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Rostker v. Goldberg: The Uneven Development of the Equal Protection Doctrine in Military Affairs

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NOTES

ROSTKER V. GOLDBERG: THE UNEVEN DEVELOPMENT OF THE EQUAL PROTECTION DOCTRINE IN MILITARY AFFAIRS

It is only superficially problematic that a feminist should support military registration for women, because inherent in the call for equal rights is the acceptance of equal responsibilities. Historically, women have been placed in a contradictory and untenable position, denied basic civil rights and "protected" from equally basic civic obligations.[1] Feminism requires the rejection of all such "protective" schemes.

To military duty is attached symbolic as well as practical importance.[2] Male-only registration excludes women from what

1. Women are both put on a pedestal and deemed not fully developed persons. They are idealized; their approval and admiration is sought; and they are at the same time regarded as less competent than men and less able to live fully developed, fully human lives—for that is what men do.

Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 589-90 (1977).

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism which, in practical effect, put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). For a thorough discussion of the effects of protective legislation, particularly as to women and labor, see J. BAER, CHAINS OF PROTECTION (1978).

2. "[E]quality for women is important for reasons beyond its practical consequences; it has symbolic importance because participation in the military life of a nation is a unique political responsibility." Goodman, *Women, War, and Equality*, 5 WOMEN'S RIGHTS L. REP. 243, 246-47 (1979).

many consider the most basic of civic obligations,[3] subtly stigmatizes women as to subsequent public service, political power and prestige,[4] and inevitably perpetuates anachronistic, stereotypical male and female roles.[5]

The recent trend in the Supreme Court's equal protection analysis, particularly in the area of sex discrimination, encouraged some observers[6] to expect a ruling in *Rostker v. Goldberg*[7] based on heightened scrutiny.[8] The Supreme Court, however, evaded any careful equal protection examination and focused instead on judicial deference to Congress in military affairs.[9]

This Note examines the Court's refusal in *Goldberg* to apply

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3. Rostker v. Goldberg, 101 S. Ct. 2646, 2662 (1981) (Marshall, J., dissenting); 126 CONG. REC. S6530 (daily ed. June 10, 1981) (remarks of Sen. Kassebaum).

4. Goodman, *supra* note 2, at 246-47.

5. *Id.* at 253. "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing sexual stereotypes about the 'proper place' of women and their need for special protection . . . ." Orr v. Orr, 440 U.S. 268, 283 (1979).

6. [S]hould Congress reinstitute a compulsory draft registration requirement using sex as a proxy for an individual's capacity to discharge military duty, there can be no doubt that litigation would be brought and that the legislation would almost certainly be invalidated as violative of the equal protection component of the fifth amendment.

126 CONG. REC. S6548 (daily ed. June 10, 1981) (remarks of Sen. Hatfield). *Cf.* Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406, 423-25 (1980). Written prior to the *Goldberg* decision, the Note concludes that the Supreme Court ought to apply heightened scrutiny to *Rostker v. Goldberg* and ought not to defer to Congress because of the decision's broad public impact.

7. Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980) was the original suit filed in 1971 in the U.S. District Court for the Eastern District of Pennsylvania. Plaintiffs charged that the Military Selective Service Act (MSSA) violated Constitutional guarantees of due process, freedom of expression and assembly, laws against sex discrimination, and aided in the furtherance of an unlawful war. 101 S. Ct. at 2650 n.2. The District Court dismissed the suit; the Third Circuit Court of Appeals affirmed, except for the discrimination claim, which was remanded. In 1974, the District Court declined to dismiss the claim, although plaintiffs were no longer subject to registration, because plaintiffs still had an affirmative obligation to register. The suit then lay dormant for five years. *Id.* at 2650. In July 1980, the District Court found the MSSA violated the due process clause of the fifth amendment and permanently enjoined the Government from requiring registration under it. 509 F. Supp. at 605-06.

8. Craig v. Boren, 429 U.S. 190 (1976) (heightened scrutiny established as appropriate level of review for gender-based discrimination suits). *See infra* notes 32-38 and accompanying text.

9. 101 S. Ct. at 2651-55.

heightened scrutiny[10] to a discriminatory statute. The Court never satisfactorily answered the constitutional challenge: Whether, under the equal protection component of the fifth amendment's due process clause, women as a class may be excluded from military registration.[11] Further, this Note argues that the Court improperly and unnecessarily deferred to congressional findings in ruling that Congress acted within its authority by registering only men.[12]

I. DEVELOPMENT OF EQUAL PROTECTION ANALYSIS IN SEX DISCRIMINATION CHALLENGES

Dissatisfied with equal protection analysis governed either by the permissive rational relation test or the rigid strict scrutiny standard, and sensing the nation's increased concern over sex discrimination,[13] the Court first attacked gender-based discrimination in *Reed v. Reed*.[14] In *Reed*, the Court struck down an Idaho probate code provision[15] under the equal protection clause of the fourteenth amendment. The provision mandated that of two equally situated family members contending for administration of a will, the male would automatically be appointed. The Court held that although administrative convenience was a rational state interest, Idaho's classification did not rationally further that goal.[16] The Court emphasized the impor-

10. For a discussion of equal protection case law and development of analyses see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1060-97 (1978).

11. 509 F. Supp. at 596-97. The District Court carefully articulated the *Goldberg* issue: "It is not enough to show that [women's] inclusion was needed; it would have to be shown that their exclusion was needed . . . . To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces." *Id.*

12. 101 S. Ct. at 2660.

13. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (b), (c) (1976) (prohibiting any employer, labor union, or other organization subject to provisions of the Act from discriminating against any individual on the basis of race, color, religion, sex, or national origin); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976) (prohibiting discrimination by employers against employees on the basis of sex).

14. 404 U.S. 71 (1971).

15. The Idaho Probate Code required that estate administration be granted in the following order: "(1) The surviving husband or wife or some competent person whom he or she may request to have appointed, (2) The children, (3) The father or mother . . . ." IDAHO PROBATE CODE § 15-312 (1972).

16. 404 U.S. at 76. The Court recognized the state's right to classify persons for different treatment under the law. However, persons otherwise similarly situated could not be treated differently for reasons totally unrelated to the purpose of a statute. *Id.* at 75-76.

To give a mandatory preference to members of either sex over

tance of equal treatment for persons similarly situated, thereby underlining a crucial element of traditional equal protection analysis.[17]

Several fifth amendment challenges followed. *Frontiero v. Richardson* challenged an Air Force policy which required spouses of female members to prove their financial dependence before receiving medical benefits and increased quarters allowances.[18] Relying on *Reed,* the Court held administrative convenience did not justify the different treatment of similarly situ-

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> members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Id. at 76-77. Although *Reed* was a fourteenth amendment challenge, the analysis used by the Court became the analysis used in fifth amendment challenges as well. The Court consistently has considered the fifth and fourteenth amendments' guarantees interchangeable in sex discrimination suits. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1972). *See also,* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541, 555 (1977). For a discussion of these cases see *infra* notes 18-32 and accompanying text.

17. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 520 (1978) ("Equal Protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same."). See Tussman & TenBroeck, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949) (the classic study of constitutional equal protection).

18. 411 U.S. 677 (1972). 37 U.S.C. § 401 (1976) provides in pertinent part:

> In this chapter, "dependent", with respect to a member of a uniformed service, means—
> (1) his spouse;
> . . . .
> However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support.

10 U.S.C. § 1072 (2) (1976) provides in pertinent part:

> "Dependent", with respect to a member . . . of a uniformed service, means—
> (A) the wife;
> . . . .
> (C) the husband, if he is in fact dependent on the . . . wife for over one-half of his support.

Benefits would be granted automatically to male service members regardless of the spouse's dependence. Appellants claimed that their rights were violated both procedurally and substantively and sought a permanent injunction against the enforcement of the statutes. Frontiero v. Richardson, 411 U.S. 677, 678-79 (1972).

ated males and females[19] and that the statutes violated the due process clause of the fifth amendment.[20]

In *Schlesinger v. Ballard*[21] the Court took a turn by relying on the similarly situated principle when it found constitutional Navy statutes which allowed female officers longer tenure than males before facing discharge for failure to be promoted. The suit was brought by male naval officers, who argued they were unfairly burdened because they were discharged if they were passed over twice for promotion to lieutenant commander.[22] Distinguishing *Reed* and *Frontiero*, the Court found the unequal treatment of men and women was the result of women's reduced

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19. 411 U.S. at 688-89. The plurality opinion stated that the Government had the burden to demonstrate that it is cheaper to grant benefits to all male members than to determine which male members are entitled and to grant increased benefits only to them. The Court noted that, if put to the test, many female "dependents" would not qualify for benefits. *Id.* at 689-90.

20. *Id.* at 690-91.

21. 419 U.S. 498 (1974).

22. The relevant statute, 10 U.S.C. § 6382 (1976) provides in pertinent part:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year.
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> . . . .
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> (d) This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty.

10 U.S.C. § 6401 (1976) provides in pertinent part:

> Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant and each woman officer on the active list of the Marine Corps who holds a permanent appointment in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which—
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> (1) she is not on a promotion list; and
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> (2) she has completed 13 years of active commissioned service in the Navy or in the Marine Corps.
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> However, if she so requests, she may be honorably discharged at any time during that fiscal year.

The effect was that female officers had a thirteen year tenure before they were discharged for want of promotion; male officers, however, could be passed over twice in fewer years. Lieutenant Ballard was not promoted for nine years. 419 U.S. at 499, 504-06.

opportunities in the Navy,[23] not administrative convenience or "overbroad generalizations" about women's roles.[24] In effect, the Court upheld the statutes because they were designed to remedy sex discrimination.

In *Weinberger v. Wiesenfeld*[25] the Court overturned a Social Security Act provision[26] which awarded death benefits to widows, but not widowers, calling it "entirely irrational."[27] A unanimous Court found that women's financial contributions to family support were denigrated under the statute,[28] and that working men and women are similarly situated, thus equally eligible for Social Security death benefits.[29] The Court found the Social Security statute more pernicious than the dependency provision in *Frontiero* because the widower had no chance to

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23. Schlesinger v. Ballard, 419 U.S. at 508. The Court's rationale raises its own questions as to job discrimination in the military. J. Goodman's article provides a discussion of women's unequal treatment in the military, focusing particularly on the effects of the combat exclusion on women's military careers. See Goodman, *supra* note 2, at 243.

24. 419 U.S. at 508-10.

25. 420 U.S. 636 (1974). Stephen Wiesenfeld challenged his exclusion from Social Security survivor's benefits for himself following the death of his wife, who had earned the principal family income during their marriage. Benefits were awarded to appellee's son but not to him because benefits were available only to women. *Id.* at 639-40.

26. 420 U.S. at 653. 42 U.S.C. § 402(g) (1976) provides in pertinent part:

> (1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
> (A) is not married,
> (B) is not entitled to a widow's insurance benefit,
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . . shall . . . be entitled to a mother's insurance benefit for each month . . . .

27. 420 U.S. at 651. The purpose of amended § 402(g) of the Social Security Act was to assure protection of the family. However, children of covered female workers were eligible for survivors' benefits only in limited circumstances, and no benefits were provided for husbands or widowers based on their wives' employment. *Id.* at 643-44. This was despite the clear legislative intent "to provide children deprived of one parent with the opportunity for the personal attention of the other." *Id.* at 648-49.

28. *Id.* at 645 (Brennan, J.).

29. *Id.* at 653.

prove support or dependence even though the benefits were based on the woman's employment.[30]

The Court found these "archaic and overbroad" presumptions at the root of *Weinberger*: (1) male workers' earnings are vital to family support, whereas women's are not,[31] (2) women as a group prefer child care to employment, when given a choice, and (3) men who raise children alone prefer work to child rearing.[32]

Despite some uncertainty as to the appropriate degree of judicial scrutiny, the above cases at least evinced a developing rationale as to sex discrimination analysis: Administrative inconvenience and overbroad or archaic generalizations regarding roles of women would no longer withstand an equal protection challenge.

Craig v. Boren[33] provided the turning point in gender-based equal protection analysis, because it articulated (but did not formally adopt) a heightened level of scrutiny[34] by requiring that any gender-based classification serve an important governmental purpose and be substantially related to the achievement of that

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30. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others.

Id. at 645. The statute's "effect was to discriminate among surviving children on the basis of the sex of the surviving parent." *Id.* at 651.

31. *Id.* at 643.

32. *Id.* at 652-53.

33. 429 U.S. 190 (1976). A fourteenth amendment case, *Craig v. Boren* involved the constitutionality of an Oklahoma statute which prohibited the sale of 3.2% beer to males under 21 years and females under 18 years. Craig, a male between the ages of 18 and 20, and Whitener, a licensed vendor of beer, brought the action, charging that males between 18 and 20 years were denied equal protection of the law.

34. In a separate concurrence, Justice Stevens argued the invalidity of gender-based classifications by quoting *Weber v. Aetna Casualty & Surety Co.*:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .

429 U.S. at 212 n.2 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

purpose.[35]

The Oklahoma statute in *Craig* burdened males rather than females. Nevertheless, the Court carefully scrutinized the record and took exception to the state's use of statistics as verification of the statute's rationale that teenage boys are more likely to drink and drive than are teenage girls:[36] "Proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."[37] The Court found inconsistencies and irrelevancies in the studies and found that the statistics provided no showing that sexual classification represented a valid substitute for other methods of regulating drinking and driving. The Court concluded that traffic safety (Oklahoma's state interest) and gender were tenuously connected at best, and that the classification constituted an invidious discrimination against young men between the ages of eighteen and twenty.[38]

By specifically relying on *Reed* and its progeny, *Craig v. Boren* synthesized the new equal protection analysis of the preceding five years and again rejected administrative convenience, archaic or overbroad generalizations about men and women, and outdated notions of women's place in the home rather than the "marketplace" or the "world of ideas"[39] as bases for gender-based classifications.

Following *Craig*, a series of sex-discrimination cases came before the Supreme Court in which the court consistently applied heightened scrutiny, even if the statutes were not always

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35. 429 U.S. at 197.

36. *Id.* at 200-01. The studies showed that although arrests of men ages 18-20 for drinking and driving significantly exceeded arrests of women the same age, the Court found the evidence unpersuasive because the disparity increased at later ages. *Id.* at 200 n.8. Furthermore, random roadside surveys conducted in 1972 and 1973 indicated that as males grew older their drinking before driving increased somewhat, while females drinking levels remained generally constant. This statistic added nothing to the state's argument that a gender line among teenagers advanced the state's interest of traffic safety. *Id.* at 203 n.16.

37. 429 U.S. at 204.

38. *Id.*

39. *Id.* at 198-99.

struck down.[40] In *Califano v. Goldfarb*,[41] the Court found an old age benefits scheme, which provided that widowers were ineligible to receive benefits unless they could show prior dependency of at least fifty per cent upon their deceased wives, to be a violation of the fifth amendment due process clause.

The Court analyzed the legislative history which showed that the statute's drafters presumed a man generally responsible for the support of his family[42] and compared it to the presumptions in *Weinberger*.[43] The Court found that, whatever the validity of the law's original assumptions, a gender-based classification could no longer suffice because it unfairly disadvantaged males by discriminating against the survivors of female contributors.[44] As in *Weinberger*, women's contributions to family support were denigrated by the legislative scheme[45] which rested on archaic and overbroad generalizations.[46]

During the same term, in *Califano v. Webster*, the Court again applied heightened scrutiny and upheld section 215 of the Social Security Act.[47] A unanimous Court held the statute had

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40. Kirchberg v. Feenstra, 101 S. Ct. 1195 (1981) (striking down on fourteenth amendment grounds Louisiana statute giving husband unilateral right to dispose of jointly owned property); Wengler v. Druggist's Mut. Ins. Co., 446 U.S. 142 (1980) (striking down Missouri statute denying death benefits to widowers unable to prove physical or mental incapacitation as a violation of fourteenth amendment equal protection); Califano v. Webster, 430 U.S. 313 (1977) (upholding remedial provision of Social Security Act because purpose was to reduce economic disparity between men and women); Califano v. Goldfarb, 430 U.S. 199 (1976) (old age benefits statute requiring men to prove financial dependence of at least 50% struck down under the fifth amendment).

41. 430 U.S. at 202 (1976). *Cf.* Wengler v. Druggist's Mut. Ins. Co., 446 U.S. at 143 (1980).

42. 430 U.S. at 215. *See* HOSKINS & BIXBY, WOMEN & SOCIAL SECURITY: LAW AND POLICY IN FIVE COUNTRIES, SOCIAL SECURITY ADMINISTRATION RESEARCH REPORT No. 42, at 77 (1973). The original social policy behind the Social Security Act was to benefit the persons who suffered at the wage earner's death, namely the wage earner's dependents. Therefore, dependency, not need, was the criterion for inclusion. 430 U.S. at 213-14. In 1950, the benefits changed, and there is no evidence that Congress intended different treatment for the benefit of non-dependent wives. *Id.* at 216. Assumptions about support and dependency, however, cannot justify sex-based discrimination in the distribution of employment-related benefits. *Id.* at 217.

43. 420 U.S. at 643. *See supra* notes 30-31 and accompanying text.

44. 430 U.S. at 208.

45. *Id.* at 206.

46. *Id.* at 211.

47. 430 U.S. 313, 316 (1976). Before it was amended in 1972, the section provided in pertinent part:

> (3) For purposes of paragraph (2), the number of an individ-

an important governmental purpose: reducing the economic disparity between men and women caused by this country's long history of sex discrimination.[48] The statute established different methods of computing elapsed years of employment, thereby slightly advantaging retired female workers in their monthly benefit.[49]

Referring to *Ballard*, the Court found that this favorable treatment of women was not based on archaic notions of women,[50] nor was it "protective" legislation. Significantly, the statute's purpose was to remedy past discrimination by integrating women into the "marketplace."[51]

II. LEGISLATIVE HISTORY

The statute challenged in *Goldberg* was the 1948 Military Selective Service Act (MSSA),[52] which provided for the achievement and maintenance of an adequate armed strength to insure the nation's security.[53] Included in the MSSA was a section re-

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> ual's elapsed years is the number of calendar years after 1950 . . . and before—(A) in the case of a woman, the year in which she died, or if it occurred earlier but after 1960, the year in which she attained age 62.
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> . . . .
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> (C) in the case of a man who has not died, the year occurring after 1960 in which he attained (or would attain) age 65.

42 U.S.C. § 415(b)(3) (amended 1972).

48. 430 U.S. at 317. *Cf.* Kahn v. Shevin, 416 U.S. 351, 355 (1974) (State tax law discriminated in favor of women; however, classification was not arbitrary because statute advanced social policy of cushioning financial impact of spousal loss on persons particularly burdened.).

49. 430 U.S. at 314-16. "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Id.* at 318. Kahn v. Shevin, 416 U.S. 351, 353 (1974). Therefore, allowing women to eliminate extra low-earning years from their calculations for social security benefits directly remedies years of discrimination. 430 U.S. at 318.

50. 430 U.S. at 317. *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1974) (Naval male and female line officers are not similarly situated; hence, different treatment does not reflect archaic and overbroad generalizations.).

51. *Cf.* Stanton v. Stanton, 421 U.S. 7 (1975) (Utah statute establishing child support requirements based on gender of child struck down for its effect of perpetuating role-typing and limiting options for female children).

52. M.S.S.A., ch. 625, 62 Stat. 604 (1948) (current version at 50 U.S.C. App. §§ 451-473 (1981)).

53. 50 U.S.C. App. § 451(b) (1981).

> The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accor-

quiring registration of men between the ages of eighteen and twenty-six.[54] Registration procedures, however, were revoked by President Ford in March 1975 who intended to revise them.[55]

In response to the Soviet armed invasion of Afghanistan, President Carter announced in his 1980 State of the Union Address the necessity of reinstituting military registration.[56] As an integral part of renewed registration, President Carter recommended that the MSSA be modified to include women.[57]

Congress conducted hearings, inviting testimony from military commanders and Department of Defense representatives.[58] During those hearings the registration of women was debated at length, resulting in persuasive testimony from both military and administrative witnesses that: (1) there were no administrative

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> dance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

50 U.S.C. App. § 451(c) (1981).

54. 50 U.S.C. App. § 453 provides in pertinent part:

> 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.

55. Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975), which provided in pertinent part: "[I]n order to evaluate an annual registration system, existing procedures are being terminated and will be replaced by new procedures which will provide for periodic registration."

The result was the highly controversial All-Volunteer Army. By 1979, Congress and the military expressed substantial doubt that the country's security needs were adequately met by the system. Complaints included increased "difficulty in recruiting sufficient manpower to meet active duty levels," substantial deficiency in numbers of the Selected Reserve—the units which would augment active military forces in a time of mobilization—and critical shortages of doctors and other skilled personnel. S. REP. No. 96-197, 96th Cong., 1st Sess. 2 (1979), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1820-21.

56. 16 WEEKLY COMP. PRES. DOC. 198 (Jan. 23, 1980).

57. PRES. RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM—A REPORT TO CONGRESS PREPARED PURSUANT TO PUB. L. 96-107 (Feb. 11, 1980).

58. *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1678 (1980) [hereinafter cited as *Hearings on S. 2294*].

obstacles to registering women as well as men,[59] (2) even in a time of mobilization women would be useful and necessary for support functions,[60] (3) studies showed women's performance in the military is high, including under tested field conditions with sexually mixed units,[61] (4) in some areas of the military women perform with skill superior to men,[62] and (5) women would provide a valuable addition to the national registration pool.[63]

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59. 409 F. Supp. at 599 n.18 (quoting deposition of Bernard Rostker, Director of Selective Service System (May 13, 1980)).

60. *Id.* at 600-02. Assistant Secretary of Defense Robert Pirie projected that by 1985, 250,000 women will be on active duty in the military. If there were a mobilization, 80,000 additional women could be used. *Hearings on S. 2294, supra* note 58 (testimony of Robert B. Pirie, Jr.) (March 5, 1980).

During the Korean War, the Department of Defense unsuccessfully attempted to recruit 100,000 women to meet personnel needs. 509 F. Supp. at 600 n.22 (citing U.S. DEP'T OF DEFENSE, BACKGROUND STUDY—USE OF WOMEN IN THE MILITARY 3 (2d ed. 1978)). Therefore, if mobilization were to occur, the Department of Defense could not rely on filling all of its support jobs with women volunteers. 509 F. Supp. at 600 n.22.

61. 509 F. Supp. at 604 n.30. "The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women. The Administration strongly believes they should be available for services in the jobs they can do." *Hearings on S. 2294, supra* note 58 (testimony of Robert B. Pirie, Jr.) (March 5, 1980). *See* Owens v. Brown, 455 F. Supp. 291, 295 (D.D.C. 1978) (No Navy report evaluating male and female capabilities has revealed that women lack the native ability to perform competently in positions now held only by men). Another report found: "Our experience with the enlisted women has been very good. The quality is high; the performance is high; the capabilities are outstanding." Goodman, *supra* note 2, at 255-56 n.114. *See also Hearings on Military Posture and H.R. 10929 and H.R. 7431 Before the House Comm. on Armed Services.* 95th Cong, 2d Sess. 1179-88 (1978). For a discussion of military exercises conducted in 1977 and 1978 to study women's performance in mixed units under field conditions, see Goodman, *supra* note 2, at 257; 126 CONG. REC. S6548 (daily ed. June 10, 1981) (remarks of Sen. Hatfield).

62. 101 St. Ct. at 2665 n.8 (Marshall, J. dissenting). According to the Senate Armed Services Committee:

> [B]asically the evidence has come before this committee that 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 that the jobs are being performed with the same, if not in some cases, with superior skill.

Hearings on S. 2294, supra note 58, at 1678 (remarks of Sen. Cohen).

63. 509 F. Supp. at 600 n.20 ("The current uniform opinion of the armed services and Department of Defense is that women inductees could be utilized, and that it would be valuable to include women in the pool of registrants available for the draft."). "The representatives of the various armed services all testified that they would have no objection to the registration of women." *Id.* at 603 n.30. During the Senate debate, some senators spoke enthusiastically about women's role in the military. For example:

> Let me begin by saying that there is a clear military justification to register women. I have had an opportunity to study the role women now play in our military forces, and I have been

Underlying the Administration's recommendation to include women in any registration scheme was its conviction that equity demanded universal registration.[64] A Defense Department witness testified:

> The President's decision to ask for authority to register women is based on equity. It is a recognition of the reality that both men and women are working members of our society and confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military is no exception. Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstituted.[65]

Despite persuasive evidence from the Administration and

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impressed by it, and let me spell out those conclusions that I have reached as a result of this study.

First, women in noncombat positions have made significant contributions to the military . . . .

. . . .

Second, in the event of mobilization there will be a military role for an increased number of women . . . .

. . . .

The Manpower Subcommittee has also had the opportunity to study the Maxivac and the Rostker reports which indicate that the Armed Forces could absorb up to a 35-percent female base without in any way interfering with combat readiness.

So while there may not be a military need for women, there is a significant military justification for using them in a period of mobilization.

126 CONG. REC. S6536 (daily ed. June 10, 1980) (remarks of Sen. Cohen).

64. Rostker v. Goldberg, 101 S. Ct. at 2659.

65. 509 F. Supp. at 605 n.31. *Proposed Reinstitution of MSSA: Hearings Before the Subcomm. on Mil. Personnel of the Armed Services Comm. of the House of Representatives*, 96th Cong., 2d Sess. 2 (March 5, 1980) (statement of Robert B. Pirie, Jr., Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics).

> By "considerations of equity", the military experts acknowledged that female conscripts can perform as well as male conscripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft. Thus what the majority so blithely dismisses as "equity" is nothing less than the Fifth Amendment's guarantee of equal protection of the laws which "requires that Congress treat similarly situated persons similarly."

101 S. Ct. at 2671 (Marshall, J., dissenting).

the military that women would enhance the armed forces, Congress virtually ignored both the factual testimony and the equal protection policy and voted to exclude women from registration.[66]

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66. 101 S. Ct. at 2649. Included in the Joint Resolution passed by the House on April 22, 1980 and by the Senate on June 12, 1980, were the following specific findings:

> (1) Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and makes rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary.
> (2) An ability to mobilize rapidly is essential to the preservation of our national security.
> (3) A functioning registration system is a vital part of any mobilization plan.
> (4) Women make an important contribution to our national defense, and are volunteering in increasing numbers for our armed services.
> (5) Women should not be intentionally or routinely placed in combat positions in our military services.
> (6) There is no established military need to include women in a selective service system.
> (7) Present manpower deficiencies under the All-Volunteer Force are concentrated in the combat arms—infantry, armor, combat engineers, field artillery and air defense.
> (8) If mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements.
> (9) The need to rotate personnel and the possibility that close support units could come under enemy fire also limits the use of women in non-combat jobs.
> (10) If the law required women to be drafted in equal numbers with men, mobilization would be severely impaired because of strains on training facilities and administrative systems.
> (11) Under the administration's proposal there is no proposal for exemption of mothers of young children. The administration has given insufficient attention to necessary changes in Selective Service rules, such as those governing the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women.
> (12) A registration and induction system which excludes women is constitutional.

S. REP. No. 96-826, 96th Cong., 1st Sess. 160 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2650-51 [hereinafter cited as S. REP. No. 96-826].

> In concluding that a registration and induction system involving only male citizens is the best course to insure the country's preparedness and its ultimate ability to protect itself, the committee was mindful of arguments made by some critics of

Although Congress claimed that it reviewed the issue constitutionally,[67] it repeatedly framed the question improperly. Instead of asking whether there was substantial justification for excluding women from registration, Congress asked whether the Constitution required that women be included.[68]

Rather than examine the issue of women and registration, Congress mistakenly focused on women and combat.[69] Congress justified exclusion because: (1) although historically women have defended themselves, they have never been asked to engage in aggressive combat,[70] (2) sexually mixed military units involve unknown risks,[71] (3) women in combat might affect the national resolve in wartime,[72] (4) there was no military need to draft women (because a sufficient number of men would be available),[73] (5) military flexibility would be threatened by the inclusion of

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> registration that the Constitution requires both men and women to be treated equally. The argument rests on an interpretation of the principle of equal protection that would mandate an equal sharing among men and women of the burden of registration and conscription. The committee has carefully considered constitutional arguments raised in detailed statements from opponents of a male-only registration and induction system. In the committee's view, the arguments for treating men and women equally—so compelling in many areas of our national life—simply cannot overcome the judgment of our military leaders and of the Congress itself that a male-only system best serves our national security.

Id. at 159, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2649.

67. 101 S. Ct. at 2651.

68. Goldberg v. Rostker, 509 F. Supp. at 596-97; see *supra* note 11.

69. S. REP. No. 96-826 *supra* note 66 at 157, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2647.

> The committee remains convinced that registration is vitally necessary and that women should not be included in any registration and induction system. This judgment is based upon the committee's assessment of the military needs of the Nation, and its comprehensive study of the registration issue. It is also based on the committee's assessment of the societal impact of the registration and possible induction of women.

Id.

70. Goodman, *supra* note 2, at 260.

71. S. REP. No. 96-826, *supra* note 66 at 157, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2647.

72. *Id.*

73. 509 F. Supp. at 599 (Congress' Specific Finding No. 6: "There is no military need to include women in a selective service system"). Congress' specific findings are set out in full *supra* note 66.

women,[74] and (6) registering all women and inducting a token number would be an unsatisfactory solution; however, inducting all registered women would be administratively impossible.[75]

Congress' list of considerations assumed that registration equals the first step of conscription, which eventuates in mobilization—i.e., combat—despite the fact that military witnesses defined registration as merely a means by which the pool of available young people could be measured.[76] The argument that registering women would require their inevitable inclusion in combat, should the country mobilize, ignores Naval and Air Force statutes and Army and Marine Corps policies prohibiting women's combat participation.[77] Consequently, Congress and the military would have to rewrite law and policy before women would be allowed into battle. Thus the argument is irrelevant and fails to focus on the actual intent and scope of the proposed legislation.[78]

Congress also reasoned that women would not be excluded wholly from military service in any event because they were al-

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74. 509 F. Supp. at 598. However, according to the Selective Service System, 72 countries have military conscription, of which 10 register or conscript both men and women. *Id.* at 599 n.18.

75. *Id.* at 598. The committee confused the issue: The numbers of men or women to be drafted would always be a decision made by the military. In the proposed legislation there was no provision to include equal numbers of men and women if a draft were required; there was no provision for *any* draft specifications. Other administrative problems which the committee foresaw included housing and physical standards. As the District Court observed, "Women in the military as a group suffer only about half the lost time of men." *Id.* at 599, n.18. The height and weight differences between men and women are analogous to those between Caucasian and Asian men. Those differences have not inhibited excellent performance among Asian men. *Id.*

76. *Id.* at 602.

77. 10 U.S.C. § 6015 (1976) ("women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions"); 10 U.S.C. § 8549 (1976) (female Air Force members "may not be assigned to duty in aircraft engaged in combat missions"). The Army and Marine Corps preclude women from combat by established policy. 101 S. Ct. at 2657 (citing J.A. 86, 34, 58).

78. The District Court summarized the Government's argument as follows:

> [W]omen cannot fill all positions in the armed services, especially combat positions; in a time of mobilization the primary need of the military services will be in combat related positions and in support position personnel who can readily be deployed into combat; therefore, in order to maximize the flexibility of personnel management, women should be excluded from the MSSA.

Id. at 599-600.

lowed to volunteer.[79] This argument begged the issue of whether a registration scheme which excluded women unfairly burdened men as a class and denied equality of opportunity and responsibility to women.[80]

The bias underlying Congress' irrelevant conclusions was exposed in a single sentence of the subcommittee report that recommended both houses vote to exclude women from registration because of the "military needs of the Nation. . . . [And] *the committee's assessment of the societal impact of the registration and possible induction of women.*"[81] The committee's assessment was purely speculative; nowhere did the committee attempt to verify its conclusion.

Following the introduction of the committee report and recommendation, Senator Kassebaum[82] offered an amendment to the proposed MSSA funding allocation which would have precluded any allocation of funds if the system did not include women.[83] After lengthy debate, the Senate rejected the Kassebaum amendment.[84] On July 2, 1980, President Carter reinstituted military registration to include males only.[85]

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79. 101 S. Ct. at 2660.

80. *Cf.* Taylor v. Louisiana, 419 U.S. 522, 538 (1974). In *Taylor*, a jury system which in practice excluded women (who constituted 53% of the eligible jurors of a community) was held unconstitutional even though women could volunteer for service by submitting a written declaration of desire to serve.

81. S. REP. No. 96-826, *supra* note 66, at 157, *reprinted in* U.S. CODE CONG. & AD. NEWS 2647 (emphasis added).

82. (R. Kansas). In June, 1980, she was the only female senator.

83. H.R.J. Res. 521, 96th Cong., 2d Sess. (1980). Pub. L. No. 96-282, 94 Stat. 552 (1980) was amended to read:

> Provided: That none of the funds made available by this joint resolution shall be available for instituting or taking action to draft any individual for military service or be used for production of any selective service form used for classification which does not permit a registrant to have the option of stating that such registrant is conscientiously opposed to participation in war in any form pursuant to section 6(j) of the Military Selective Service Act.

The Kassebaum-Levin amendment would have added the following language after the word "Act": "or shall be made available for implementing a system of registration which does not include women." 126 CONG. REC. S6544 (daily ed. June 10, 1980) (remarks of Sen. Nunn).

84. 126 CONG. REC. S6549 (daily ed. June 10, 1980) (40 yeas, 51 nays, 9 abstentions).

85. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

III. COURT'S ANALYSIS OF *ROSTKER v. GOLDBERG*

A. JUDICIAL DEFERENCE

Justice Rehnquist, writing the majority opinion in *Goldberg*, constructed a rationale which is logically flawed, analytically confused and generally unpersuasive. He began by declaring that the Court must defer to the congressional determination to exclude women from registration, because of what he called a clear history of judicial deference in constitutionally mandated areas.[86] The majority argument was skewed because it did not acknowledge the uneven and controversial history of judicial deference.[87] The Court, beginning in the Warren era, had intervened when important constitutional issues, especially equal protection, were at stake,[88] a fact which Justice Rehnquist ignored when he assembled his line of cases to bolster the majority's deferential posture.[89]

The *Goldberg* majority wrote that the judiciary owes particular deference to Congress in the regulation of military affairs, because such decisions demand specific competence and are "complex, subtle and professional" in areas of training, equipping and controlling the military force.[90] The Court argued that Congress is qualified to regulate such affairs, whereas the Court is not.[91] The majority, however, did not substantiate its position that the expertise of Congress exceeds it own—a notable omission.

The deference argument is illustrative of the weakness and analytical confusion of the majority opinion. The Court cited *Gilligan v. Morgan*, a free speech case, to establish the Court's

86. 101 S. Ct. at 2651-55.

87. *See generally*, Gunther, *In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

88. *E.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1968).

89. 101 S. Ct. at 2651-55.

90. *Id.* at 2651.

91. *Id.* at 2652. *But see* Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) ("When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitably is drawn into question.").

non-competence in military affairs.[92] In *Gilligan*, however, the Court limited its deference: "[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel . . . ."[93]

While another cited case, *Orloff v. Willoughby*,[94] can be read to support the argument that the judiciary lacks competence to review military decisions, the issue there was at least fully reviewed by the Court.[95] Despite the result, the opinion suggests that the Court deferred to Congress because it concurred with the result of the case.[96]

In *Parker v. Levy* the Army court-martialled a military physician for disobedience, disloyal and disrespectful remarks made to his subordinates, and conduct unbecoming an officer.[97] Although the Court ultimately deferred on a constitutional issue, it spent thirty pages discussing the merits of the case.

These cases weaken the majority's argument that the judiciary generally and properly defers to Congress in areas constitutionally encompassing the Congressional prerogative.[98] They

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92. 101 S. Ct. at 2652 (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1972)). In *Gilligan* the Court held it could not adjudicate charges that the National Guard unnecessarily used lethal force to quell campus disturbances, because the Constitution vests such surveillance power in the legislative and executive branches of government.

93. 413 U.S. 1, 11-12 (1972).

94. See Rostker v. Goldberg, 101 S. Ct. at 2655 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1952) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.").

95. The Court admonished the Government that it properly admitted its responsibility to use professionals in their skilled areas, affirmed that the President was justified in refusing a commission to appellant, and removed itself from examining whether Orloff should be specially assigned. Orloff v. Willoughby, 345 U.S. 83, 87-93 (1952).

96. "Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party?" *Id.* at 91.

97. 417 U.S. 733 (1974). The Uniform Code of Military Justice (UCMJ) provides punishment for disobedience, insubordination, improper conduct. Art. 90 (10 U.S.C. § 890 (2) (1976)) prohibits willful disobedience of a lawful command of a superior commissioned officer; Art. 133 (10 U.S.C. § 933 (1976)) prohibits any disorders and negligences which lead to lack of good order and discipline in the armed forces.

98. *See* Powell v. McCormack, 395 U.S. 486 (1968) (invalidating House of Repre-

demonstrate the Court's history of mixed review and deference when hearing cases involving the military.

B. Equal Protection and Military Affairs

Military cases involving equal protection challenges even more persuasively argue against the majority's assertion of deference; in those cases the Court consistently has reviewed the equal protection issue.

In *Frontiero*[99] the Court examined Congress' intent in passing discriminatory legislation to attract career personnel,[100] cited the factors announced in *Reed*,[101] and held that administrative convenience could not withstand the equal protection interest at stake.[102] The plurality opinion closely examined this country's history of sex discrimination[103] and recommended that gender-based classifications be subject to strict scrutiny.[104]

Clearly the *Frontiero* Court did not view the question as a purely military one or as one deserving deference. Instead, it scrutinized the governmental purpose, the effect of the statute in furthering stereotypical sex roles,[105] and finally invalidated the classification as invidious.[106]

Although *Ballard* upheld the Navy provisions which created different promotion standards for men and women,[107] the *Bal-*

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sentatives' denial of seat to Adam Clayton Powell who had been charged with misappropriation of public funds). "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 549.

99. For a brief discussion of *Frontiero v. Richardson* see *supra* notes 18-20 and accompanying text.

100. Frontiero v. Richardson, 411 U.S. 677, 679 (1972).

101. Reed v. Reed, 404 U.S. 71 (1971). For a discussion of the factors outlawed by *Reed*, see *supra* notes 18-20 and accompanying text.

102. 411 U.S. at 690-91.

103. *Id.* at 684-88.

104. *Id.* at 688. "With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.*

105. *Id.* at 688-90.

106. *Id.* at 690-91.

107. For a discussion of *Schlesinger v. Ballard*, see *supra* notes 21-24 and accompanying text.

lard Court reviewed the law and recent equal protection case history[108] in reaching its decision. The Court distinguished *Ballard* from both *Frontiero* and *Reed* by finding no overbroad generalizations in the Navy policy.[109] The male and female naval officers in *Ballard* were not similarly situated;[110] therefore, the legislative classification was rational because it compensated women for reduced career opportunities.[111] The *Ballard* Court also determined that administrative convenience was not the basis of the law,[112] and specifically found that the statute served the flow of military promotions and reflected current Navy needs.[113]

Thus, while the Court regards legislative acts most seriously and sometimes defers to Congress by acknowledging Congress' prerogative in certain constitutional areas, the Court has not always refused to review military affairs questions and has often adjudicated those involving equal protection challenges. In this context, it is plain that when *Goldberg* came before the Court, the Court had decided precedent by which to review the equal protection argument and deliberately chose not to do so.

C. THE *Goldberg* EQUAL PROTECTION ANALYSIS

While refusing to label *Goldberg* either a strictly military case or a sex discrimination case, the Court did acknowledge that *Craig* requires the articulation of an important governmental interest, which the Court identified as "raising and supporting armies."[114] There was no proof, however, that registering women would interfere with the smooth functioning of the military. In fact, the opposite was true.[115] Even assuming the important interest was articulated, the Court should have analyzed whether a gender-based classification was substantially related to raising and supporting armies. Instead, the Court adopted the

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108. Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1974).

109. *Id.* at 508.

110. *Id.* The Court noted that "[t]he complete rationality of this legislative classification is underscored by the fact that in corps where male and female lieutenants are similarly situated, Congress has not differentiated between them with respect to tenure." *Id.* at 509.

111. *Id.* at 508.

112. *Id.* at 510.

113. *Id.*

114. 101 S. Ct. at 2654.

115. For a discussion of testimony before congressional subcommittees regarding women's roles in the military, see *supra* notes 59-68 and accompanying text.

congressional finding that a male-only registration more efficiently serves national security.[116]

The Court then announced the direction of its analysis: When a congressional decision is challenged "on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but *whether that chosen by Congress denies equal protection of the laws.*"[117] However, the Court never reviewed whether Congress' alternative denied equal protection. Instead the Court became bogged down in the issue of judicial deference and whether women ought to be put into combat.

The Court improperly relied on *Ballard* again, arguing that the case best demonstrated the reconciliation achieved between Congress and the Court, without noting that intermediate scrutiny had been applied there.[118] The Court also cited *Orloff v. Willoughby,* even though that case had nothing to do with gender-based classifications, and, as has been established already, the Court applies a separate standard in military cases which involve equal protection challenges.[119]

The majority was particularly disingenuous in asserting that "[w]e cannot 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."[120] The Court neglected to state the constitutional importance of the "alternative"—equality under the law. And by deferring so thoroughly to Congress' findings,[121] the Court ignored the obvious inconsis-

116. 101 S. Ct. at 2660. The Court emphasized administrative burdens involved in drafting women during mobilization, citing alleged training and housing problems, and the detrimental effect on military flexibility. However, the proposed legislation did not include mobilization plans and, as the dissent points out, in case of mobilization the military would properly determine its immediate needs. *Id.* at 2673. Furthermore, Congress offered no proof that registering women was detrimental to the smooth operation of the military. See *supra* notes 59-65.

117. 101 S. Ct. at 2654 (emphasis added).

118. *Id.*

119. For a discussion of the Court's equal protection analysis in military cases see *supra* notes 99-113 and accompanying text.

120. 101 S. Ct. at 2655.

121. Such deference had not been the former position of this Court: "This Court need not in equal protection cases accept at face value assertions of legislative purposes,

tency between the congressional findings and the military and administration testimony,[122] inconsistencies similar to those expressly rejected in *Craig*.

The majority erred just as Congress did by adopting the idea that registration means a draft which inevitably results in combat[123] and that combat restrictions form the basis of the exclusion of women from registration.[124] However, Congress did not determine that drafting women would be harmful to the military, only that there was no necessity to draft women.

Even assuming women would be drawn into combat, the Government could not produce any factual studies to support its argument that women could not perform well on the battlefield. In fact, military studies have shown the opposite.[125] And even if women were to be legitimately barred from combat, they could fill support positions in the United States and rear areas.[126] However, combat was not the issue of the registration statute,

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when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1974).

122. See *supra* notes 59-66 and accompanying text for discussion of subcommittee testimony.

123. 101 S. Ct. at 2657. "Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. . . . The purpose of registration, therefore, was to prepare for a draft of combat troops." *Id.*

124. *Id.* Combat is difficult to define. In military parlance it apparently has no technical or general meaning. Congress gave the Secretary of Defense six months to submit a definition, to which he responded: Combat is "engaging an enemy or being engaged by the enemy in an armed conflict;" and a person is "in combat" if "he or she is in a geographical area designated as a combat/hostile fire zone by the Secretary of Defense . . . ." The Secretary conceded that under this definition women had been in combat in combat zones in World War II and earlier. Goodman, *supra* note 2, at 258.

125. Goodman, *supra* note 2, at 255-57. The performance of women was evaluated by the Army during 72-hour field exercises in which the percentage of women varied up to 35% of total personnel in combat support and combat service support companies. The result: The proportion of women had no negative effect on performance. *Id.* at 256-57 (citing U.S. ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL AND SOCIAL SCIENCES, WOMEN CONTENT IN UNITS FORCE DEVELOPMENT TEST (MAX/WAC) (1977)) [hereinafter cited as 1977 WOMEN'S DEVELOPMENT TEST]. During annual war games in Germany, women's performance was studied. In a 30-day sustained combat exercise women "did not impair the performance of combat support and combat service support units." Goodman, *supra* note 2, at 257.

126. 101 S. Ct. at 2668 (citing *National Service Legislation: Hearings on H.R. 6569 before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (1980) (testimony of Robert B. Pirie, Jr., Ass't Secretary of Defense) (unpublished)).

and Congress' and the Court's preoccupation with it was extraneous, although ultimately conclusive to their respective decisions.[127]

The majority asserted that the exemption of women from registration was "closely related" to the governmental objective[128] without having honored a proper equal protection review, without acknowledging the clear inconsistencies between congressional testimony and findings, and without establishing a basis for blatant archaic and overbroad generalizations about women. The Government did not establish that men and women are not similarly situated as to combat, and it did not satisfactorily confront the essential issue of whether men and women are similarly situated as to registration.[129]

D. Justice Marshall's Dissent

Justice Marshall's dissent[130] clarified the errors of the majority opinion: (1) the case presents one question: Whether the exclusion of women from the MSSA contravenes the equal protection component of the fifth amendment,[131] (2) heightened scrutiny must be applied because a purely gender-based classification is at issue,[132] and (3) the Government failed to carry the burden of showing the substantial relation between the statute's discriminatory means and asserted governmental objective.[133] Additionally, the Court never asked whether some less restrictive alternative was available to accomplish the Government's purpose.[134]

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127. "The policy precluding the use of women in combat is, in the committee's view, the most important reason for not including women in a registration system." S. Rep. No. 96-826, *supra* note 66, at 157, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2647, *cited in* 101 S. Ct. at 2658.

128. 101 S. Ct. at 2658. "The exemption of women from registration is not only sufficiently but closely related to Congress' purpose in authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops." *Id.*

129. "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (Louisiana statute empowering husband to unilaterally alienate property declared unconstitutional under the due process clause of the fourteenth amendment.).

130. 101 S. Ct. at 2662 (which Brennan, J., joined).

131. *Id.*

132. *Id.* at 2663.

133. *Id.*

134. *Cf.* Dothard v. Rawlinson, 433 U.S. 321 (1976) (Title VII prohibits statutory

As for the Court's deference,

> One . . . safeguar[d] of essential liberties is the Fifth Amendment's guarantee of equal protection of the laws. When, as here, a federal law that classifies on the basis of gender is challenged as violating this constitutional guarantee, it is ultimately for this Court, not Congress, to decide whether there exists the constitutionally required close and substantial relationship between the discriminatory means employed and the asserted governmental objective.[135]

Justice Marshall's opening and most compelling point, one which he regrettably did not elaborate on, was that Congress' decision and the majority's affirmation constituted an "[i]mprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.' "[136]

IV. CRITIQUE: *ROSTKER V. GOLDBERG* AND APPLICATION OF THE *CRAIG* TEST

Rostker v. Goldberg fits logically into the *Craig* line of cases because the exclusion of women from military registration is based on a constitutionally sensitive criterion—sex alone. As in *Weinberger, Craig,* and *Goldfarb,* males based their claim on the principle that the law unfairly burdened them as a class and benefitted females.[137] The *Goldberg* factors parallel those in

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height and weight requirements excluding 40% of the female population but only 1% of the male population from job as correctional counselor.). The Court recommended individual testing, fairly administered, rather than overbroad classifications, to determine physical strength equal to job requirement. *Id.* at 332.

135. 101 S. Ct. at 2664. "When it appears that an Act of Congress conflicts with [a constitutional] provisio[n], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less." *Id.* at 2676 (quoting Trop v. Dulles, 356 U.S. 86, 104 (1958)).

136. 101 S. Ct. at 2662 (Marshall, J. dissenting) (quoting Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J. concurring)).

137. Goldberg v. Rostker, 509 F. Supp. 586, 588 (E.D. Pa. 1980). The District Court stated plaintiffs' constitutional argument as follows:

> [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.

Id.; Goldberg v. Tarr, 510 F. Supp. 292 (E.D. Pa. 1980).

prior sex-discrimination equal protection challenges: As to military registration, males and females were similarly situated but treated differently; the classification was based on archaic and overbroad generalizations regarding women's roles, and the classification could not be upheld on the basis of its administrative expedience. The difficulty in applying equal protection analysis to *Goldberg* did not center on identifying the important governmental objective. There is no dispute that national security, and more particularly the raising of armed forces, is an important government objective, although there was no showing that registering or even drafting women would be detrimental to that interest. The difficulty arose in establishing the substantial relatedness between the important governmental objective and the gender-based classification.[138]

What the *Goldberg* majority failed to do—and what is critical to a proper equal protection analysis—was to inquire beyond Congress' specific findings and discover the actual purpose of the gender-based classification.[139] That necessarily involves scrutiny of the legislation's language, history and structure. Given the inconsistent conclusions resulting from subcommittee hearings and the congressional findings, the Court had every reason to make such an inquiry, which it chose not to do.

There were factors which made the *Goldberg* classification clearly questionable. Military and Defense Department witnesses testified that the quality of women's contribution to the All-Volunteer force equalled, and at times exceeded, men's contributions,[140] which underlines the argument that women enhance the effectiveness of a military force. Military studies show that in field exercises women did not reduce the effectiveness of their units.[141] This suggests that stereotypes about women's physical weakness and emotional instability cannot be supported factually. Experiments involving men and women living

138. For a discussion of the difficulty in correlating the objective sought by a statute or rule with classifications which are gender-based, see Owens v. Brown, 455 F. Supp. 291 (1978).

139. L. TRIBE, *supra* note 10, at 1086.

140. For a brief discussion of women's excellent performance in the military, see *supra* note 61 and accompanying text.

141. For a description of women's performance in field exercises, see *supra* note 125 and accompanying text.

and working together in close quarters showed no reduction in discipline or morale,[142] which suggests that with training and proper management there would be no significant adverse effects to mixed units of soldiers.

Given this unrefuted evidence, it can be concluded that the inclusion of women in the military does not reduce military effectiveness and, by logical extension, that women's exclusion from the military cannot be proved to increase military effectiveness. That is the constitutional question: Does the exclusion of women as a class promote the important governmental objective of advancing an effective armed force? The answer clearly is that it does not.

The other proper line of inquiry is whether the congressional basis reflects stereotypical or overbroad generalizations about the role of women.[143] Case history shows that such classifications cannot pass constitutional muster.[144] One Senator's remarks about women and the family, made during the debate on Senator Kassebaum's proposed amendment, suggests that stereotypical notions of women's proper place abound in certain governmental quarters.[145]

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142. Owens v. Brown, 455 F. Supp. 291, 308-09 (D.D.C. 1978). The Commander of the Atlantic Fleet has said commanding officers have "sufficient authority" to deal with individuals who have problems adjusting to mixed crews aboard Navy vessels: "Adjustment and thawing of preciously held barriers to the presence of women and acceptance by the male ship's company are social facts of life which must be recognized and dealt with." *Id.* at 309 (citing Defendant's Answers to Plaintiffs Second Interrogatories, Nos. 37-39 & Attach 7). The Chief of Naval Operations compared adjusting to mixed crews with adjusting to mixed dormitories on college campuses: Careful planning is required. *Id.* (citing Defendant's Answers to Plaintiffs Second Interrogatories, Nos. 37-39 & Attach 7, Third Endorsement on USS Sanctuary, at 6).

143. L. TRIBE, *supra* note 10, at 1089-92.

144. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1974), discussed *supra* notes 25-32 (finding irrational a Social Security Act provision which denigrated women's financial contributions to family support and was based on "archaic and overbroad" generalizations about women); Frontiero v. Richardson, 411 U.S. 677 (1972), discussed *supra* notes 18-20 (Air Force statute which prescribed that male dependents prove their financial dependence on their spouses before being eligible for benefits struck down as undermining females' developing social roles).

145. Maybe I am old fashioned, and I am sure some people will accuse me of living in the 18th or 19th century, but I was brought up to believe that the basic fundamental unit of Government in this country was the family. This country was based on the family unit and a belief in God, and a belief in a religious heritage of whatever denomination, and that a family was composed of a mother and a father and children . . . .

Rostker v. Goldberg, properly analyzed under heightened scrutiny, cannot stand. Although Congress' decision complies with the first requirement of the test by having an articulable, important government objective, its gender-based classification cannot be proved to be substantially related to the governmental objective.

> . . . .
>
> I am certainly not here to say that women should not have equal job opportunities, equal rights in pay. I agree with all of that. But on the basis of equity to say that we are involuntarily someday in the future possibly going to take them out of their homes, I cannot even conceive of that in the tradition of the American family and what it has meant to society.
>
> . . . .
>
> . . . I am not about to vote for one more strike against the American family and the traditionalism we have known in this country.
>
> . . . .
>
> How ridiculous can we get when we cannot recognize anymore in the popular fad of the time, that we are going to try to have unisex and make everybody equal, that we cannot recognize that there are basic fundamental physical and biological differences between men and women?

126 CONG. REC. S6539-40 (daily ed. June 10, 1980) (remarks of Sen. Garn). In the same debate, Senator Mark Hatfield offered a reasoned counter-voice:

> Once the combat issue is put in proper perspective and the evidence of women's recognized ability to perform military functions is assessed, it becomes apparent that an exclusion of women from a draft registration requirement would be the product of the archaic notion that women must remain "as the center of home and family." One court apparently recognized as much about the Congress which enacted the prior draft law. In upholding that law's exclusion of women, the court stated: "In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."
>
> At one time judicially accepted, such romantically paternalistic underpinnings of sex-based classifications are intolerable under current equal protection doctrine. Overbroad generalizations concerning one sex or the other no longer can [sic] used to substitute for a functional, gender-neutral means of distinguishing between the physically unfit and the able bodied. The paternalistic attitude inherent in exclusion of women from past draft registration requirements not only relieved women of the burden of military service, it also deprived them of one of the hallmarks of citizenship. Until women and men share both the rights and the obligations of citizenship, they will not be equal.

Id. at S6548. (remarks of Sen. Hatfield).

V. CONCLUSION

Early in the Burger era the Court tried to find a new equal protection footing, somewhere between the permissiveness of rational basis and the rigidity of strict scrutiny. What resulted was a fragmentary body of law, sometimes born of poorly elaborated rationale, sometimes expediently chosen.[146] The questions which remain after *Goldberg* reveal how insubstantial the Court's progress and independence have been.

It would go too far, perhaps, to assert that this opinion reflects an alarming shift by the Court. More likely the Court, particularly viewing such regressive legislative trends as the ERA backlash currently underway, presumed that a decision which would incorporate women in a registration system would wreak social havoc. This fear is borne out neither by the popular polls taken regarding the ERA (in which a clear majority of Americans favored its passage),[147] nor in a recent poll conducted by a national periodical which shows that a majority of the magazine's female readers favor not only military registration but the elimination of the combat exclusion as well.[148] What the male-dominated Congress and male-dominated Supreme Court more probably reflect is the tired delusion that the military—and war itself—is a preeminently male world.

> The trenches, combat service in the air, transport jobs in advanced positions, and even the other less brilliant arenas of activity on the theatre of

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146. *See* Gunther, *supra* note 87, at 19.

147. A Gallup poll of September 1980 showed 64% of Americans favored the ERA; *Time Magazine's* June 1981 poll reported the ERA was favored 2-1; and an NBC Associated Press poll in July 1981 showed 71% favored the amendment. ERA COUNTDOWN CAMPAIGN KIT: STRONG PUBLIC SUPPORT FOR ERA (1981).

148. (1) Do you think there should be more servicewomen?—Yes: 78%; No: 22%.

. . . .

(3) Do you think women should be restricted to noncombat duties as currently prescribed by law and military policy?—Yes: 40%; No: 60%.

. . . .

(6) Do you think the military is a good career for a woman?—Yes: 72%; No: 28%.

(7) Should women be drafted in times of crises?—Yes: 68%; No: 32%.

This is What You Thought About . . . Women's Role in the Military, GLAMOUR, March 1982, at 33.

> war, are the last remaining strongholds of men. I suspect that men might rather vacate the arena altogether than share it with women. Drafting women for the real work of war—not for the pretty, sideline jobs where you can wear giddy uniforms and not get dirtied up—would make war much less inviting to the males. Of course, once we got a serious discussion of such a draft, we should hear Chivalry crying out that females are much too frail to be subjected to the inhuman cruelties and hardships of what is, after all, "a man's game." Nonsense! Such a concept of Chivalry is hypocritical. Already it has blankly averted the men's gaze from the women who do so much of the world's dirty work—as often as not in the face of discrimination against their sex.[149]

Sara MacDwyer

149. Amelia Earhart, *quoted in* WOMEN, WAR, AND EQUALITY, *supra* note 2, at 269. *See generally* P. BRIAND, DAUGHTER OF THE SKY (1960).