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Armed Forces: Sex-Based Draft Violates Due Process and Equal Protection

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ARMED FORCES: SEX-BASED DRAFT VIOLATES DUE PROCESS AND EQUAL PROTECTION—*United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975).

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 discipling the Militia . . . and the Authority of training the Militia according to the discipline prescribed by Congress."[4] The power of Congress to conscript can be supported by the necessary and proper clause as a justifiable means for execution of the Art. I, §8 mandates. Although the power of Congress to raise and maintain armies is beyond dispute,[5] whether the exercise of those powers enables Congress to conscript *only* male citizens and thereby exclude the conscription of females is questionable. Can an argument be made that such a distinction is a violation of equal protection or that no rational basis exists for such a classification? Previous challenges to the Selective Service Act[6] based on violations of equal protection have been disallowed by holdings which maintained that Congress had a rational basis for discriminating against one sex.[7] These courts uniformly applied the *rational basis test.*

In *United States v. Reiser*,[8] the defendant was indicted under 50 U.S.C. App. § 462(a) for failing to report for induction. Defendant filed a motion to dismiss. His position was premised upon the theory that sex-based classifications are inherently suspect, and therefore, must be justified by a compelling governmental interest. Defendant contended that the government had no such interest. Against a long line of precedent, the District Court of Montana

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1. U.S. CONST. art. I, § 8, cl. 12.
2. U.S. CONST. art. I, § 8, cl. 13.
3. U.S. CONST. art. I, § 8, cl. 14.
4. U.S. CONST. art. I, § 8, cl. 16.
5. United States v. O'Brien, 391 U.S. 367 (1968). *See also* Litcher v. United States, 334 U.S. 742 (1948); Arver v. United States, 245 U.S. 366 (1918)(Selective Service Cases).
6. 50 U.S.C. App. § 453 (1968):

> . . . [I]t shall be the duty of *every male* citizen of the United States, and *every other male person* now or hereafter 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)

7. United States v. Baechler, 509 F.2d 13 (4th Cir. 1974); United States v. Betram, 477 F.2d 1329 (10th Cir. 1973); United States v. Camara, 451 F.2d 1122 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).
8. 394 F. Supp. 1060 (D. Mont. 1975).

(Ninth Circuit) held that legislation limiting the draft to male citizens denies to them due process and equal protection of the law in violation of the fifth amendment.[9] The *Reiser* court abandoned the older rational basis test and instead applied a test of strict judicial scrutiny holding that the former test was inapplicable where a fundamental interest or a suspect classification[10] is involved.

The *Reiser* court adopted the *strict scrutiny test* on the basis that sex is a suspect classification, but did not address itself to the question of whether the rights of the defendant which were being abridged, were fundamental.[11] According to the court, "Suspect classifications are based upon a person's status. The more immutable the characteristics are upon which the classification is based, the more likely they will be held to be suspect."[12] Such characteristics are those over which we have no control; those things which genetics and heredity impose upon us, such as race and physical features.

The case should not turn upon which standard the court is willing to adopt since under either test the Selective Service Act could not meet the requirements of constitutionality. Although the *Reiser* court held sex to be a suspect classification, and therefore applied the strict scrutiny test, a persuasive argument can be made for holding the legislation unconstitutional under the more tradi-

9. While the fifth amendment contains no equal protection clause, it does forbid discrimination that is so "unjustified as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168 (1964), *citing* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

10. Suspect classifications have been described as groups which are in special need of protection because they are "discrete and insular minorities." United States v. Caroline Prod. Co., 304 U.S. 144, 152-53, n.4 (1938).

11. Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. 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.

Justice Marshall's dissent in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102 (1973). *See* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973). Thus, determinations of fundamental interests appear to be based on a historical perspective. No clear standard has been announced for deciding what is and what is not fundamental. The Supreme Court has dealt with the issue on a case-by-case basis. The following cases reveal which rights have been declared fundamental: Shapiro v. Thompson, 394 U.S. 618 (1969)(right of interstate travel); Sherbet v. Verner, 374 U.S. 398 (1963)(religion); Griffin v. Illinois, 351 U.S. 12 (1956)(criminal appeals); Harper v. Virginia Bd. of Electors, 383 U.S. 663 (1966)(voting); Bates v. City of Little Rock, 361 U.S. 516 (1960)(freedom of association); Loving v. Virginia, 388 U.S. 1 (1967)(marriage); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)(procreation). It was not necessary for the *Reiser* court to find a fundamental interest since a suspect classification was found.

12. 394 F. Supp. at 1063; *see generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1126-27 (1969). *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

tional rational basis test. In order to understand this possibility it is necessary to compare the two tests and the *Reiser* court's opinion.

The *rational basis test* requires the government to provide a rational justification for a statutory classification.[13] Since every legislative enactment carries a rebuttable presumption of constitutionality,[14] the burden is on the person challenging the legislation to prove that there is no correlation between the classification and the objective to be obtained. Under the *rational basis test* courts require that the "classification 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."[15]

The *Reiser* court believed that sex-based classifications are, like racial classifications, the result of long-standing stereotyped determinations concerning the worth or abilities of a group and, as such, arbitrary.[16] The court referred to a number of Supreme Court decisions in determining what type of classifications were suspect. Just as the Supreme Court has refused to let stand classifications based on race,[17] alienage,[18] and national origin,[19] the *Reiser* court felt that placing a burden on a sex group was *immediately suspect* since such a classification was not related to merit.[20] The court recognized a persuasive analogy between race and sex classifications.[21] It found

13. McGowan v. Maryland, 366 U.S. 420 (1961), involved a suit which contested Maryland's Blue Laws. The court set as a criteria for review of statutes, under the "rational basis" test, whether "any set of facts may be conceived to justify it." *Id.* at 426. The "constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 425.

14. *Id.* at 425-26.

15. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

16. *See* Comment, *Are Sex Based Classifications Constitutionally Suspect?*, 66 Nw. U.L. REV. 481 (1971).

17. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

18. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915).

19. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

20. *See* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

21. The similarities between race and sex discrimination are indeed striking. Both classifications create large, natural classes, membership in which is beyond the individual's control; both are highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women. Both slaves and wives were once subject to the all-encompassing paternalistic power of the male head of the house. Arguments justifying different treatment for the sexes on grounds of

that like race, sex is subject to overbroad generalizations based on visible differentness.[22]

Although judicial standards for determining which classifications are *suspect* have not as yet been clearly articulated, the *Reiser* court felt it was justified in applying to sexual classifications the same standard as that applied to race. Like race, sex-based classifications are characterized by the stigma of inferiority and second class citizenship associated with them.[23]

The *Reiser* court found support for labeling sex as a suspect classification in the case of *Frontiero v. Richardson*.[24] In that case, the Court divided equally on the issue of whether sex is a suspect classification. According to Justice Brennan,

> . . . [A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of legislative choice forbidden by the [Constitution] . . . ."[25]

Congress has itself manifested an increasing sensitivity to sex-based classifications.[26]

The *Reiser* court's decision to hold sex as an *inherently* suspect classification is not compelled by *Frontiero* since there was no clear majority in that regard. Justice Powell, the Chief Justice and Jus-

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female inferiority, need for male protection, and happiness in their assigned roles bear a striking resemblance to the half-truths surrounding the myth of the "happy slave." The historical patterns of race and sex discrimination have, in many instances, produced similar present day results. Women and blacks, for example, hold the lowest paying jobs in industry, with black men doing slightly better than white women.

Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507-08 (1971) (footnotes omitted).

22. *See* note 16 *supra*.

23. *See* note 21 *supra*.

24. 411 U.S. 677 (1972). *Frontiero* declared unconstitutional a federal statute which allowed male armed service members to collect additional allowances and benefits for their wives regardless of dependency, but required female armed service members to prove their husband's dependency before receiving such allowances and benefits.

25. *Id.* at 690, *citing* Reed v. Reed, 404 U.S. 71, 76, 77 (1971).

26. *Id.* at 687:

> In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex* or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." And §1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of *sex*." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious . . . . (footnotes omitted)

tice Blackmun felt compelled to refrain from invoking the strictest test of judicial scrutiny due to a belief in the imminent ratification of the proposed Equal Rights Amendment. If the amendment is adopted, it will represent the will of the people. A court decision finding sex to be an inherently suspect classification would be premature according to these two Justices. To hold all sexual classifications as *inherently* suspect might open a Pandora's box of questions. Such an expanded version of the equal protection clause may obviate the need of an Equal Rights Amendment as Justice Powell and Blackmun observed in *Frontiero*.

Under the strict scrutiny test the burden is upon the government to show a *compelling* interest if the legislation is to be sustained.[27] Such a burden is almost impossible to meet. The distinctions drawn by the law must be of such a compelling nature that not even protected constitutional rights can withstand its purpose. The Selective Service Act could not meet such a test.

It would be possible to argue the unconstitutionality of the Selective Service Act using the *rational basis test* without encountering all the problems that might ultimately arise by holding sex a suspect classification. For example, the *Reiser* court could have asked: what constitutionally permissible objective might the Selective Service Act and other relevant statutory materials be construed to reflect? A presumption of constitutionality evidencing considerable judicial restraint would be in keeping with the *rational basis test*.

Previous cases had placed emphasis on women's unique place in society. In *United States v. Clair*,[28] sex discrimination in the military was upheld because:

> . . . Congress made a legislative judgment that men should be subject to involuntary induction but that women, presumably because they are "still regarded as the center of the home and family life" . . . should not. Women may constitutionally be afforded "special recognition" . . . particularly since women are not excluded from service in the Armed Forces . . . .
>
> In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning. (citations omitted)

27. *See* note 24 *supra*.

28. 291 F. Supp. 122, 124-25 (S.D.N.Y. 1968). *See also* United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973); United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970); United States v. Fallon, 407 F.2d 621 (7th Cir. 1969).

This type of stereotyped portrayal of women in society is no longer valid. The Supreme Court in *Stanton v. Stanton*,[29] declared:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is desirable, if not always a necessary antecedent, is apparent and a proper subject of judicial notice.

Taylor v. Louisiana[30] revealed that, in 1974, 54 per cent of all women between 18 and 64 years of age were in the labor force. The nineteenth century conception of women's "separate place" is completely outdated.[31] If such concepts are no longer tenable, then the justification for such legislation no longer rests upon a rational basis.[32]

Formerly, under the *rational basis test*, invoking a claim of *national security* was enough to give judicial approval to the all-male draft.[33] However, even under this criterion, the government should be required to show more than a mere *claim* of national security. It must give some specific indication of how *national security* would be affected. The government could not establish a rational basis which would justify a draft drawn solely on sex lines.

The arguments set forth by the government in *Reiser* are not persuasive. The government argued that such a classification was justified on the basis of physical differences, especially in regard to the relative strengths of the sexes. Formerly, hand-to-hand combat was a necessary part of war. Therefore, strength was a compelling

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29. 95 S. Ct. 1373 (1975).

30. 95 S. Ct. 692, 700, n. 17 (1975).

31. Weinberger v. Weisenfeld, 420 U.S. 636 (1975), held that gender-based distinctions mandated by the Social Security Act, § 202(g), *as amended*, 42 U.S.C.A. § 402(g) (1950), were overbroad and archaic generalizations since they were based on the premise that male workers' earnings are vital to their families' support, while female workers' earnings do not significantly contribute to families' support. The statute, therefore, violates due process since it unjustifiably discriminates against women wage earners. The gender-based distinction made by § 402(g) is indistinguishable from that made in *Frontiero*.

32. Schlesinger v. Ballard, 95 S. Ct. 572 (1975), held that different treatment afforded men and women with respect to discharge and promotion was constitutionally valid. The Court recognized that the different treatment was rationally based and did not reflect "archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." *Id.* at 577. Since women had less opportunity for promotion Congress had a rational basis for allowing them a longer period of tenure in order to put them on par with men. Since the parties were not similarly situated the case can be distinguished from *Reiser*.

33. Cases cited note 7 *supra*.

reason for excluding women from the draft. However, the technical nature of modern warfare reduces the chance of hand-to-hand combat to a bare minimum. During the Vietnam War less than 2 per cent of the total military were actually engaged in combat.[34] Since most positions in the armed forces have nothing to do with strength, it cannot be authoritatively argued that women are, as a class, unfit for military service. Other nations, such as Israel, have effectively incorporated women into their armed services. In that country, the law requires that every woman, upon reaching the age of 18, must report for 20 months compulsory service. Most women, although they receive combat training, are assigned to necessary non-combat jobs such as electronics, communication and nursing.[35] As evidenced by the 1967 Six Day War, the inclusion of women in the armed forces did not dilute the Israeli war effort. Only a small percentage of armed forces are ever engaged in actual combat in modern warfare.

Even the armed forces themselves recognize the fact that women can serve effectively. Today 66 of the Navy's 88 job ratings are open to WAVES. Women can now serve in 434 of the possible 482 positions in the Army. The Air Force and Marines have also made more fields available to women.[36] Although, until recently, the percentage of women who could serve in the armed forces was restricted to 2 per cent, the services are now actively recruiting women.[37] In 1970, there were 41,183 women in the armed forces; in 1973, there were 55,375; a projected figure of 123,261 is set for 1978.[38] With women being actively recruited, there is no justification for non-conscription should the need arise.

United States v. Dorris[39] held that a military classification based on sex was reasonable in order to "provide for the common defense" in a manner ". . . which would both maximize the efficiency and minimize the expense of raising an army . . . ." Arguments such as this based upon economics are also untenable. Justice Brennan in his dissenting opinion in *Kahn v. Shevin*,[40] said that, "Gender classifications cannot be sustained merely because they

34. R.B. Conlin, *Equal Protection Versus Equal Rights Amendment—Where Are We Now?*, 24 DRAKE L. REV. 259, 320 (Winter 1975).

35. 118 Cong. Rec. part 7, S. 9332-9333, March 21, 1972.

36. U.S. News & World Report 75: 82-84, Dec. 10, 1973.

37. *See, e.g.*, Act of Aug. 10, 1956, ch. 1041, 70A Stat. 174, *as amended*, 10 U.S.C. § 3209(b)(1967); 10 U.S.C. § 5410 (1956) (repealed 1967).

38. *See* note 36 *supra*.

39. 319 F. Supp. 1306, 1308 (W.D. Pa. 1970) *quoting* Preamble to United States Constitution and United States v. Fallon, 407 F.2d 621, 623 (7th Cir. 1969).

40. 416 U.S. 351, 358 (1974).

promote legitimate governmental interests, such as *efficacious administration* of government" (emphasis added).[41] The Supreme Court decision in *Frontiero*, and *Reed v. Reed*,[42] affirmed the proposition that gender-based classifications solely for administrative convenience cannot stand. If economics is an argument then there is all the more reason to subject women to the draft. By providing women with the opportunity for military service the government is reducing the job strain on the economy. Military service training will provide women with educational and vocational skills which might otherwise be lost. This would put women on an equal basis with men when they are ready to re-enter the job pool. Such educational opportunities are a legitimate method of bringing women into full participation in the political, business, and economic arenas. Since women would be judged on their abilities to perform rather than on their sex, incentives to compete and achieve would naturally follow and give women a greater sense of their own worth. Another benefit of such service would be to provide young women an alternative to marriage and college.[43]

Other arguments based on women's abilities are also dubious. The fact that some women would be unable to meet the standards set up by a conscription act does not thereby afford women protection as a class from a duty concomitant with citizenship. Many men are also drafted who are eventually turned away because their physical and mental qualifications are unacceptable. Sex-based classifications are unnecessary since neutral nonsexual criteria could be used to determine those individuals who would satisfy the necessary standards of performance. The burden is on the legislature to define more realistic classifications.

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41. *See* note 25 *supra*.

42. The Court found that legislation involving men as administrators of estates (a classification based on sex) did not rest upon any ground "of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced be treated alike." *Reed* at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

43. Hâle and Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199 (1971).