

1-15-1982

## Rostker v. Goldberg: A Step Backward in Equal Protection, or a Justifiable Affirmation of Congressional Power?

Gilbert L. Purcell

Janet Rappaport

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Jurisprudence Commons](#), [Law and Gender Commons](#), and the [Military, War, and Peace Commons](#)

### Recommended Citation

Gilbert L. Purcell and Janet Rappaport *Rostker v. Goldberg: A Step Backward in Equal Protection, or a Justifiable Affirmation of Congressional Power?*, 9 Pepp. L. Rev. Iss. 2 (1982)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol9/iss2/4>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# **ROSTKER v. GOLDBERG: A Step Backward in Equal Protection, or a Justifiable Affirmation of Congressional Power?**

*The Supreme Court in Rostker v. Goldberg upheld a Congressional decision which excluded women from registration for service in the Armed Forces of the United States. Although the case was brought based upon equal protection grounds, the majority took a separation of powers stance and based its decision upon the fact that the Court has traditionally granted deference to the decisions of Congress in the area of military affairs. The minority opinions disagreed with the majority's analysis and claimed that the central issue in Rostker was not military in nature, but was that Congress' plan to register males only, promoted gender based discrimination.*

*In this unique presentation, both sides of the Rostker case are analyzed and argued by two authors. One author argues that even though Rostker does involve elements of gender based discrimination, the decisions of Congress in the area of military affairs warrant deference by the Court. The other argues that the evolution of the equal protection standards, and the precedents arising therefrom, should have dictated the outcome in Rostker. In addition, each author discusses the possible impact Rostker will have on future Court decisions as well as the women's movement generally. The decision as to which analysis is correct is left to the reader.*

## I. INTRODUCTION

At a time when equal rights for women were paramount in the minds of many people in this country, the United States Supreme Court, in *Rostker v. Goldberg*,<sup>1</sup> decided that American women would not be required to register for the draft even though men were compelled to do so.<sup>2</sup> The decision in *Rostker* can mean one

---

1. 101 S. Ct. 2646 (1981). Justices Stewart, Blackmun, Powell, Stevens, and Chief Justice Burger joined Justice Rehnquist's majority opinion. Justices Marshall and White dissented, joined by Justice Brennan.

2. The registration for males was required under the Military Selective Service Act, 500 U.S.C. § 453 app. (1976). Section three of the Act provides in pertinent part, that:

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 residing 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.

*Id.*

In President Jimmy Carter's State of the Union Address on January 23, 1980, he

of two things. Either it is an end of the Court's advance on equal protection in sex discrimination cases, or it is a stumbling block on the road toward an expanded concept of equality for men and women.<sup>3</sup>

The Court was faced with a balancing of power between the legislative and judicial branches of government.<sup>4</sup> The majority opinion tipped the scales decidedly in favor of the legislature, giving great deference to the congressional findings in this case.<sup>5</sup> This deference dictated the outcome of *Rostker*. On the other hand, the dissent reasoned that the decision was not in accord with the Court's equal protection precedents.<sup>6</sup> By diverging from the precedential path, the Court may have turned its back on the changing social and economic roles that women play in today's society, or it may have defined where the changing role of women currently stands.

This note will examine the meaning of the *Rostker* decision and whether the conclusion reached was a correct one. Both sides of the argument will be presented by separate authors. It will be left up to the reader to decide which argument is correct. But regardless of one's stand on the issue of whether women should be

---

called for the draft registration process to begin due to the Soviet invasion of Afghanistan and the lack of military preparedness under an all volunteer force. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 194 (Jan. 23, 1980).

3. See generally *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Reed v. Reed*, 404 U.S. 718 (1971) (rejected idea that males are superior administrators); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (stereotypical notion that men are primary supporters of women as a basis for Air Force benefits rejected); *Kahn v. Shevin*, 416 U.S. 351 (1974) (statute perceived as remedial for some women and harmful to none); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (statute intended to compensate Navy women for specific differentials favoring men); *Craig v. Boren*, 429 U.S. 190 (1976) (statute found unconstitutional which prohibited the sale of beer to males under 21 while females were allowed to make purchases at 18); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (support criteria applied to widowers but not widows held to be gender based discrimination); *Orr v. Orr*, 440 U.S. 268 (1979) (rejected law which required only males to pay alimony); *Califano v. Westcott*, 443 U.S. 76 (1979) (invalidated gender line drawn in the Aid to Families with Dependent Children, Unemployed Fathers program); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (struck down statute requiring widowers, not widows, to show dependence before receiving Workmen's Compensation benefits); see also text accompanying notes 39-97 *infra*.

4. This is not to say that the executive branch is "inferior"; but rather, the executive branch is not dealt with here for the sake of simplicity. It is felt any disadvantage caused by such an omission is outweighed by increased clarity in expression of the concepts involved.

5. The Constitution provides Congress with the power to raise and support an army for defense. U.S. CONST. art. I, § 8, cls. 12 & 14. Thus, the judicial branch pays careful attention to congressional decisions in this area. See, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973).

6. See note 3 *supra*.

required to register for the draft, the Court's decision in this area of equal protection touches upon traditional ways of life embedded in the origin of this nation.<sup>7</sup> As society changes,<sup>8</sup> so do traditions, but whether the Court or whether the Congress should affect or reflect that change remains a matter of law and opinion.

## II. STATEMENT OF THE CASE—FACTUAL PERSPECTIVE

In June of 1971, four draft-aged males, individually and as a class, sought the convention of a three-judge Court<sup>9</sup> to decide the constitutionality of the Military Selective Service Act (MSSA).<sup>10</sup> After a number of challenges were directed at the MSSA<sup>11</sup> and denied, the district court granted a Government cross-motion to dismiss the complaint<sup>12</sup> on the ground that Congress is vested with the power to declare war<sup>13</sup> and, therefore, the power to promulgate, select, and maintain military forces.<sup>14</sup> This is provided for constitutionally as well as statutorily in the MSSA.<sup>15</sup> The district court regarded the plaintiffs' assertions as "a frontal attack on the draft itself. What [was] sought [was] a declaration of unconstitutionality as to the MSSA in toto . . ."<sup>16</sup> The district court concluded there was no jurisdiction<sup>17</sup> and dismissed the suit.<sup>18</sup>

7. Thomas Jefferson wrote that all *men* are created equal. But when questioned about women he said: "Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." M. GRUBERS, *WOMEN IN AMERICAN POLITICS* 4 (1968).

8. The notion of holding onto the status quo has disappeared as a national aspiration according to comparative polls carried out in 1964, 1974, and 1980. Americans seem to be accepting change as a way of life. In 1964, 12% polled generally favored holding onto the status quo, whereas, in a 1980 survey, none of the respondents favored retaining the status quo. Watts, *The Future Can Fend for Itself*, *PSYCHOLOGY TODAY*, Sept. 1981, at 48.

9. *Rowland v. Tarr*, 341 F. Supp. 339, 340 (E.D. Pa. 1972).

10. See note 2 *supra*.

11. 101 S. Ct. at 2650 n.2. Specifically, the plaintiffs contended that the MSSA constituted a taking of property without due process, imposed involuntary servitude, violated rights of free expression and assembly in its application, was unlawfully implemented in the pursuit of an unconstitutional war, and that the MSSA discriminated along sexual lines.

12. 341 F. Supp. at 343.

13. U.S. CONST. art. I, § 8, cl. 11.

14. 341 F. Supp. at 342 (extensive case history).

15. See notes 2 & 13 *supra*.

16. 341 F. Supp. at 342.

17. *Id.* at 343.

18. *Id.*

The Court of Appeals for the Third Circuit dismissed every claim of the plaintiffs except the one asserting an equal protection violation.<sup>19</sup> The case was then remanded to the district court to decide whether the discrimination challenge was substantial enough to justify convening a three-judge court pursuant to 28 U.S.C. § 2282<sup>20</sup> and whether the plaintiffs had standing to sue. The district court ruled affirmatively on both counts.<sup>21</sup>

As a result, a three-judge court was convened to hear the issue of whether the MSSA unlawfully discriminated against draft-age men. In denying a Government motion to dismiss the claim, on July 1, 1974, the court ruled that, although the authority to draft registrants had expired the year before, obligations connected with registration still applied to the plaintiffs.<sup>22</sup> When President Ford proclaimed the end of registration on March 19, 1975,<sup>23</sup> the lawsuit lapsed "into a state of suspended animation."<sup>24</sup> A few years later, when a court clerk suggested the case finally be dismissed, current discussion of renewing registration triggered additional discovery and the case again became active.

On February 11, 1980, President Carter, in response to various world events,<sup>25</sup> recommended that Congress appropriate the funds necessary to reinstate a draft registration program.<sup>26</sup> In addition, he suggested the MSSA be amended to permit the inclusion of women in such a scheme. After much debate, Congress refused to amend the MSSA but did grant the funds necessary to register males.<sup>27</sup>

The day before President Carter signed a proclamation reinstating draft registration for nineteen and twenty year old males, the

---

19. Rowland v. Tarr, 480 F.2d 545, 547 (3d Cir. 1973).

20. The statute authorizing three-man District Courts is no longer effective. "The Act authorizing three-judge courts to hear claims such as this was repealed in 1976, Pub. L. 94-381, §§ 1 and 2, 90 Stat. 1149 (Aug. 12, 1976), but remains applicable to suits filed before repeal, *id.*, § 7, 90 Stat. 1120." 101 S. Ct. at 2650 n.2.

21. Rowland v. Tarr, 378 F. Supp. 766 (E.D. Pa. 1974).

22. *Id.* at 768.

23. Presidential Proclamation No. 4360, 11 WEEKLY COMP. OF PRES. DOC. 318, (Apr. 7, 1975), reprinted in 50 U.S.C. § 453 app. at 1994 (1976).

24. Roberts, *Gender-based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 Wayne L. Rev. 35, 38 (1980).

25. Most notable was the crisis created in Southwestern Asia when the Soviet Union invaded Afghanistan.

26. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 198 (Jan. 23, 1980); see Note, *Women and the Draft: The Constitutionality Of All-Male Registration*, 94 HARV. L. REV. 406 (1980). It was reasoned by the Administration that such a policy change would be viewed as a sign of America's strength and its willingness to defend America's worldwide interests.

27. H.R.J. Res. 521, Pub. L. No. 96-282, 94 Stat. 552. See S. REP. NO. 96-789, 96th Cong., 2d Sess. 1 nn.1 & 2 (1980).

district court proceeded with the litigation. The plaintiffs argued that:

[T]heir rights to equal protection of the law, as that concept is included in the due process clause of the Fifth Amendment, are violated in that males only are subject to registration for the draft and therefore there is an increased probability of the male plaintiffs actually being inducted because the pool of draft eligibles is decreased by the exclusion of females.<sup>28</sup>

In other words, the plaintiffs alleged that they were harmed by this "gender-classification"; a classification that cannot be justified under applicable standards of constitutional review.<sup>29</sup>

After deciding that the case was ripe and that plaintiffs had standing to sue,<sup>30</sup> the district court proceeded to apply the "important governmental interest" test of constitutionality. The court framed the issue in terms of whether or not excluding women from the registration scheme was substantially related to an important governmental interest.<sup>31</sup> The district court did not agree that the justifications offered by the Government for an exclusively male draft registration were substantially related to the achievement of any important governmental interests.<sup>32</sup> Accordingly, the court found the sex based classification to be unconstitutional.

Following this announcement, the government sought out Justice Brennan, the Circuit Justice for the Third Circuit. The following Saturday, from his home on Nantucket Island, Justice Brennan granted a stay of the district court order.<sup>33</sup> The next Monday, registration of draft-age males went forward as scheduled, pending appeal to the Supreme Court.<sup>34</sup>

28. *Goldberg v. Rostker*, 509 F. Supp. 586, 588 (E.D. Pa. 1980).

29. *Id.* The courts, however, have consistently rejected this contention. *See, e.g., United States v. Cook*, 311 F. Supp. 618 (W.D. Pa. 1970); *United States v. Clinton*, 310 F. Supp. 333 (E.D. La. 1970); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968).

30. 509 F. Supp. at 588-89.

31. *Id.* at 605. *See Craig v. Boren*, 429 U.S. 190 (1976), which discusses an "important governmental interest" test formulated to weigh the purpose of legislation against the means employed to carry it out. *See notes 71-76 supra* and accompanying text.

32. 509 F. Supp. at 605.

33. Ironically, though he had earlier stayed the ruling of the lower court, Justice Brennan concurred with Justices White and Marshall in dissenting from the Court's reversal of the lower court ruling. *Rostker v. Goldberg*, 101 S. Ct. 2646, 2661 (1981).

34. *Id.* *See N.Y. Times*, July 22, 1980, § A, at 3, col. 2; *N.Y. Times*, July 19, 1980, § A, at 1, col. 6. Due to the current widespread failure to register, President Reagan is re-evaluating whether it should be continued, although the Selective Serv-

### III. EQUAL PROTECTION AND GENDER BASED DISCRIMINATION: AN EVOLUTION

#### A. *What the Warren Court Left Behind*

The Warren Court left substantial precedent clarifying and defining the so-called "two-tiered"<sup>35</sup> approach to equal protection issues. Put simply, the Warren Court initially adopted a permissive, or "rational basis," test and later developed a "strict scrutiny" test in response to the need for greater coherence between the means and the ends of legislation.<sup>36</sup> The "rational basis" test dictates that a legislative classification must be *rationaly* related to a *legitimate* governmental objective in order to survive judicial scrutiny.<sup>37</sup> The "strict scrutiny" test is less permissive in its view of the relationship between legislative means and ends. It requires that classifications be *necessary* for the accomplishment of *compelling* governmental objectives. Classifications which have been held to signal the application of the "strict scrutiny" test are said to be "suspect"<sup>38</sup> or are described as those which infringe on "fundamental rights."<sup>39</sup> Thus, the Warren Court, while paving the path toward racial justice, expanded the shelter of the equal protection umbrella<sup>40</sup> so that it encompassed a more inclusive standard of equality.<sup>41</sup>

---

ice has stated that this is not evidence of rebellion, just procrastination. L.A. Times, Nov. 5, 1981, at 1, col. 5.

35. See generally Roberts, *supra* note 24.

36. The Equal Protection Clause did not become a viable tool for striking down legislation until the advent of the "strict scrutiny" test in the 1960's. This was due to the fact that the "rational basis" test offered little or no protection. *McGowan v. Maryland*, 366 U.S. 420 (1961); Gunther, *The Supreme Court 1971 Term, In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

37. See, e.g., *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *United States v. Clinton*, 310 F. Supp. 333 (E.D. La. 1970); *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968).

38. Classifications deemed suspect include those which discriminate according to race, *Loving v. Virginia*, 388 U.S. 1 (1967), and national origin *Korematsu v. United States*, 323 U.S. 214 (1944).

39. Rights defined as fundamental include the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the right to interstate travel, *Memorial Hosp. v. Maripocopa*, 415 U.S. 250 (1974).

40. The Warren Court had greatly expanded the area of equal protection, but had not really dealt with gender based discrimination. Ginsburg, *Sex, Equality and the Constitution*, 52 TUL. L. REV. 451, 457 (1978).

41. The Warren Court did not advance equal protection in the area of gender based discrimination, but it did set the stage for the Burger Court to take the historical step of invalidating a law which discriminated among people solely on the basis of sex. See *Reed v. Reed*, 404 U.S. 71 (1971); Johnston, *Sex Discrimination and the Supreme Court 1971-1974*, 49 N.Y.U. L. REV. 617 (1974). Accordingly, this article focuses only on those gender discrimination cases of the Burger Court leading up to *Rostker*.

*B. Searching for the "Middle Tier"*<sup>42</sup>

The Burger Court, characterized as conservative,<sup>43</sup> restrained<sup>44</sup> and noninterventionist,<sup>45</sup> followed some trends of the Warren Court but was slow to acknowledge the Warren Court's progress in the equal protection area.<sup>46</sup>

The first sex discrimination case the Burger Court heard was *Reed v. Reed*.<sup>47</sup> *Reed* involved a state statute which gave mandatory preference to appointing males as executors in the administration of estates. The Court,<sup>48</sup> in a unanimous opinion, held that, although lowering probate costs and avoiding familial controversies were legitimate state objectives,<sup>49</sup> these objectives were not sufficient to support the arbitrary distinction between females and males, contrary to the Equal Protection Clause. The Court did not apply either the "rational basis" or "strict scrutiny" tests.<sup>50</sup> In fact, the Court did not articulate exactly what test it was applying. The Court seemed to find the "two-tiered" approach insufficient for sex based classifications and was beginning to search for a middle ground level of review with regard to gender classifications.

In *Frontiero v. Richardson*,<sup>51</sup> a female Air Force officer claimed her husband as a dependent in order to receive increased benefits. Her claim was denied. Wives of military men were automatically accorded dependent status under the statute, but husbands of military women had to meet specific criteria. The Court, in an eight to one decision, ruled the statute to be in violation of the Equal Protection Clause. Justice Brennan, writing the plurality opinion,<sup>52</sup> declared that sex was a "suspect" classification, com-

---

42. See Roberts, *supra* note 24, at 45.

43. See Forum, *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 648 (1975).

44. Ginsburg, *supra* note 40 at 457.

45. *Id.* But see Forum, *supra* note 43 at 657. For a comprehensive discussion of the Burger Court, see Gunther, *supra* note 36.

46. *Id.* Roberts, *supra* note 24, at 50.

47. 404 U.S. 71 (1971).

48. At the time of the *Reed* decision, the Court had seven members. Justices Rehnquist and Powell joined the Court in 1972. See 404 U.S. at iv.

49. 404 U.S. at 76.

50. *Id.*

51. 411 U.S. 677 (1973).

52. Justices Douglas, White, and Marshall joined in the majority opinion written by Justice Brennan declaring that sex was a suspect classification and therefore subject to the "strict scrutiny" test. *Id.* at 682. Justices Stewart, Powell,



paring it to race and national origin. Race and national origin, Justice Brennan wrote, are characteristics over which one has no control and "which frequently bear no relation to ability."<sup>53</sup> Consequently, the government's justification of administrative convenience<sup>54</sup> could not meet the compelling governmental interest requirements of the "strict scrutiny" test.

Although five justices<sup>55</sup> refused to declare sex a "suspect" classification in *Frontiero*, the Court again seemed to be applying a stricter standard of review than the "rational basis" test. Perhaps a sign of the Court's growing involvement in the issue of gender based discrimination was its choice to redefine the legislation to provide equal benefits to families of military women, rather than totally invalidating it.

In 1974, *Kahn v. Shevin*<sup>56</sup> added to the confusion over what standards the Court was using to decide sex discrimination issues. In *Kahn*, a widower attacked a Florida statute giving tax exemptions to widows but not to widowers. The Court upheld the law because financial difficulties are greater for widows than for widowers and the state's purpose was to compensate for previous economic discrimination against women. The exemption, the Court noted, was remedial and, in any event, it helped some women while harming none.<sup>57</sup>

Three cases followed in the wake of *Kahn*: *Schlesinger v. Ballard*,<sup>58</sup> *Stanton v. Stanton*,<sup>59</sup> and *Weinberger v. Wisenfeld*.<sup>60</sup> In *Schlesinger*, the Court held it was constitutional to require male naval officers to conform to the "up or out" regulation (out if

---

Blackmun, and Chief Justice Burger concurred but found it inappropriate to decide whether sex was suspect at this time. Justice Rehnquist dissented.

53. *Id.* at 686.

54. *Id.* at 688. Previously in *Reed*, the court had stated that administrative convenience would not be justification for discrimination based on sex. See text accompanying notes 47-50 *supra*. In *Frontiero*, the Air Force claimed that men were generally not dependent upon their wives for support. Therefore, instead of requiring proof of all spousal dependency, the Air Force automatically granted increased benefits to husbands claiming on behalf of their dependent wives. Alternatively, a wife claiming a husband as dependent had to prove his dependency. This was done in an effort to decrease the amount of administrative work involved in issuing benefits.

55. See note 52 *supra*.

56. 416 U.S. 351 (1974).

57. Justices Brennan and Marshall would have upheld the legislation had it prescribed a narrower "need" test. *Id.* at 357 (Brennan, J., dissenting). Only Justice White claimed the gender based tax exemption to be unconstitutional. *Id.* at 360 (White, J., dissenting). The opinion seemed to ignore the issue of whether the legislation was paternalistic and stigmatized women, thus preventing any change from the status quo.

58. 419 U.S. 498 (1975).

59. 421 U.S. 7 (1975).

60. 420 U.S. 636 (1975).

passed over twice for promotion) while giving female naval officers a period of thirteen years before discharge for lack of promotion. On the average, this practice allowed women to stay in the Navy four years longer than men.<sup>61</sup> Justification for this difference rested on the fact that promotion possibilities were smaller for women due to their exclusion from service in combat positions. Because of the less frequent opportunity for promotion, the Court held that the classification was permissible in that women and men were not similarly situated.<sup>62</sup>

A Utah statute allowing a father to end support payments to a daughter at eighteen and a son at twenty-one was challenged in *Stanton*. The Court found that the statute imposed "criteria wholly unrelated to the objective of the statute."<sup>63</sup> Thus, the Court once again skirted the issue of a "middle tier," saying that it "perceived nothing *rational* in the distinction drawn by the Utah statute."<sup>64</sup>

In *Weinberger*, Justice Brennan writing for the majority, examined the purpose and effect of a social security rule allowing greater benefits for women.<sup>65</sup> The Court found the statute denigrated the status of women and perpetuated the stereotype that men are the primary wage earners. In overturning this statute, the Court framed its ruling as upholding the rights of women.<sup>66</sup>

---

61. Repeating the argument that sex classifications should be suspect, Justice Brennan observed that the statute simply based one gender based discrimination on another, that of prohibiting women from combat positions. 419 U.S. at 511.

62. 419 U.S. at 508. After this, some commentators felt that women were being offered the best of both worlds. The Supreme Court was ready to strike down classifications that discriminated against women, yet the Court preferred statutes that favored women. However, others believed these were the sort of stereotypical products of legislation that women must fight against because they portrayed women as dependent, weak, and as needing husbands in guardian roles rather than as peers. Ginsburg, *supra* note 40 at 465-66.

63. 421 U.S. at 14.

64. *Id.* (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)). At first, the Court seems to apply a stricter standard by looking behind the legislative reasons for differentiating between males and females. However, the Court's conclusion was that there was nothing "rational" in the classification. This demonstrates that the Justices still had aspects of the "rational basis" test in mind. *See, e.g.*, note 37 *supra*.

65. Although many laws purport to benefit women the effect often can be that of reinforcing stereotypical roles from which women want to break free. *See generally* Note, *supra* note 26; Steele, *Males Only Draft Registration: An Equal Protection Analysis*, 11 CUM. L. REV. 295 (1980); Committee on Federal Legislation, *If the Draft is Resumed: Issues for a New Selective Service Law*, 36 RECORD OF N.Y.C.B.A. 98 (1981) [hereinafter cited as Committee on Federal Legislation].

66. *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 (1975).

*Weinberger* seemed to follow the *Frontiero* approach instead of the *Kahn* approach. The Court in *Weinberger* retreated from *Kahn*<sup>67</sup> by applying a more stringent standard to determine legislative purpose. It appeared that when legislation discriminated against women,<sup>68</sup> such as in *Reed*, *Frontiero*, and *Stanton*, or reinforced sexual stereotypes, such as in *Weinberger*, the Court reviewed it with a demanding skeptical eye. However, if the legislation favored women,<sup>69</sup> such as in *Kahn* and *Schlesinger*, the Court seemed more permissive in its examination. Although no actual test was articulated from the time of *Reed* to *Weinberger*, the Court clearly appeared to be taking a harder look at sex based legislation.<sup>70</sup>

### C. Finding the "Middle Tier": *Craig v. Boren*

Appropriately, Justice Brennan wrote the decision in *Craig v. Boren*,<sup>71</sup> which finally articulated the new "middle tier."<sup>72</sup> *Craig* involved an Oklahoma statute which allowed females to purchase beer at eighteen, while males had to wait until they were twenty-one. The Court's new test stated that classification by gender must *substantially* relate to an *important*<sup>73</sup> legislative objective.<sup>74</sup>

---

67. The Court's pertinent language is worth noting:

The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme. Here it is apparent both from the statutory scheme itself and from the legislative history. . . that Congress' purpose in providing benefits to young widows with children is not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, . . . , [the statute] linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work, and to devote themselves to the care of their children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work.

420 U.S. at 648.

68. *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

69. *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). See also *Stanley v. Illinois*, 405 U.S. 645 (1972), where a law denying custody of illegitimate children to surviving male parents, yet which granted custody to surviving females, was held unconstitutional.

70. Two concerns limited the celebration of the equal treatment proponents. First, Justices Rehnquist, Marshall, and Brennan were the only justices who voted with absolute consistency from 1971-1975, with Justice Rehnquist voting always to *sustain* discriminatory laws. Second, there was an absence of unanimity on the Court since *Reed*. Johnston, *supra* note 41 at 688-89.

71. 429 U.S. 190 (1976). See also note 70 *supra*.

72. Some commentators have even called it an "upper middle tier." Ginsburg, *supra* note 40 at 468.

73. 429 U.S. at 197. Cf. *Vance v. Bradley*, 440 U.S. 93, 111 (1979), which involved a challenge to a legislative judgment under the "rational basis" test.

74. Thus, "important" is greater than "legitimate" and less than "compelling,"

An appropriate standard for judging statistical evidence was not explained in detail, yet the Court did present a lengthy discussion of the evidence, all of which was outside the legislative history of this statute.<sup>75</sup> It is also significant that the Court adopted the "middle tier" approach in a case involving gender based discrimination against males because, previously, the court had been primarily concerned with cases involving legislation which discriminated against women.

Thus, in 1976, the process which began with *Reed* culminated in the definition of a new test to be used when reviewing legislation challenged on the basis of gender discrimination. The "important governmental interest" test was less stringent than Justice Brennan's declaration in *Frontiero* that sex was a "suspect" classification. Yet, it was much more than the "rational basis" test which had formerly been applied to gender discrimination situations.<sup>76</sup>

#### D. After Craig v. Boren

Two cases, shortly after *Craig*, demonstrated that the Court was not as harmonious as it had appeared to be on the issue of gender based discrimination. *Califano v. Goldfarb*<sup>77</sup> invalidated a social security provision which automatically allowed a widow survivors' benefits and forced a widower to show that his wife contributed at least one-half of the couple's support in order to receive such benefits.<sup>78</sup> Although the legislation was perceived as favoring women, the Court viewed it as economic discrimination against men and societal discrimination against women.<sup>79</sup>

After *Goldfarb* came *Califano v. Webster*,<sup>80</sup> which held constitu-

---

from the "rational basis" and "strict scrutiny" tests, respectively. Again, "substantial" is more stringent than "rational," but is less than "necessary."

75. 429 U.S. at 200-04, 201 n.10.

76. Previous cases applied the "rational basis" test to gender-discrimination issues. See, e.g., *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); *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. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968).

77. 430 U.S. 199 (1977).

78. *Id.* at 208-09.

79. There are over 800 provisions in the United States Code which discriminate on the basis of sex. The double-edged sword of discrimination is particularly apparent in the Social Security Act. See Social Security Act, 42 U.S.C. § 402(b), (c), (e), (f), (g) (1976). See also *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19, 22 (1978) [hereinafter cited as *Equal Rights*].

80. 430 U.S. 313 (1977).

tional a remedial social security provision giving higher benefits to female wage earners. The Court upheld the legislation because it was based on other than "archaic and overbroad generalizations"<sup>81</sup> about women's societal roles. Although at first glance the Court's decisions seem confused in this area, one thing is clear: the purpose of the legislation was being examined in a coherent fashion to see exactly what the intent of the legislation was.

An example of acceptance by the Court of a "more generalized justification for striking down gender based distinctions"<sup>82</sup> is the case *Orr v. Orr*.<sup>83</sup> An Alabama statute allowing alimony for wives only was found to discriminate against both men and women. Justice Brennan, in the majority opinion, stated that "legislative classifications which distribute benefits . . . on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."<sup>84</sup> With this decision the Court indicated that it is incumbent upon the judiciary to look to the legislative purpose of the laws and to be aware that legislation which embodies traditional stereotypes and strict gender based roles is limiting the potential of men and women.

Immediately following *Orr* came *Califano v. Westcott*,<sup>85</sup> in 1979, and *Wengler v. Druggists Mutual Insurance Co.*,<sup>86</sup> in 1980. *Westcott* invalidated the gender based line drawn in the Aid to Families with Dependent Children, Unemployed Father's program. Prior to the Court's decision, the law allowed benefits to families of unemployed fathers but did not allow benefits for the families of unemployed mothers.<sup>87</sup> Again, the Court recognized in such a law the presumed inferior position of the female wage earner.<sup>88</sup> It is significant that the Court involved itself in a non-contributory welfare statute<sup>89</sup> and struck it down due to gender based discrimination.<sup>90</sup>

*Wengler* involved another statute which presumed that all women are dependent upon their husbands for income. A Missouri

---

81. *Id.* at 317 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

82. Roberts, *supra* note 24, at 50.

83. 440 U.S. 268 (1979).

84. *Id.* at 283.

85. 443 U.S. 76 (1979).

86. 446 U.S. 142 (1980).

87. See note 79 *supra*.

88. 443 U.S. at 88.

89. Previously, the court had deferred decision in the area of non-contributory welfare because it was considered well within the area of divorce, which the *Stanton* case dealt with. See Note, *supra* note 26, at 409-10 n.32. See also *Stanton v. Stanton*, 421 U.S. 7 (1975).

90. Cf. *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding A.F.D.C. restrictions); *Dandridge v. Williams*, 397 U.S. 471 (1970) (same).

statute automatically gave widows survivor's benefits but required widowers to prove dependence on their wives' earnings.<sup>91</sup> The Court decided eight to one<sup>92</sup> that the law was unconstitutional. Based on precedent,<sup>93</sup> the Court applied the "important governmental interest" test, concluding that many women are not dependent on their husband's income,<sup>94</sup> making a case-by-case determination more appropriate.<sup>95</sup>

Thus, the chain of cases since *Reed* shows a willingness on the Court's part to strike down gender based discrimination laws. In addition, any justification of the purpose of legislation needs to be supported by factual evidence conclusively showing a substantial relationship between the gender based classification and the governmental objective.<sup>96</sup> The application of the "middle tier" test seemed relatively certain in the cases of gender based discrimination before the Court. However, that is not to say all gender discrimination statutes were automatically struck down under the new test. Remedial purposes<sup>97</sup> and deferential interests such as tax<sup>98</sup> were areas in which the legislature was able to differentiate between men and women to achieve its objectives. It is with this background that the Court encountered *Rostker v. Goldberg*.

#### IV. ARGUMENT IN FAVOR OF THE *ROSTKER* DECISION

On June 25, 1981, the Supreme Court reversed the district court's holding in *Rostker v. Goldberg*.<sup>99</sup> Properly construed, the Court's holding stated that the MSSA's registration provision did not transgress fifth amendment protections<sup>100</sup> and Congress, in calling for the registration of men and not women, acted well within its constitutional power to raise and regulate military

---

91. The Court found the law entailed "discrimination against women wage-earners and surviving male spouses." 446 U.S. at 151.

92. *Id.* at 153 (Rehnquist, J., dissenting).

93. *Id.* at 150.

94. Husbands were the sole wage-earner in only 24% of United States married couples in 1979. This figure is down from 30% in 1974. Cory, *Tin Pan Alley's Housewife Fantasies*, PSYCHOLOGY TODAY, Sept. 1981, at 25.

95. 446 U.S. at 152.

96. The Court said in *Wengler* that "two other requirements must be met—proof of actual legislative intent, and factual proof that the distinction or presumption underlying the law is valid." *Id.*

97. *Califano v. Webster*, 430 U.S. 313 (1977).

98. *Kahn v. Shevin*, 416 U.S. 351 (1974).

99. See note 1 *supra*.

100. *Id.* at 2658.

forces.<sup>101</sup> Absent any true constitutional violation by the MSSA with which to deal, the conclusionary notions advanced by the district court proved shallow. Justice Rehnquist commented on the disregard shown the wishes of Congress by the district court in an area where "Congress is permitted to legislate both with [significant] breadth and [even] greater flexibility."<sup>102</sup> He also pointed to an evident failure by the district court to "recognize that the Constitution itself requires . . . deference to congressional choice"<sup>103</sup> in military matters. "[J]udicial deference to [the] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>104</sup> The district court, in the majority's opinion, had failed to properly assess the effect of its holding on such a policy and thereby exceeded its authority.<sup>105</sup>

Most certainly the majority accommodated an act of Congress. The controversy is focused in part on whether this practice side-stepped a prevailing responsibility to decide constitutional questions. Justice Marshall, in dissent, voiced the opinion that by deferring to the congressional decision, the majority evaded a responsibility to "safeguar[d] [the] essential libert[y]"<sup>106</sup> of equal protection under the Constitution's fifth amendment. On the other hand, Justice Rehnquist, in speaking for the majority, expressed the sentiment that the Constitution dictated the Court's choice of action.

---

101. *Id.* at 2660.

102. *Id.* at 2652 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

103. *Id.* at 2653. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973).

104. 101 S. Ct. at 2654.

105. By not deferring to the judgment of Congress, the district court broke with a consistent and recurring feeling expressed in other district court decisions. *Id.*, at 2653 n.6. See also *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1125. "Ordinarily, the legislative judgment, which ideally expresses the harmonized outlooks of the various groups in the community, is entitled to considerable respect in its evaluation of proper objectives for state action and rational means for attaining them." *Id.* Justice Marshall's interpretation of the district court ruling was quite different from that of Justice Rehnquist. He felt that the Constitution, the supreme law of the land under which all legislation must abide, placed the Court in a position to override the decision to exclude women in the draft registration plan offered by Congress. He accused the Court of "push[ing] back the limits of the Constitution," 101 S. Ct. at 2676 (quoting *Trop v. Dulles*, 356 U.S. 86, 104 (1958)), in order to accommodate the congressional decision. With emphasis on the guarantee of equal protection under the Constitution, Justice Marshall challenged the validity of a gender distinction in a registration scheme and concluded that the exclusion of females exceeded limits prescribed by the Constitution. In consequence, he decided affirmation of the district court holding was appropriate.

106. *Id.* at 2664 (quoting *United States v. Robel*, 389 U.S. 258, 263-64 (1967)). See *Home Bldg. and Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934).

### A. *Rationale of the Majority*

The backbone of Justice Rehnquist's majority opinion<sup>107</sup> was that when ruling as to the constitutionality of a congressional act, "the Court accords 'great weight to the decisions of Congress.'"<sup>108</sup> He quoted Justice Frankfurter<sup>109</sup> when making the point that in judging a congressional decision as to its constitutional "correctness," the Court needs to remember that such a decision was made in a coequal government branch by members sworn to uphold the same Constitution as is the judge. When the constitutional issues behind legislation are specifically and thoroughly addressed in Congress,<sup>110</sup> "customary deference"<sup>111</sup> is often appropriate. The Court is hard pressed to find otherwise if the legislation is clear.

The deference due Congress in *Rostker* was even more pronounced. "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."<sup>112</sup> Understanding the focus of Justice Rehnquist's approach as the importance of judicial deference due Congress within the separation of powers is critical in analyzing the *Rostker* decision.

#### 1. The Deference Issue

Conceptually, "deference" is held to impart a yielding in opinion, judgment, and wishes born of the respect due another.<sup>113</sup> When comparing congressional and judicial separation of power, however, this assessment is indelicate, for it seems to indicate an abdication not found in this governmental relationship.<sup>114</sup> Indeed, as was the case in *Rostker*, a court is able to defer without necessarily yielding any wishes or opinion it might have.

The founders of this nation based "the structure of our central

107. 101 S. Ct. at 2648.

108. *Id.* at 2651 (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 102).

109. *Id.* See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion).

110. See generally Wilkinson, *The Supreme Court, The Equal Protection Clause, And The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 948 (1975). Sometimes this is not required since congressional acts are to be presumed to be constitutional.

111. 101 S. Ct. at 2651.

112. *Id.*

113. WEBSTER'S NEW WORLD DICTIONARY 370 (2d ed. 1974).

114. Justice Rehnquist made this quite clear. 101 S. Ct. at 2654.



government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity."<sup>115</sup> Fundamentally, this separation is somewhat ambiguous in its allotment of command. To the extent the separation is ambiguous, it is flexible in order that it might tolerate the "inevitable friction"<sup>116</sup> drafted *into* the Constitution under the checks and balances framework. Justice Holmes stated that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white."<sup>117</sup> It is in this ambiguity of separation of powers that deference becomes important.

On their face, the articles of the Constitution seem clear in their allocation of governmental power. For instance, the explicit power granted Congress under article I, section 8<sup>118</sup> to raise and support armies and implement whatever laws necessary and proper to that end is straightforward. So is the delegation to the Supreme Court of the power to oversee all cases arising under the Constitution as extended in article III, section 2.<sup>119</sup> Both articles seem to strike distinct and unambiguous lines of separation between Congress and the Supreme Court. Against a background like *Rostker*, however, it becomes clear that these articles are not disjointed, but rather substantially overlap and at times call for a deference policy.

For the most part, whenever a citizen challenges the constitutionality of a decree levied and empowered under the "congressional-war-power article,"<sup>120</sup> that citizen needs to eventually<sup>121</sup> implement the "judicial-power article."<sup>122</sup> A challenge of the former impacts the latter. If the judiciary upholds the congressional decree, then there is no separation of powers conflict. However, if the judiciary decides in favor of the citizen-challenger, any remedy offered in response necessarily imposes on the congressional command.<sup>123</sup> To the extent that the judicial command is repre-

---

115. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952), *See also* Frund, *Forward: The Year of the Steel Case*, 66 HARV. L. REV. 89 (1952).

116. *Myers v. United States*, 272 U.S. 52, 240, 293 (1926).

117. 343 U.S. at 597 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1929)).

118. U.S. CONST. art. I, § 8, cl. 12.

119. U.S. CONST. art. III, § 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." *Id.*

120. *See* note 118 *supra*.

121. In order to make the comparison clear, channels other than the judiciary route open to a citizen making such a challenge are purposely excluded.

122. *See* note 119 *supra*.

123. To the extent that the power to provide for the common defense is all-encompassing, a judicial reprimand of a decree as being unconstitutional is indeed an "imposition" upon congressional command when the decree was enacted under such a power. *See* U.S. CONST. art. I, § 8, cl. 16.

sentative of the people,<sup>124</sup> there exists a constitutionally created uncertainty as to which branch should properly<sup>125</sup> control:<sup>126</sup> the Congress or the judiciary? Both branches play an equal role in protecting and representing the people. On the one hand, the judiciary plays a role of checking, balancing, and measuring the actions of Congress against the Constitution,<sup>127</sup> being purposely impartial and independent of any direct external influence.<sup>128</sup> On the other hand, Congress, purposely subject to the external influence of the citizens it represents, is carrying out its constitutional power, which is beyond question,<sup>129</sup> to register and conscript sufficient manpower for military service.

124. See generally *Developments in the Law—Equal Protection*, *supra* note 105, at 1097-132. See also W. MURPHY & C. PRITCHETT, *COURTS, JUDGES, AND POLITICS* 403 (3d ed. 1979).

125. In essence, the debate over which portion of government is to "properly" be given the power to determine military power has at its roots the desire to avoid at all costs the "improper" use of such a vast power. Cf. K. LASSON, *YOUR RIGHTS AND THE DRAFT* 51 (1980) In the extreme:

Everyone will now be mobilized, and all boys old enough to carry a spear will be sent to Addis Ababa. Married men will take their wives to carry food and cook. Those without wives will take any women without a husband. Anyone found at home after the receipt of this order will be hanged—Emperor Haile Selassie.

*Id.*

126. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974) (investigated a claim that any judicially compelled disclosure of presidential conversations would interfere with the functioning of executive branch); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587, 593-655 (1952) (congressional ability to reprimand executive seizure); *Meyers v. United States*, 272 U.S. 52, 127 (1926) (the scope of one branch's power is closely related to the potential interference it may have with another branch's authority). Patrick Henry, during the Virginia Convention to ratify the same Constitution we now acknowledge as being partly ambiguous, stated that: "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary." 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 325 (2d ed. 1866).

127. Chief Justice Marshall called this "the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803).

128. See White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1223 (1976). "Once Americans had decided to have a constitution with a tripartite governmental structure, . . . they had necessarily decided to have an independent judiciary . . ." *Id.*

129. *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning case). "The constitutional power of Congress to raise and support armies and make all laws necessary and proper to that end is broad and sweeping." *Id.* at 377. The deference due the Congressional decision to exclude women is clearer when this quote is coupled with the Court's statement that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *National Mut. Insur. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949).

As applied to *Rostker*, this means that if the Court had chosen to overrule the congressional refusal to amend the MSSA so as to include women in a registration scheme, it would have been challenging the extent to which the exclusion of women is representative of the collective will.<sup>130</sup> If the Court was correct in deciding that the times called for such an *inclusion* of females, the checks and balances system would have served its purpose—to see to it that any one branch did not exercise arbitrary power.<sup>131</sup> If incorrect, the Court itself would have been guilty of an arbitrary exercise of its power. Because such a mistake in assessing the contemporary situation on the part of one branch invites no milder an uprising than the same mistake by the other branch, the authority to make the decision should lie with the branch most able to avoid uprisings altogether by employing some superior ability to assess the collective sentiment of the majority of the people.<sup>132</sup>

In the realm of the military, Congress has this superior ability. Justice Rehnquist, quoting *Gilligan v. Morgan*,<sup>133</sup> noted the lack of competence on the part of the judiciary in the area of assessing how the collective majority feels about the running of the military facet of government:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.<sup>134</sup>

No doubt the question of which branch is to command in the event of uncertainty has been addressed before Justice Rehnquist commented on it. Justice Cardozo wrote: “The Constitution overrides a statute, but a statute, if consistent with the Constitution overrides the law of judges. In this sense, judge-made law is sec-

---

130. A good definition of law that expresses how the collective will operates can be found in the concept propounded by the German philosopher Immanuel Kant when he stated that in his view a law conceives “[t]he sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of Freedom.” R. POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 65 (1943) (quoting I. KANT, *PHILOSOPHY OF LAW* (1797)). See also BOSANQUET, *PHILOSOPHICAL THEORY OF THE STATE* 120-23, 138-43, 215-16 (3d ed. 1920).

131. *Meyers v. United States*, 272 U.S. at 293. Mr. Justice Brandeis stated that “[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” *Id.*

132. See H. BALL, *CONSTITUTIONAL POWERS: CASES ON THE SEPARATION OF POWERS AND FEDERALISM* 202 (1980). See generally *Eakin v. Raub*, 12 Serg. & Rawles 330, 343-58 (Pa. 1825) (Gibson, J., dissenting); Murry, *Chief Justice Gibson of the Pennsylvania Supreme Court and Judicial Review*, 32 U. PITT. L. REV. 127 (1970) (providing a more modern assessment).

133. 413 U.S. 1 (1973).

134. *Id.* at 10. See also *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

ondary and subordinate to the law that is made by legislators."<sup>135</sup> Applying this to draft registration laws, so long as the MSSA is "consistent" with the Constitution,<sup>136</sup> it should control judge-made law.<sup>137</sup> In other words, as long as the MSSA is held to be a creation of Congress within its constitutionally granted power and is consistent with the Constitution, which extends to Congress the power to make the rules governing such practice,<sup>138</sup> it should not be judicially altered. Unless the Court can be convinced that the determination by Congress to exclude women from draft registration was an exercise of arbitrary, as opposed to constituent-based, sentiment, it should not intervene. "[L]egislatures are [the] ultimate guardians of the liberties and welfare of the people in quite as great a degree as courts."<sup>139</sup>

However, the license granted Congress to raise and support armies "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."<sup>140</sup> In terms of registration, "although the constitution grants Congress and the President broad authority to raise and maintain armed forces, this authority is not entirely beyond the scope of judicial review."<sup>141</sup> Indeed, deference without *any* judicial review would be tantamount to abdication. Despite Justice Rehnquist's reliance on deference,<sup>142</sup> the discourse and extensive investigation the Court employed in *Rostker* as to the validity of the congressional decision is anything but abdication. Deference after such deliberation is the result, not replacement, of judicial review. With this, no justice in *Rostker* takes issue.<sup>143</sup> The repre-

135. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1921).

136. U.S. CONST. art. I, § 8, cl. 12.

137. This, in fact, is exactly the rationale used by the first judge, in 1971, who addressed the *Rostker* case. See *Rowland v. Tarr*, 341 F. Supp. 339, 342 (1972).

138. U.S. CONST. art. I § 8, cl. 16.

139. B. CARDOZO, *supra* note 135, at 90. *Accord*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1975).

140. Note, *supra* note 26, at 419.

141. T. WALKER, *AMERICAN POLITICS AND THE CONSTITUTION* 191 (1978). Cf. Barret, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L. J. 845 (1980) (the proper role of the court system is to monitor the structural and procedural limitations which the Constitution puts on the legislative process but not to scrutinize the outcomes for their reasonableness); Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?* 54 CORNELL L. REV. 1, 25 (1968) (courts should avoid "choking . . . the political process with the equal protection clause").

142. *Rostker v. Goldberg*, 101 S. Ct. 2646, 2654 (1981).

143. *Id.* at 2649, 2661-62. The dissenting views result from the concern over whether the MSSA is "consistent" with the constitutional guarantees of essential

sentative accuracy of the congressional decision excluding women from draft registration was at issue and ripe for more investigation regarding the collective sentiment<sup>144</sup> it supposedly represented. This was as large a request placed on the Court by the case as was the equal protection challenge.

Herein lies a source of separation of power ambiguity between the judiciary and congressional branches of government. As purveyor of the constitutionality of legislation, the Court looks in part to very much the same source of policy and collective social will as does the congressional group it oversees.<sup>145</sup> Placing the responsibility of assessing the community will in more than one branch so that each might correctly check and balance the other's judgments breeds ambiguity as to which assessment is to control in the event of a disparity in findings. This function, however, is exactly what Justice Brandeis referred to as the designed result of separation of powers, whose purpose is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among [branches],"<sup>146</sup> to breed such friction.

It is in this framework that the deference due Congress in *Rostker* was appropriate. Deferring to Congress did not indicate that the Court was in no position to restrain or reprimand the congressional assessment. To be sure:

The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism,

---

liberties, not from a feeling that the Court is wrong to recognize the deference due congressional findings of military protocol. While it is generally true that "[w]e see in legislation the more direct and accurate expression of the general will," sometimes we do not, and when such recognition occurs, checks and balances render judicial review appropriate. Horack, *The Common Law of Legislation*, in *READING IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 503 (Cohen comp. 1951) (footnote omitted). Cf. I. DILLIARD, *THE SPIRIT OF LIBERTY—PAPERS AND ADDRESSES OF LEARNED HAND* 14, 15 (1960) ("The profession of the law of which [a judge] is a part is charged with the articulation and final incidence of the successive efforts towards justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member").

144. See 101 S. Ct. at 2661. This is Justice White's concern when he points out, in dissent, that "there is an indication that Congress rejected the Defense Department's figures or relied upon an alternative set of figures." *Id.* He is concerned that the collective sentiment has not been adequately assessed.

145. The development of judicial deference to public sentiment focused on three issues. First, is the law in accordance with common custom and usage? Second, does public sentiment favor the particular law? Third, is the law in accord with a firm and established consensus of opinion in the civilized world? In 1910, Mr. Justice Holmes declared that "[t]radition and the habits of the community count for more than logic." *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910). See also *People v. Charles Schweinler Press*, 214 N.Y. 395, 108 N.E. 639, (1915); WALKER, *AMERICAN POLITICS & THE CONSTITUTION* 1910, 190-92 (1978).

146. 272 U.S. at 293 (Brandeis, J., dissenting).

the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.<sup>147</sup>

In deferring to Congress, the Court in *Rostker* yielded very little. The ability of the Court to retain its separate command influence over Congress while allowing the assessment of the branch most competent to determine that military needs prevail dictated the Court's decision to do just that.

## 2. The Gender Based Classification Issue

### a) *Equal Protection*

As just discussed, in order for the MSSA to stand up against judicial review, it must be consistent with the Constitution. That means the gender based classification excluding women from draft registration must not be violative of the delicate equal protection rights of men and women. Equality as defined by the constitutional guarantee of equal protection,<sup>148</sup> despite volumes of interpretation,<sup>149</sup> remains to date "a formless concept."<sup>150</sup> Over time, the handling of equal protection of the laws has become known as the most "bewildering chapter"<sup>151</sup> in the Supreme Court's history.<sup>152</sup>

147. B. CARDOZO, *supra* note 135, at 92-93.

148. Conceptually, equal protection and due process concerns are not mutually exclusive. The fifth amendment of the Constitution of the United States provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Although it contains no Equal Protection Clause, as does the fourteenth amendment, the fifth amendment's Due Process Clause prohibits the federal government from engaging in discrimination that is so unjustifiable it becomes violative of due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

149. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Johnson v. Robison*, 415 U.S. 361 (1974); *USDA v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). *See also* P. POLYVIUO, *THE EQUAL PROTECTION OF THE LAW* 177-298 (1980).

150. Wilkinson, *supra* note 110, at 946.

151. *Id.* at 1017. *See also* Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. (1955) (historical record).

152. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is

Conceptually, equal protection “can hardly be taken to be a guarantee that every law shall apply equally to every person, for almost all legislation involves classifications placing special . . . benefits [on] individuals or groups.”<sup>153</sup> The proper impetus behind an equal protection challenge does not so much call for a thorough investigation of the means employed in relation to the ends achieved—a “standard of review analysis”<sup>154</sup>—as it calls for focusing on a narrower issue included therein: the *achievement* of the classification itself. As Jennings put it, equality before the law “assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike.”<sup>155</sup> In other words, equality before the law requires that the “means” used to apply a law be administered equally among those individuals similarly situated. What cannot be as easily summed up is the narrow issue of how equals are to be classified. The crux of this statement, the classification issue, is where one’s analysis must focus.

#### b) *Classification in General*

It is implied in the term “classification” that there exists some distinguishing element that permits one to separate those entities which fall into the class from those that do not. Whatever the characteristic, there must exist a commonality of some sort by which the classification is defined. Entities not having the characteristic are separated. To the extent that this separation impacts differently, the classification is not “equal” in the broadest sense of the word. In fact, separate cannot be “equal.”<sup>156</sup> Indeed, if the “very idea of classification [is] that of inequality,”<sup>157</sup> and classification is truly an “inescapable part of government,”<sup>158</sup> then “the fact of inequality in no manner determines the matter of constitu-

---

so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

*Slaughter-House Cases*, 83 U.S. (16 Wall). 36 at 81 (1873). See also *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879). Indeed, in expounding on the application of the fourteenth amendment, the *Slaughter-House Cases* predicted that the Equal Protection Clause would do no more than protect the slaves. With time, the error in this observation becomes more and more pronounced.

153. E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW* 583 (6th ed. 1981). See also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?* 1976 B.Y.U. L. REV. 89, 90.

154. See BARRETT & W. COHEN, *supra* note 153, at 589-91.

155. N. JENNINGS, *THE LAW AND THE CONSTITUTION* 50 (5th ed. 1959).

156. *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) (separate can be equal)).

157. P. POLYVIUO, *THE EQUAL PROTECTION OF THE LAWS* 33 (1980).

158. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 59 (1976).

tionality."<sup>159</sup> Those proposing equal treatment need not focus on the inequities of inequality itself, but rather should scrutinize the reasoning behind the "distinguishing elements" that produce the inequality. Any other focus follows a dead-end road.

Inasmuch as they are not arbitrary,<sup>160</sup> these "distinguishing elements" are what rightfully allow society to organize, monitor, and, more importantly for our purposes, collectively defend itself. In terms of draft registration then, inherent inequalities themselves are of no moment in a constitutional challenge; rather, the focus must be on the capriciousness of the registration of men and not women. Justice Marshall emphatically points this out in beginning his dissenting opinion. To the degree that Justice Rehnquist expounds otherwise in the majority opinion, a quandary exists as to whether such was in fact necessary. "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality"<sup>161</sup> only for equality's sake.

*c) Male Only Registration—Is It Arbitrary?*

The Court expressed per curiam that "[t]o withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"<sup>162</sup> In discussing this heightened scrutiny test,<sup>163</sup> both Justice Rehnquist and Justice Marshall agreed that "the Government's interest in raising and supporting armies is an 'important governmental interest,' " but differed as to whether the "means" of discriminating between men and women in a draft registration scheme "serves the statutory end."<sup>164</sup> As previously mentioned, this translates into a difference over

159. P. POLYVIUO, *supra* note 157, at 33.

160. "Arbitrary," as used here, has a great deal of relation to the true sentiment of the collective will. That which is arbitrary confounds such a will. *But see* Braden, *The Search For Objectivity In Constitutional Law*, 57 YALE L. J. 571, 584-85 (1948).

161. 101 S. Ct. at 2659.

162. *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (per curiam) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

163. *Craig v. Boren*, 429 U.S. at 197. *Cf. Vance v. Bradley*, 440 U.S. 93, 111 (1979) (depicts the "rational basis" lower scrutiny test).

164. 101 S. Ct. at 2663.



whether the "sexual" separation here is arbitrary.<sup>165</sup> Justice Marshall feels it is. Justice Rehnquist feels it is not.

Insofar as arbitrary might mean accidental, Justice Rehnquist clearly shows that the decision to register men and not women was no accident. "Congress and its committees carefully considered and debated"<sup>166</sup> the gender issue. They "did not act 'unthinkingly' or 'reflexively,'" but rather took notice of the "considerable national attention and . . . wide ranging public debate"<sup>167</sup> given the issue. "The issue was considered at great length, and Congress clearly expressed its purpose and intent"<sup>168</sup> by emphatically opting for male-only draft registration. If it is true that "[t]he less clear the intent of the legislature, the greater freedom the court has to use its own judgment,"<sup>169</sup> the expressly clear intent of the legislature in the registration policy it proposed would severely limit the propriety of the Court to substitute its own judgment for that of the legislature.<sup>170</sup>

What is needed is a clear description of why Congress excluded females in the registration plan it proposed.<sup>171</sup> Certainly, as Justice Marshall points out, it was not because there is inherent benefit in "preventing women from serving in the military. . . . Indeed, the successful experience of women serving in all branches of the Armed Services would belie any such claim."<sup>172</sup> Neither can the pursuit of the "administrative convenience"<sup>173</sup> a gender based classification might yield give justification to such exclusion.<sup>174</sup> Additionally, the exclusion of females was not done

---

165. If found to be "arbitrary", then equal protection has been denied. *See generally* 101 S. Ct. at 2655.

166. *Id.* at 2654. "As a member of the Armed Services Committee who has studied [the registration of women] issue with great care, I can tell my colleagues that there is simply no military reason to draft women and therefore no reason to register them for a possible draft." 126 CONG. REC. H2695 (daily ed. Apr. 22, 1980) (statement of Mr. Hillis).

167. 101 S. Ct. at 2655.

168. *Id.* at 2656.

169. M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 477 (3d ed. 1977).

170. One author suggests this "implementation" is exactly what was the case in *Goldberg v. Rostker*. *See* Roberts, *supra* note 24, at 83.

171. For one author's assessment, *see* Note, *supra* note 26, at 411.

The legislative history of the current registration law reveals that, in addition to the overall objective of maintaining an effective defense, Congress intended to achieve five specific objectives by excluding women: preventing females from participating in combat, avoiding the unnecessary registration of women, enhancing military flexibility, precluding the division of the military into two separate groups, and assuring that the draft is administratively convenient.

*Id.*

172. 101 S. Ct. at 2664.

173. *See* *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973).

174. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

to keep women out of combat because that policy is protected through other statutes that remain in force.<sup>175</sup>

With this in mind, Justice Rehnquist reasoned that if registration serves no purpose<sup>176</sup> beyond providing a pool for a draft whose only purpose is to resupply a shortage in combat arms, for which women are not eligible, why then register females? In other words, Justice Rehnquist was arguing that in this case men and women are not similarly situated, and, therefore, the classification made by Congress was not arbitrary. In fact, he cited the existence of combat restrictions as "the basis for Congress' decision to exempt women from registration."<sup>177</sup> Granting the logic in this reasoning, Justice Marshall stated it still was fundamentally flawed. Marshall asserted that the government *itself* must *demonstrate* how registering women would *impede* efforts to prepare for war. Only then, he contends, will the rationale supporting the exclusion of women surpass constitutional inquiry. On close inspection, however, Justice Marshall's demand on the government<sup>178</sup> directly parallels an "equality for equality's sake" argument, which conflicts with what is *required* by the Constitution—only that similarly situated persons be treated similarly.<sup>179</sup>

For a classification to meet the "equality" standard of the Con-

175. 101 S. Ct. at 2666.

176. See 126 CONG. REC. H272048-47 (daily ed. Apr. 22, 1980). Mr. Conte said the purpose of registration as now proposed was "to get large numbers of men into the military sooner." *Id.* at 2706. See also Note, *supra* note 26, at 415; note 125 *supra*, at 21; Falbo v. United States, 320 U.S. 549, 552 (1944); United States v. Nugent, 346 U.S. 1, 9 (1953).

177. 101 S. Ct. at 2658.

178. There was a conflict as to who has the burden of proof. In *Rostker*, Justice Marshall said the party "defending" the classification has the burden of proof. See 101 S. Ct. at 2663. *Contra*, United States R.R. Retirement Bd. v. Fritz, 101 S. Ct. 453, 464 (1980) (Brennan, J. dissenting: "the burden rests on those *challenging* a legislative classification . . ." Marshall, J., joined in the dissent).

179. See generally Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), which states that a legislature may provide for the special problems of women without offending the Equal Protection Clause.

In addition, it was argued in *Rostker* that the reason why Congress excluded females in its registration scheme was that if females were drafted, resulting problems would impair military flexibility. Though somewhat speculative, it was envisioned that women, being legally and morally of limited utility under contingency conditions, might end up in support base locations at some time in the war effort and eliminate an option a commander might otherwise have to pull forward such support forces. But for the sex of these support forces, the commander's position might not be considered precarious. No doubt, should such a self-imposed hinderance to the success of a war maneuver occur, it would be detrimental to every one concerned in the war effort. Free rotation of personnel is beyond a

stitution it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>180</sup> With this *test* in mind, the words of the congressmen who themselves voted for the exclusion of women might be the best source to get at the reasoning behind such a decision.

No doubt it is a formidable task to decipher a *lone* rationale behind a congressional choice, and perhaps it is accurate to say that one never exists. It could be that after all the argument and debate, congressmen voted instinctively, in response to any number of influences, when they chose to exclude women from the registration program. If this was the case, it could even be argued that to the extent these instinctive votes represented the collective will of the "people," the resulting exclusion was not arbitrary at all.<sup>181</sup> Nonetheless, the debates in committee and hearings involved in the inquiry at hand do provide at least one concrete and satisfying rationale.

No doubt "the Selective Service Act is precisely that —*selective service*."<sup>182</sup> It proves to be the initial exposure for non-voluntary military personnel to a military operation wrought with selective policies. The selective practices at this the initial level of military service are only the beginning of the spectrum permitted the military.<sup>183</sup>

By not allowing women in the military to enter combat, the Armed Forces openly espouse a policy tantamount to "it's not a women's place."<sup>184</sup> Such a practice, though possibly histori-

---

mere administrative convenience; it is a legitimate concern, held by Justice Rehnquist to be most significant. 101 S. Ct. at 2660.

With this, Justice Marshall took no exception; instead, he attacked the argument's relevance to including women in a registration plan. Justice Marshall stated that if induction of a *limited* number of female draftees were the rule, the inclusion of women would no "more divide the military into 'permanent combat' and 'permanent support' groups than is presently the case with the All-Volunteer Armed Forces." 101 S. Ct. at 2673. However, in suggesting that Congress amend section 5(a)(1) of the MSSA so as to authorize differential induction of men and women, Justice Marshall advised Congress to create a plan perhaps conceptually more violative of essential liberties than the exclusionary plan he now scorns.

180. *Reed v. Reed*, 404 U.S. at 76 (quoting *Royster Guano & Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

181. See note 160 *supra*.

182. H. POLLACK & A. SMITH, *CIVIL LIBERTIES & CIVIL RIGHTS IN THE UNITED STATES* 206 (1978) (emphasis added).

183. This "permission" is relatively unique. See E. CARY, *WOMEN AND THE LAW* 92 (1977).

184. See Brown, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 970 (1971). Hale & Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 *HASTINGS*

cally<sup>185</sup> and morally appropriate, "keeps women from . . . command positions and is a crucial factor in promotion and advancement" in the military hierarchy.<sup>186</sup> In short, "[w]omen who . . . volunteer for the armed forces find no equality of opportunity in the work place."<sup>187</sup> Furthermore, "[m]ilitary women have also been excluded from flying and other 'combat specialties' that are often prerequisites for the best assignments and advancement to the highest levels in the armed forces."<sup>188</sup> *Schlesinger v. Ballard*<sup>189</sup> established no less. As Justice Rehnquist stated in retrospect: "In light of the combat restrictions, women did not have the same opportunities for promotion as men . . . ."<sup>190</sup> It is well recognized today that the situation still exists, and that, at least in the short-term, women who would have the military thrust upon them, via the draft, could expect to find things no different. Therefore, in order to prevent the *forced* inclusion of women into such a system, Congress elected not to register them. Certainly the equal protection fundamentals in such a policy, in view of the treatment women now get in the military, extend past benign purpose<sup>191</sup> and, in fact, suggest exclusionary practice. As the Court has stated, "a legislature may provide for the special problems of a woman."<sup>192</sup>

It was in recognition of these factors that Senator Warner, a member of the Senate's Armed Services Committee's Subcommittee on Manpower and Personnel, submitted a rationale for excluding women from draft registration.<sup>193</sup> In drawing a distinction

---

L.J. 199, 212-14 (1971). See generally P. KARSTEN, LAW, SOLDIERS, AND COMBAT (1978).

185. See Roberts, *supra* note 24, at 36 n.3.

186. M. DELSMAN, EVERYTHING YOU NEED TO KNOW ABOUT ERA 229 (1973). Delsman discusses the Air Force excluding women from serving as pilots or navigators.

187. *Id.* at 243.

188. *Id.* at 8.

189. 419 U.S. 498 (1975). A law mandating that any lieutenant in the U.S. Navy or captain in the U.S. Marine Corps who is twice passed over for promotion shall be honorably discharged was held not to be violative of the concept of equal protection implied by the fifth amendment Due Process Clause despite its failure to apply to women officers. *Id.*

190. 101 S. Ct. at 2653.

191. See Wright, *supra* note 141.

192. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975). See generally *Muller v. Oregon*, 208 U.S. 412 (1908). This was one of the first cases to consider the constitutional position of women at length, although the Court did not consider the application of women's rights to the Equal Protection Clause to be at issue.

193. See 126 CONG. REC. S6527-49 (daily ed. June 10, 1980).

between a volunteer who thrusts herself into the military hierarchy and a woman who is required to register, Senator Warner said:

I think it is very unfair to a woman to place her involuntarily in a system which [recognizably] has discriminatory practices . . . . [F]orcing her involuntarily into that system where she will be confronted against her will with discriminatory practices [such as] not be[ing] permitted to have the same job opportunities as the man with whom she trains [is not acceptable].<sup>194</sup>

In addressing the other side of the inequities involved, Senator Warner went on to predict an influx of claims by men in the military "saying that [they are] being forced into combat unfairly while women are exempted. . . ." <sup>195</sup> The difficulty the government would have in resolving these challenges would be great, as is today evidenced by the refusal of fellow Senators to address Senator Warner's claims.

If lawsuits alone would not create enough of a problem by inducting women in large quantities into the armed services, the effect on morale might provide the extra impetus for opting to exclude women from a draft registration scheme. As J. Fred Buzhardt, the General Counsel for the Defense Department wrote to Senator Birch Bayh back in 1972:

There is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces. On the other hand, if women were not assigned to duty in the field, overseas, or on board ships, but were [nonetheless] entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.<sup>196</sup>

In other words, morale is hurt if women in large numbers occupy a disproportionate number of the "soft" jobs under an induction scheme purposely modified to promote equal treatment among similarly situated persons. If women are included in the draft registration system and subsequently are drafted, how will the government demonstrate that anything but a fifty-fifty induction ratio is not arbitrary? Even if somehow rationalized on that level, how will the subsequent "ratio," of men to women, of 100 to 0 in combat assignments be justified? Every male called up that exceeds in number the females called up and vice versa, plus every male soldier assigned a combat role, depicts a potential plaintiff in a suit challenging the capriciousness of such policies. Yet, a fifty-

---

194. *Id.* at S6535.

195. *Id.* at S6530.

196. M. DELSMAN, *supra* note 186, at 230-31. See also P. KARSTEN, LAW, SOLDIERS, AND COMBAT 62 (1978) ("Soldiers about to fight have fears that can be reduced or controlled if they are satisfied that they and their comrades are at least as tough, 'mean,' deadly, and capable as the enemy.")

fifty conscription policy would "create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our national defense preparations [possibly] at a time of great national need."<sup>197</sup> Furthermore, a policy demanding an equal number of women in combat roles is unacceptable altogether.<sup>198</sup> In supporting the challenge by the plaintiff in *Rostker*, Justice Marshall might leave himself no other alternative than to one day support these other challenges as well. If one line of classification differentiating between men and women in the military is to be held vulnerable to constitutional challenge, how is it that others drawn elsewhere are not?

Inasmuch as it can be said that the object of the legislation challenged in *Rostker* was to sidestep the vast equal protection issues of *forced* female submission to a male-oriented military system, the question as to why Congress excluded women in a registration scheme might be answered. As Justice Rehnquist argued, the purpose of registration is to provide a pool for the drafting of combat troops. Because only men are eligible for combat positions, men and women are not similarly situated. Drawing the inevitable gender classification line at registration instead of later at combat contributes to the goal<sup>199</sup> of preventing similarly situated inductees from being treated differently as well as heading off lawsuits which would undoubtedly result. The MSSA prevents this unequal treatment by excluding women from the discriminatory, albeit necessary,<sup>200</sup> practices of the military. Only those women who enlist of their own free will will be exposed to those practices. These reasons certainly illustrate that the male-only classification and the congressional decision regarding it were anything but arbitrary. The checklist for the constitutionality of a classification is therefore complete. Until the roads of gender inequality inside the military are torn up and repaved, the

---

197. 101 S. Ct. at 2674 quoting *Senate Comm. on Armed Services, Authorizing Appropriations for Fiscal Year 1981 for Military Procurement, Research and Development, Active Duty, Selected Reserve, and Civilian Personnel Strengths, Civil Defense, and for Other Purposes*, S. REP. NO. 96-826, 96th Cong., 2d Sess. 159, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2612, 2649.

198. See generally P. BOUNE, MEN, STRESS, & VIETNAM (1970); *Equal Rights for Men and Women, 1971: Hearings on H. J. Res. 35, 203 and Related Bill, and H.R. 916 and Related Bills Before the Subcomm. No. 4 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 303-04 (1971), at 164.

199. See Barrett, *supra* note 153, at 92.

200. But see M. DELSMAN, *supra* note 186, at 229-30.

proponents of equal treatment must recognize *why* their road comes to a dead end where civilian and military worlds begin to meet; it has no place else to go.

### B. Future Impact of *Rostker*

It may be that one day the discourse of the Court in *Rostker* will be held in the same regard as is the "*Slaughterhouse*"<sup>201</sup> prediction as to the future place of the Equal Protection Clause. But, before this comes about, a change is necessary in the collective will and its representative Congress as to the role women are to play in the military.<sup>202</sup> Though such a transformation has begun, as *Rostker* shows us, it is not complete.

"It [*Rostker*] is substantially different from recent gender-based discrimination cases, in that it does not involve the *exclusion* of women from military service, [a concept surpassed by today's society] but rather their [sic] exclusion from *compulsory* service . . . ."<sup>203</sup> A paramount worth lies in the case's reassurance that the congressional refusal to jettison past precedent defines the *limit* (at the instant of *Rostker*) beyond which our society has yet to venture.

It could be that the ratification of the Equal Rights Amendment (ERA)<sup>204</sup> will spell the end of *Rostker*. No doubt it is a movement in the transformation of the collective will towards equal treatment of all citizens that ventures beyond any "limit," saying, in short, that "*sex is a prohibited classification.*"<sup>205</sup> To achieve the objectives of the amendment<sup>206</sup> only an "*unequivocal ban* against

---

201. See note 152 *supra*.

202. It took a similar shift, indeed a civil war, to emancipate the role of Blacks in our society. After the Civil War, there was a further shift which was partially brought about by a judicial recognition of "racial antagonism" as being the design behind certain classifications. As such, Justice Black referred to them as per se violative of the Constitution. Antagonism can never justify a classification. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Perhaps the inability of equal treatment proponents to find "sexual antagonism" in the classification of those eligible to register undermines their effort's worth. Do efforts that in good faith "accommodate" women sexually "antagonize" men? See H. POLLACK & A. SMITH, *supra* note 182, at 207, 263-69.

203. See Roberts, *supra* note 24, at 93 (emphasis added).

204. The proposed equal rights amendment reads as follows:

- Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
- Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- Section 3. This amendment shall take effect two years after the date of ratification.

U.S. CONST. amend. XXVII (proposed).

205. Brown, *supra* note 184, at 889 (emphasis added).

206. *Id.* at 892. No doubt, then, statutes like the MSSA would fall along with

taking sex into account" will suffice. Militarily, "[t]here is little doubt that if the Equal Rights Amendment becomes law, men and women will be equally subject to compulsory military service . . . ,"<sup>207</sup> the same forced inclusion that *Rostker* denies. Time will tell which of these contrasting viewpoints best pursues the ideals of our Constitution. Today, *Rostker* complies best, but, "[s]ooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship . . . utility will tend to triumph."<sup>208</sup>

Society must continue to scrutinize the utility of *Rostker*. Each citizen time and again must decide whether a military limit on the further progress of the equal treatment effort pursues important collective interests. Until the advent of a collective desire to do otherwise, possibly endowed in a ratified ERA, *Rostker's* future is secure.

Back in 1971, the Assistant Attorney General predicted "that if [the] ERA were ratified Congress would probably have to either draft both men and women on the same basis or draft no one."<sup>209</sup> To the extent this official remains of this opinion, it is unlikely that *Rostker* will coexist with a ratified ERA because he now sits on the Supreme Court's "cutting edge," conceivably in the premier position to decide. The opinion of the majority in *Rostker* was his own.<sup>210</sup>

### C. Conclusion

It is obvious that Congress made a conscious policy choice, within its constitutional authority, to not register women. When this was judicially challenged, a healthy ambiguity born of the separation of powers arose. Responding to the deference accorded Congress in assessing military matters, the Court's majority reaffirmed the wisdom of the decision tendered by those called upon in the Constitution to make it. Despite the majority's assurance that abdication had no place in this deference,<sup>211</sup> the Court's

---

*Rostker* under the ERA. A drastic restructuring of societal laws would be apposite.

207. R. LEE, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT 55 (1980).

208. B. Cardozo, THE GROWTH OF THE LAW 117 (1924).

209. M. DELSMAN, *supra* note 186, at 227.

210. For an excellent brief discussion of Justice Rehnquist's ten years on the Supreme Court, *see* L.A. Times, Sept. 6, 1981, at 1, col. 1.

211. 101 S. Ct. at 2653.



dissent viewed this reaffirmation as a glaring dodge of the judicial responsibility of "safeguarding essential liberties."<sup>212</sup>

No doubt merit is to be found in the decision. Such exclusion of women prevented the Court from finding itself in the precarious situation of *forcefully* subjecting women to a discriminatory military world over which it has limited power. It was proper for the Court to defer such a decision to the branch with such control—a branch which evidently appreciates the vast equal protection hotbox suggested by the combination of a decidedly permissible sexually discriminatory military and *compelled* female subservience thereto.

## V. ARGUMENT AGAINST THE *ROSTKER* DECISION

### A. *The Majority Applies a Deferential Standard*

Justice Rehnquist delivered the majority opinion, declaring that the MSSA did not violate the fifth amendment equal protection guarantee by authorizing the President to require a male-only draft registration. The Court began by stating that Congress had devoted a great deal of attention to reviewing the constitutionality of the MSSA. Furthermore, the Court had traditionally allowed Congress a considerable amount of leeway in legislative decisions involving military affairs.<sup>213</sup> The majority cited *United States v. O'Brien*<sup>214</sup> as authority to illustrate the deference given by the Court to Congress regarding military matters. This appeared to be an excuse for a lesser degree of scrutiny of congressional actions than the Court had applied since *Craig v. Boren*.<sup>215</sup> By citing *O'Brien*, which came well before the new "important governmental interest" test, the majority seemed to be reaching back in time to justify its decision.<sup>216</sup> "In such a case, we cannot

---

212. *Id.* at 2664.

213. *Id.* at 2651. This analysis by the Court aligns closely with what is characterized as the lowest level review, the "rational basis" test. Extreme deference is given to the legislature and the Court looks at the classification only to determine if there is a conceivable rational basis upon which the legislature could have relied on to promulgate the law. See notes 36 & 37 *supra*. Such a test is basically toothless in that it neither delves into the legislature's purpose in enacting such a law, nor requires that the legislation be substantially related to an important governmental interest. Simply, the "rational basis" test requires that the classification be rationally related to a legitimate governmental interest. See text accompanying note 37 *supra*. While the majority purported to apply the "important governmental interest" test from *Craig*, in substance it appears as if Justice Rehnquist applied a "rational basis" test while still calling it an "important governmental interest" test. See 101 S. Ct. at 2654; see also note 74 *supra*.

214. 391 U.S. 367 (1968).

215. 429 U.S. 190 (1976). See notes 71-76 *supra* and accompanying text.

216. The *O'Brien* case was decided by the Warren Court in 1968, while the

ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal."<sup>217</sup>

The majority also believed that, in the area of military affairs, the courts were not competent, thus indicating an intention to give even more deference to Congress. As authority for this deferential concept, the majority cited cases which dealt with internal military affairs,<sup>218</sup> cases that did not touch on civilian rights,

---

*Craig* test was not even formulated until 1976. See note 129 *supra*. The facts in *O'Brien* involved several young men facing criminal prosecution for burning their draft cards. Cf. *Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (gender classification demands "exceedingly persuasive justification").

217. 101 S. Ct. at 2655. Although the Court gave a large degree of deference to what it has termed a "studied choice" of Congress, it is questionable whether Congress really made its decision based on the evidence brought forth by military officials and others testifying on the efficacy of women in the military. See notes 243, 247, 249 & 273 *infra*. Part of the *Craig* test requires that the Court look to the evidence supporting the Congressional decision to determine if the legislation is based upon that evidence. 429 U.S. at 197-98. From Congressional testimony, it appears that the statistics on women in the military and the testimony of military experts fell on deaf ears. For example, note the comments of distinguished Senator Sam Nunn, Member of the Committee on Armed Services:

You can talk all you want to about theoretical rights, but this administration is not dealing with reality. You are not confronting the difficult questions in peacetime; therefore, we are going to have to confront the difficult questions in wartime if we have it. And we are going to have pure, absolute bedlam in this society.

You are going to be drafting women, not putting them in combat, but putting them in the military service and perhaps leaving their husbands at home to take care of the children. Anyone who thinks this society is prepared for that kind of shock is either operating in a different environment that I am or in a dream world.

*Department of Defense Authorization for Appropriations for Fiscal Year, 1981—Part 3, Manpower and Personnel: Hearings on S.2294 Before the Senate Comm. on Armed Services*, 96th Cong. 2d Sess. 1691-92 (1980) (statement of Senator Nunn). One writer stated:

The subject of women and war is an emotional one that evokes immediate and strong responses, based largely on ancient and deeply held beliefs [and]. . .still blind[s] military planners and public officials to the damage done by the exclusion of women from a full role in the military affairs of the nation.

Goodman, *infra* note 270, at 243.

218. See *Middendorf v. Henry*, 425 U.S. 25 (1976). The plaintiffs were charged with unauthorized absences from the military. They were brought before their commanding officer for a hearing and punishment without counsel. This was deemed constitutional because of the policy of deference to Congress in the conducting of *internal* military affairs. *Id.* *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, candidates attempting to speak on a military post were banned from doing so. The Court held that first and fifth amendment rights were not infringed upon because a military post is for the exclusive use of training soldiers, and is not to

as does the issue of draft registration.

In a factually unjustified step, the majority distinguished *Rostker* from the precedent established in *Reed*<sup>219</sup> and *Frontiero*,<sup>220</sup> that overly broad gender based classifications would not be upheld, and claimed to follow the lead of *Schlesinger*.<sup>221</sup> *Schlesinger* discriminated between men and women on the basis that they were not similarly situated due to the exclusion of women from combat roles. Based on that decision, the majority in *Rostker* said that excluding women from draft registration was not grounded on generalizations about male and female roles,<sup>222</sup> but rather that there were other substantial reasons for the exclusion. Therefore, by applying *Schlesinger's* holding to a different set of facts, the majority justified Congress' male-only draft registration. Congress equated registration with induction, reasoning that the one ultimately led to the other.<sup>223</sup> This made the potential position of military inductees of prime importance.<sup>224</sup>

Even though the parties in *Rostker* attempted to label the legislation either "gender based" or "military,"<sup>225</sup> the majority denied<sup>226</sup> that labels would guide the justices to the proper decision. Although the majority used strong language to disclaim the categorization of the legislation as one or the other, it appeared that the majority accommodated the Government by giving it the "mil-

---

serve as a public forum for political debate as are public streets and arenas. *Id.* In *Parker v. Levy*, 417 U.S. 733 (1974), the Court held that Congress has wider authority to draft broad laws and standards in the military sphere which would otherwise be struck down as unconstitutional if applied in civilian society.

All these cases dealt with internal military functions. They can be factually distinguished from the case of registration, in that registration involves the rights and liabilities of civilians, not those of military personnel.

219. See text accompanying notes 47-50 *supra*.

220. See text accompanying notes 51-53 *supra*.

221. 419 U.S. 498 (1975).

222. 101 S. Ct. at 2652.

223. *Id.* at 2653. Under the MSSA, two separate grants of authorization are required to draft civilians into the military. The first grant of power authorizes the registration of eligible civilians to register with the Selective Service. The second authorization of power is to induct registrants into the military. Section three of the MSSA gives the President power by proclamation to order registration. However, there is no current authority to induct civilians into the military. This authorization expired in 1975 and would need legislation by Congress to be revived. *Id.* at 2649.

224. However, the military testimony alerted Congress to a substantial need for male and female inductees. Females, not allowed to fill combat positions, are currently sought after in the All Volunteer Force and have been historically short in numbers at actual mobilization. Thus, even if Congress wants to equate registration with induction, a logically unsound connection, there is still a substantial need for women inductees in the military. See notes 236, 243, & 252 *infra*.

225. 101 S. Ct. at 2654.

226. *Id.*

itary" label and the subsequent deferential result.<sup>227</sup>

The majority then turned to the application of the "important governmental interest" test, which left no doubt that raising an army was an important governmental objective.<sup>228</sup> But with regard to whether the exclusion of women from draft registration was *substantially* related to that governmental objective, the majority reviewed the conclusions of Congress on the subject of women in the military. The majority failed to find it necessary to delve into the original intentions of Congress when it enacted the MSSA in 1948.<sup>229</sup> Because Congress had prepared a reevaluation of the legislative history of the MSSA in 1980, the majority treated these findings as the relevant legislative history.<sup>230</sup>

In summarizing, the majority said<sup>231</sup> that the legislation must be examined in light of the registration leading to a draft, and that a draft would primarily be used to obtain combat troops. Therefore, the purpose of the registration was to create a pool for drafting combat troops. Because Congress has refused to authorize the use of women in combat, the majority validated the legislation excluding women from draft registration.

But, even if women as a group do not participate in combat positions, the majority allowed broad legislation, based on gender discrimination, to pass before it without conducting a proper examination of the real purposes behind such legislation as required by the "important governmental interest" test.<sup>232</sup> The majority did not address the issue of a benign benefit or favoritism for women which is being espoused in the MSSA. Nor did it consider the issue of discrimination against men. Dismissing the facts that surround women's current role in society and the military, the majority concluded that Congress had evaluated the "ne-

227. *Id.* at 2655; *see also* note 217 *supra*.

228. 101 S. Ct. at 2654.

229. *Id.* at 2656. This aspect of the Court's deference to Congress again illustrates the watered-down application of the *Craig* test which Rehnquist purported to apply. The Court looked only at the conclusions of Congress and not at the evidence presented. Inspection of the evidence is an integral component of the "important governmental interest" test. The absence of examination into the reasons behind the legislation is the same as the lowest level of scrutiny of the "rational basis" test, which the Court has acknowledged as improper in sex-discrimination cases since 1971 in *Reed v. Reed*, 404 U.S. 71 (1971). *See Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *see also* text accompanying notes 74 & 75 *supra*.

230. 101 S. Ct. at 2656.

231. *Id.* at 2658-60.

232. 429 U.S. at 192.

cessity” and not the “equity” of registering women.<sup>233</sup> The majority claimed that even if a small number of women were drafted in an emergency, it would not be worth the extra burden to include them in the MSSA registration process.<sup>234</sup> Thus, the district court was found to have erred in evaluating the evidence rather than adopting Congress’s conclusions on the subject.

### *B. The Succinct Minority Opinion of Justice White*

Attacking the majority’s interpretations of Congress’ conclusions, Justice White pointed out that noncombat positions are open to women in peacetime as well as during mobilization. The conclusion that all noncombat positions could be filled by volunteers “should not be ascribed to Congress, particularly in the face of the testimony of military authorities. . . .”<sup>235</sup> The record did not appear to support the contention that all 80,000 noncombat positions open to women could be filled by volunteers.<sup>236</sup> This was a critical issue for Justice White, who admitted<sup>237</sup> that if there were some support for the statement that 80,000 women volunteers would come forth, he would have joined the majority.

Justice White agreed that in the event of a mobilization, if the percentage of women able to serve in noncombat positions was minimal, administrative convenience would have justified the decision not to register them. However, the number of women that can be used is neither “small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination”<sup>238</sup> which is involved here.

Thus, Justice White calls<sup>239</sup> for the justification of legislative purpose by empirical evidence, while recognizing that the Court should have applied its “middle tier” test rather than abdicating to the wishes of congressional administrative convenience.

---

233. 101 S. Ct. at 2659. The crux of the issue in this case is not “necessity” but “equity,” contrary to the declaration of Congress. What is at stake is equal protection under the law concerning registration requirements as they relate to the equal treatment of men and women. Whether there is a necessity to use female personnel in combat is not important. In the application of the “important governmental interest” test, the legislature must show that not registering women is substantially related to important governmental interests. 101 S. Ct. at 2663 (Marshall, J., dissenting).

234. 101 S. Ct. at 2660.

235. 101 S. Ct. at 2661 (White, J., dissenting).

236. During the 1950’s, an attempt was made to recruit roughly 100,000 women to meet the demands of the Korean War. This effort was doomed from the beginning, because the war was unpopular. The women recruited never reached the number authorized. M. BINKIN & J. BACH, *WOMEN AND THE MILITARY* 12 (1977).

237. 101 S. Ct. at 2661 (White, J., dissenting).

238. *Id.* at 2662.

239. *Id.*

### C. Justice Marshall Takes a Strong Objection

Justice Marshall set out the issue in the case by delineating the difference between registration and a draft. He concluded that the latter was not of importance in this case. "[W]e are not asked to rule on the constitutionality of a statute governing conscription."<sup>240</sup> The issue was one of gender discrimination, which was properly governed by developing precedents and application of the "important governmental interest" test. Conceding, as the majority did, that the first part of the test was met, Justice Marshall approached the issue of whether the discriminating measures employed by the MSSA *substantially* serve the statute's purpose.<sup>241</sup> He concluded that they did not, stating "that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions."<sup>242</sup> Justice Marshall, by following *Craig* more closely than the majority, did not see the validity in the majority's deferential stance.

In looking at Congress' rationalization for excluding women from draft registration, Justice Marshall found the connection between registration and conscription made by the Senate Armed Services Committee<sup>243</sup> irrelevant to the issue of registration. Precluding women from combat roles was the major finding of the Committee, and, as such, it does not affect the decision to register women because statutes<sup>244</sup> already exist to exempt women from combat roles even if they do register. Justice Marshall attacked the logic of the majority and argued that the Court had improperly applied *Craig*.<sup>245</sup> Justice Marshall applied the test, placing

---

240. *Id.* at 2662 (Marshall, J., dissenting); see also notes 223 & 224 *supra*.

241. 101 S. Ct. at 2663 (Marshall, J., dissenting). "[B]ut the question remains whether the discriminatory means employed itself *substantially* serves the statutory end".

242. *Id.* at 2663-64.

243. "The policy precluding the use of women in combat is . . . the most important reason for not including women in a registration system." *Hearings on the Fiscal Year 1981 Defense Authorization Bill: S. Rep. No. 96-826 Before the Senate Armed Services Comm.*, 96th Cong., 2d Sess. 157 (1980) [hereinafter *Senate Hearings*]. The facts contradict this conclusion: in the last draft less than one percent of those inducted actually served in combat units. 118 CONG. REC. 4390 (1972).

244. See Armed Forces Act, 10 U.S.C. § 101, 6015, 8549 (1976). Air Force and Navy women may not be assigned to combat positions or vessels. The Army and Marines have a similar policy although not in statutory form.

245. 101 S. Ct. at 2666 (Marshall, J., dissenting). Justice Marshall correctly placed the burden on the government to show that a gender-neutral registration

the burden on the Government of showing that an important governmental interest would be advanced by excluding women from draft registration, rather than placing the burden on the plaintiff-respondents to show that a gender-neutral classification would substantially advance important governmental interests. Under Justice Marshall's application of the *Craig* test, the Government did not show that the discriminatory regulation advanced governmental interests.<sup>246</sup>

Justice Marshall supported his conclusion by reviewing the evidence presented to Congress; he did not simply cite its conclusions. He found that many of the eventual draftees would be needed to fill a variety of noncombat positions,<sup>247</sup> with no combat eligibility necessary. Not every man is eligible for combat, yet all are required to register.<sup>248</sup> Furthermore, Justice Marshall pointed out that the Department of Defense found no reason for refusing to register women,<sup>249</sup> and that women are not ineligible for all positions in the event of a draft.<sup>250</sup>

Additionally, Justice Marshall attacked what the majority called "equity" and relabeled it "nothing less than the Fifth Amendment's guarantee of equal protection of the laws which 'requires that Congress treat similarly situated persons similarly.'"<sup>251</sup> To Justice Marshall, men and women both eligible to serve in various capacities<sup>252</sup> within the military, are similarly situated and

---

procedure would significantly impede the efforts to prepare for the draft. *See* note 229 *supra*, *accord*, note 249 *infra*.

246. 101 S. Ct. at 2667.

247. *Reinstitution of Procedures For Registration Under the Military Selective Service Act: Hearing Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm.*, 96th Cong., 2d Sess. 1390, 1395-96, 1665 (1980) [hereinafter cited as *Senate Hearings II*] (statements of Principal Deputy Assistant Secretary of the Army, Principal Deputy Assistant Secretary of the Defense, and General Yerks).

248. Due to a different policy that classifies registrants on their eligibility for placement in military positions, including combat positions, there will be a substantial number of men who cannot be placed in combat. Several deferments such as for physical defects, conscientious objector status, and religious affiliation, would rule out a proportion of men from eligibility for combat; yet Congress will require them to register anyway. Military Selection Services Act, 50 U.S.C. § 451 app. (1976). *See also* 101 S. Ct. at 2667 n.11 (Marshall, J., dissenting).

249. "Our conclusion is that there are good reasons for registering [women]. Our conclusion is even more strongly that there are not good reasons for refusing to register them." *Senate Hearings II*, *supra* note 247, at 1667-68 (Principal Deputy Assistant Secretary of Defense Danzig).

250. 101 S. Ct. at 2669.

251. *Id.* at 2671.

252. Currently, over 150,000 women are serving in the all volunteer force. It is expected that this number will swell to 250,000 in 1985. *See* Note, *supra* note 26, at 412. Out of a total of 567,000 jobs for enlisted personnel, women are eligible for 306,000. In addition, all branches have planned for the increase in the number of women currently serving. M. BINKIN & J. BACH, *supra* note 236, at 27.

cannot be discriminated against on the basis of sex.<sup>253</sup> Acknowledging that the draft of large numbers of women might impede the mobilization of the military, Justice Marshall concluded that Congress may induct an appropriate number of men and women, thereby achieving greater flexibility than if only men were eligible to be drafted. With such a result, the Constitution would not have to make way for this gender-discriminatory legislation.

Justices Marshall, White, and Brennan did not prevail in their view of which way the Court should turn in analysis of equal protection challenges. Nor did their observations on the important role of women in the military succeed. Instead, the majority view by Justice Rehnquist is now law.

#### *D. The Impact of Rostker*

##### 1. A Blow to an Advancing Equal Protection Doctrine

The Court's decision in *Rostker* has ramifications not only in courts of law but in the everyday lives of women throughout the United States. Turning first to the courts, the decision can be characterized as a step backward in the evolution of the Equal Protection Doctrine. Admittedly, the Burger Court started with very little in the way of a test specifically designed to aid in decisions involving gender based discrimination.<sup>254</sup> However, before 1976, when the Court articulated the *Craig* test, the Court seemed to be taking definite strides<sup>255</sup> towards ensuring that the Equal Protection Clause would be viable for men and women alike. The Court had definitely progressed from the view that the only provision thought to deal with equal protection for women was the nineteenth amendment.<sup>256</sup>

After *Craig*, the Court seemed more willing to look beyond the stated legislative purpose to determine what the actual intent of

---

253. As in the cases leading to the present, the Court characterized the double-edged effect of discrimination. Women supposedly favored here by not having to register, are actually being denied the economic and social benefits which flow from serving in the military. Alternatively, men are forced to bear the burden of national defense when it is a task to be shared by all citizens. See, e.g., *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

254. See text accompanying notes 36-40 *supra*.

255. See text accompanying notes 47, 51, 58 & 60 *supra*.

256. *Fay v. New York*, 332 U.S. 261 (1947) (women's rights stem from the nineteenth amendment and that for women the rest of the Constitution is an empty box).



the legislation was.<sup>257</sup> The *Craig* test was accepted as a solution to the polarity of the "two-tiered" test inherited from the Warren Court. The Court consistently used the "important governmental interest" test from *Craig*, developing a suspicion of sex classifications.<sup>258</sup>

When the Court faced *Rostker*, its policies on sex classification were certainly not finalized. The Court turned away from the strict application of the "important governmental interest" test as it had been used in the past.<sup>259</sup> Justice Rehnquist applied the *Craig* test with a new deference twist culled from a pre-*Craig* decision.<sup>260</sup> Thus, the enlightened view of gender discrimination appears to have come to a halt in 1981.

Several questions remain unanswered by the Court's decision in *Rostker*. It is safe to assume that the *Craig* test remains a viable tool in examining the constitutionality of gender based statutes. However, it is not at all clear how the deference aspect of the *Rostker* decision will be applied in the future.

The Court based its deference on the delegation of power to Congress by the Constitution.<sup>261</sup> But, as Justice Marshall pointed out, the Court also has a constitutional duty to interpret the supreme law of the land.<sup>262</sup> It is possible that the deference exercised in *Rostker* will be confined to military matters. Language was specific enough in the majority opinion to indicate that the area of military decision and regulation is in a category by itself.<sup>263</sup> Past Court decisions<sup>264</sup> involving non-military legislation

---

257. "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr*, 440 U.S. 268, 283 (1979). See also *Califano v. Goldfarb*, 430 U.S. 199 (1977) (social security provision causing widowers but not widows to prove dependence on deceased spouse was invalidated because it was based on societal stereotypes); *Califano v. Webster*, 430 U.S. 313 (1977) (remedial purpose behind social security benefits being greater for women upheld).

258. *Id.* See also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (eight to one, the court decided that gender classifications based on societal stereotypes are not true in many cases and a case-by-case determination is more appropriate).

259. See note 213 *supra*.

260. *United States v. O'Brien*, 391 U.S. 367 (1968) (criminal prosecution of draft-card burning, decided well before the advent of the "important governmental interest" test). More recently, however, lower courts have not found the need to defer to Congress in external military affairs.

261. See note 5 *supra*.

262. 101 S. Ct. at 2676 (Marshall, J., dissenting).

263. "The operation of a healthy *deference* to legislative and executive judgments in the area of *military affairs* is evident. . . ." *Id.* at 2652 (emphasis added). "[B]ut the tests and limitations to be applied may differ because of the *military context*." *Id.* at 2653 (emphasis added). Thus, *Rostker*, by its language, will be limited in its application of a deferential standard to military contexts.

264. See generally note 3 *supra*.

will stand as persuasive authority to strike down gender based discrimination through the *Craig* test in the future. Indeed, the Court seemed very careful to apply the *Craig* test in a methodical manner. This would indicate a willingness by the Court to retain the test in its original form, but apply a very strict deferential standard when dealing with military affairs.

Another significant aspect of the *Rostker* decision is contained in the majority's hesitation to look beyond legislative conclusions<sup>265</sup> and delve into the empirical evidence which either supports or invalidates the legislation's purpose. The precedent set in *Craig*, and followed in later cases,<sup>266</sup> seemed to express an interest by the Court in carefully examining the purposes as well as the effects of legislation before making any decisions about its validity, thus distinguishing it from the "rational basis" level of review. *Rostker* did not support the past enthusiasm of the Court in this area. The Court seemed satisfied to take the conclusion of congressional hearings and adopt them without further exploration into the soundness of those conclusions.<sup>267</sup>

However, because the case dealt with a military issue, the lack of independent investigation by the Court to support the legislation's purpose can be attributed to the deferential standard applied.<sup>268</sup> Assuming this to be the case, it is likely that the Court, in other than a military context, will once again apply the *Craig* test with the concurrent searching of legislative purpose. Apparently, when it comes to military matters, the Court has determined that equal protection must give way to the mobilization of manpower.<sup>269</sup>

---

265. See note 213 *supra*. In the majority opinion, Senate and House report conclusions were cited as well as the conclusions of several Senators. The Court did not look at the evidence here as it did in *Craig*. The *Craig* Court examined evidence outside the legislative history of the statute; in *Rostker* the Court said that the "legislative history is . . . highly relevant in assessing the constitutional validity of the exemption." 101 S. Ct. at 2656. *But see* text accompanying notes 247-50 *supra*.

266. See notes 257 & 258 *supra*.

267. "The issue was considered at great length, and Congress clearly expressed its purpose and intent." 101 S. Ct. at 2656.

268. *Id.*; see note 263 & 265 *supra*.

269. Men do not appear to be too happy about bearing the military burden alone. "The nation's 18-year-olds are failing to register for the draft at a rate far greater than during the Vietnam War. . . over 300,000 men, or 23% of those born in 1963, [have] violated [a] federal law requiring them to register." L.A. Times, Nov. 5, 1981, at 1, col. 5. Some feel that adding women to the registration pool would decrease opposition, allowing those who most oppose the military service to be

## 2. Military Life May Not Be For Everyone

As the Supreme Court has ruled, military life may not be for everyone—especially not for women. Undoubtedly, many women are happy to avoid the burdens of soldiering. Alternatively, women are not happy about not sharing in the benefits that the nation's largest employer has to offer.<sup>270</sup> Although the All Volunteer Force is comprised of roughly seven percent women,<sup>271</sup> the *Rostker* decision denies women's usefulness or value in a time of emergency.<sup>272</sup>

Ironically, women have already proved themselves in the military,<sup>273</sup> yet the proof was not enough to convince Congress or the Supreme Court that men and women are equally suited to defend their country.<sup>274</sup> Studies of the military show that men lose more days of work due to drugs, alcohol, or bad behavior than women, the All Volunteer Force will be having recruiting problems as the

---

given exemptions. The larger the population the Selective Service pulls from, the more exemptions there are. For a comprehensive discussion, see Goodman, *infra* note 270, at 250.

270. See Hale & Kanowitz, *supra* note 182 at 207-10; Goodman, *Women, War, Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S RTS. L. REP. 243, 244-45 (1979). See also notes 281-284 *infra*.

271. The military plans to increase the number of women in the service to 11.6% of the total force by 1984. In 1969 women represented only 0.9% of the total force. OFFICE OF THE ASS'T SEC'Y OF DEFENSE, BACKGROUND STUDY: USE OF WOMEN IN THE MILITARY, F-19, F-21 (2d ed. 1978).

272. A 1978 Department of Defense study concluded the following:

Significant savings and quality improvement are possible through the expanded use of enlisted women. Cost avoidance could exceed \$1 billion annually by 1982.

.....

Continued expansion of the number of enlisted women used in the military can be an important factor in making the all volunteer force continue to work.

Goodman, *supra* note 270, at 249. In addition, women are able to work in: 323 job classifications out of 345 in the Army; 226 out of 230 in the Air Force; 83 out of 99 in the Navy; and 34 out of 38 in the Marine Corps. See Note, *supra* note 26, at 412 n.45.

273. Army studies show field performance of units with significant female membership was equal to that of all-male units. Note, *supra* note 26, at 412 n.47; M. BINKIN & J. BACH, *supra* note 236, at 77-101. Senator Cohen stated: "Participation of women in the All-Volunteer Force has worked well, has been praised by every military officer who has testified before the committee, and . . . the jobs are being performed with the same, if not in some cases, with superior skill." *Defense Authorization Bill, Fiscal Year, 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1678 (1980) (testimony of Senator Cohen).

274. Not only have women proved effective in military activity but "women have been conspicuous in some of the more notorious terrorist groups such as the Symbionese Liberation Army (SLA), the Popular Front for Liberation of Palestine (PFLP), the Croatia Nationalists (USTA SHI), and the Baader-Meinhof Gang. M. BINKIN & J. BACH, *supra* note 236, at 91. Chief of Naval Operations, Admiral Elmo Zumwalt, spoke out in support of an expanded role for women. They should, he said, "have opportunity to go into combat. . . and thus far as women soldiers are concerned, when I was in Southeast Asia during the Vietnam War I found that among the most vicious fighters were the Viet Cong women." *Id.* at 50.

number of male youths drops and unemployment decreases,<sup>275</sup> and that women in the military are more apt to have a high school diploma and score higher on standardized tests than military men.<sup>276</sup> Clearly, women, together with men, should be allowed to be an integral part of the Armed Forces.

But, beyond these military concerns, the *Rostker* decision has a striking impact on women as civilians.<sup>277</sup> In granting deference to Congress in military decisions, the Court has overlooked its role in civilian affairs. Indeed, the registration of individuals for the military deals with civilian rights, and it is not until one is inducted that the jurisdiction of the military takes over.

The Court has previously noted the differences between civilian society and military society, and has allowed Congress more power to regulate in the latter.<sup>278</sup> Yet, with such an important aspect of citizenship as the right to fight for one's country at stake, the Court has let military law<sup>279</sup> dictate the privileges and responsibilities of women in the civilian sphere.

Basically, *Rostker* has turned the tide in women's equality; specifically, it has turned it back. Beyond the military flexibility and the noncombat issues that the Court dealt with is the reality that women have less opportunity for education,<sup>280</sup> advancement, self-

275. See generally *id.* at 62-63, 127. The all volunteer force has problems recruiting men of the caliber it needs and in the quantity it needs them. In response, Congress has lowered its quotas for armed services enlistment to avoid lowering the standards of enlistment.

276. See note 26 *supra* at 412.

277. *Proposed Amendments to the Equal Rights Amendment: Hearings on S.J. Res. 61 and S.J. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 326 (1970) (statement of Prof. Norman Dorsen).

[W]hen women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification.

*Id.*

278. *Parker v. Levy*, 417 U.S. 733 (1974) (Congress given broad authority to make laws in military society which would be invalidated if applied to civilian society). See generally note 218 *supra*. Thus, the Court's reliance on the deferential standard in *Rostker* is misplaced because registration impacts on the rights and liabilities of civilians, not military personnel.

279. See notes 2 & 244 *supra*.

280. Educational opportunities are a big factor in attracting men to the military. Many men would never have been able to continue their education without assist-

improvement,<sup>281</sup> economic benefit,<sup>282</sup> and learning valuable skills which can be transferred to civilian life.<sup>283</sup> These are just some of the benefits<sup>284</sup> of taking on the responsibility or burden of service in the military. Current enlistment demonstrates that women are ready and able to accept the responsibility of military duty and thereby attain full citizenship status alongside men.

The case for women's involvement in the military is compelling when the facts of women's performance and the overall good effect of women in the military are weighed against the stereotypical notion that women must stay home and men should support and protect them. Unfortunately, a decision based on such an assumption is clearly not based on the reality of today's world where women play a major role in home life as well as in the working world.

### *E. Conclusion*

Caught in a double bind with the passage of the Equal Rights Amendment still pending<sup>285</sup> and a Supreme Court seemingly unwilling to acknowledge the inequalities in the MSSA, women will have to try another route to attain full citizenship beside men.

---

ance from the military. Hale & Kanowitz, *supra* note 184, at 208. See Veterans' Benefit Act 38 U.S.C. 1652-799 (1976) (education for veterans and their families).

281. For men, the military is a vehicle for upward mobility, a chance to earn a better wage and strive to reach one's potential by learning job skills of which over 600 are offered. Women would be offered a chance to be judged by ability rather than sexual attractiveness in such a setting. *Id.* at 207-09.

282. Benefits include housing, retirement annuities, medical care and wages above those obtainable in the civilian market. M. BINKIN & J. BACH, *supra* note 236, at 31-36.

283. The military teaches skills applicable to future careers in law enforcement, electronics, mechanics and commercial piloting. The military trains around 80% of the nation's commercial pilots. Goodman, *supra* note 270, at 244 n.18.

284. The Court was speaking about veterans benefits. "To the contrary it confers upon a specifically described group-perceived to be *particularly deserving*-a competitive head start." *Massachusetts v. Feeney*, 442 U.S. 256, 277 (1979) (emphasis added).

285. Justice Powell stated in 1973 that the Supreme Court was hesitant to step into the area of equal rights in gender-based discrimination cases because of the pending Equal Rights Amendment. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973). The implication of Justice Powell's statement is that if the Court were to implement the highest level of scrutiny in such cases before the passage of the Equal Rights Amendment, it would be engaging in judicial legislation rather than judicial interpretation. But the fourteenth amendment Equal Protection Clause applies to all persons, including women. In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), the Court ruled that "women" were "persons" within the meaning of the Constitution. Thus, affirmative application of the fourteenth amendment by the Court could achieve greater equality in sex discrimination cases without being called judicial legislation. Instead, based upon the tenuous reasoning that women's rights were not on the minds of our forefathers, the Court has steadfastly refused to accord women equal protection under the fourteenth amendment. See also note 7 *supra*.

The request of Ms. Grimke in 1838 is still pertinent today. "I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from our necks. . . ."286 Women want equal standing with men and have waited a long time for a declaration of that equality.

However, as the Court in *Rostker* concluded, the time has not yet come when men will allow women the full privileges and burdens of registration for military service.<sup>287</sup> It appears that the Burger Court will not be remembered for its great strides toward equality for women. For, as Justice Rehnquist reasoned in the majority opinion, it is not the job of the Supreme Court to make law, but simply to review it.<sup>288</sup> There is, however, a faint possibility that the Court will reconsider its stand on the application of the "important governmental interest" test as a new Justice takes *her* rightful place on the Supreme Court this year.<sup>289</sup>

## VI. CONCLUSION

The Supreme Court's decision in *Rostker v. Goldberg* has, for the time being, resolved at least one issue: women will not be registered to serve in the Armed Forces. However, the decision leaves many more questions unanswered.

Although *Rostker* was decided primarily on a separation of powers rationale, it is yet to be determined whether the case will stand as authority to apply a lower level of review to sex discrimination in more than just a military context.

In addition, *Rostker* appears to reinforce the view that Congress has unlimited power to oversee military affairs, even if the legislation enacted also affects civilian life.

Furthermore, has the Court really based its decision on the deference given to Congressional wisdom in military affairs, or does this decision signal a retreat from an otherwise affirmative approach to sex discrimination?

Looking at the case in its totality, at both its legal and social

---

286. S. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN 10 (Boston 1838).

287. See note 278 *supra*.

288. 101 S. Ct. at 2653.

289. Sandra Day O'Connor was sworn in October 5, 1981, the first Monday in October, 1981. It was also the first time a woman entered the United States Supreme Court chambers as a Justice of the United States Supreme Court. L.A. Times, Oct. 5, 1981 at 1, col. 5.

consequences, it is clear that the debate is not over. Whether it is viewed as an affirmation of congressional power, or as a step backward in equal protection, the answers to the questions posed by this decision can only be supplied through future interpretations of this case.

GILBERT L. PURCELL  
JANET RAPPAPORT