging in impact and adequacy from poor to excellent. It is questionable, therefore, that a Supreme Court holding of gender-based classifications as suspect "would be sufficiently broad to make an amendment unnecessary." [36]

---

32. *Compare* Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485, P.2d 529, 95 Cal. Rptr. 329 (1971) *with* Reed v. Reed, 404 U.S. 71 (1971), Frontiero v. Richardson, 411 U.S. 677 (1973), *and* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

33. Because the concept of equal protection has its origin in the fourteenth amendment, it is not applicable to the federal government, forcing litigants to rely on the fifth amendment's due process clause for challenges to the Selective Service system. Ratification of the ERA would at least compel the courts to view sex discrimination in compulsory military service from the standpoint of equal protection. Moreover, the ERA is specifically applicable to the federal government. Note, 4 LOYOLA U. OF CHICAGO L.J. 69 (1973).

34. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

35. 87 HARV. L. REV. *supra note* 23, at 1547-48.

36. Dorsen and Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 216, 219 (1971).

From the standpoint of litigation of the rights of men and women without the Equal Rights Amendment, gains would be accomplished only on a piecemeal basis and would result in laboriously slow progress with regard to long-term solutions in the field of gender-based legislation. In addition, "[w]ithout the constitutional declaration of principle, each new statute or adjudication would raise anew the essential question of equality of the sexes." [37] Some Supreme Court decisions and lower court rulings move in the wrong direction.[38] Without an amendment, these courts would be required to distinguish their decisions before progress could be made. Such a task would most likely be long and strewn with difficulties.[39] Furthermore, the ERA would not only affect the states, but also would apply explicitly to the federal government, as well as to the private sector where a significant government involvement existed. This would eliminate the necessity for reliance on implicit guarantees of equal protection in the fifth amendment.[40]

CONCLUSION

While *Reiser* declares sex to be a suspect classification subject to equal protection analysis, such a decision does not exclude the necessity for the ERA. Under the ERA the universal truth test of irrebuttable presumptions would find compatibility with the effectiveness of the compelling state interest test. Gender-based irrebuttable presumptions could find no shelter under the ERA and every such gender-based classification would carry with it an immediate presumption of unconstitutionality.[41] As is apparent in conclusive presumption analysis, "the legal principle underlying the Equal Rights Amendment . . . is that the law must deal with the individual attributes of the particular person not with a vast overclassification based upon the irrelevant factor of sex." [42] Indeed, it has been suggested that the Equal Rights Amend-

37. *Id.* at 224.

38. Emerson, *The Constitutional Law View*, 57 WOMEN LAWYERS J. 12, 14 (1971).

39. *Id.* The Supreme Court's heretofore conservative posture in its rulings with regard to sex discrimination may be partially due to its reluctance to become involved in another area of the law likely to bring major social change. If the Court were to advance such a change, it would be important first to have the support of the other arms of government as well as the people.

40. Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 253, 259 (1971).

41. For an examination of the need for a constitutional amendment dealing solely with sex discrimination, see Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875-85 (1971).

42. Emerson, *supra* note 38, at 12, comments that

> [u]nless the difference is one that is characteristic of all women and no men,

ment would bar any classification which could not be justified on the basis of a physical difference between men and women.[43]

By including sex in the narrow group of subjects viewed as suspect classifications,[44] the district court in *Reiser* has attempted to take a solid step toward freeing both women and men from a situation in which individual characteristics are overlooked in favor of stereotypical characteristics projected onto a particular class. The court strongly asserted that differentiation based on stereotypes of woman as the weaker sex can no longer be legislated as an irrebuttable presumption. Under the *Reiser* decision, there is no room for the future maintenance of like attitudes in our society.[45]

Reiser must still follow the route of appeal before it finally comes to be recognized as a new standard in equal protection analysis. Nevertheless, it has already made a significant contribution to a 20th-century *cause celebre*, equal rights for women.

—*M. Acham-Chen*

---

or all men and no women, it is not the sex factor but the individual factor which should be determinate.

43. Murray, *The Negro Woman's Stake, supra* note 41.

44. Other classifications inherently suspect are race, alienage, and national origin. Frontiero v. Richardson, 411 U.S. 677 (1973).

45. *Cf.* Bradwell v. Illinois, 16 Wall. 130, 141 (1872), where women were excluded from the legal profession since the role of women was "to fulfill the noble and benign offices of wife and mother." Even today such logic still persists, *e.g.*, United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968). In Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), it was irrebuttably presumed that all pregnant teachers were unfit to teach; and in Stanley v. Illinois, 405 U.S. 645 (1972), an Illinois statute conclusively presumed that all unmarried fathers were unqualified to raise their own children. It should be noted, in cases dealing with irrebuttable presumptions as being violative of fifth and fourteenth amendment protection of due process, that such presumptions when judged unconstitutional only provide the individual challenging the statute a right to a hearing on his own individual merits vis-à-vis the class.