

EQUAL PROTECTION UNDER THE MILITARY SELECTIVE SERVICE ACT: REVISITING *ROSTKER* AND THE EXCLUSION OF WOMEN FROM THE MSSA’S MANDATE

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INTRODUCTION

The Military Selective Service Act (MSSA) requires men, but not women, to register with the government in preparation for a possible future draft.¹ The basic purpose of the registration requirement is to provide military manpower in an “administratively manageable” way in the event Congress enacts a draft.² Women, however, have been excluded from this requirement.³ As Professor Kerber⁴ put it, “The obligation of military service, which involves substantial physical risk, has not rested evenly on the population as a whole.”⁵ The rationale behind the exclusion of women from this requirement is that women have historically been ineligible to

1. *Fast Facts, Who Must Register*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/FSwho.htm> (last updated Aug. 21, 2014).

2. Major Scott E. Dunn, *The Military Selective Service Act’s Exemption of Women: It Is Time to End It*, ARMY LAW., April 2009, at 1, 9.

3. See *Fast Facts*, *supra* note 1.

4. Professor Linda Kerber is a professor in the Department of History at the University of Iowa.

5. Linda K. Kerber, “*A Constitutional Right to Be Treated Like . . . Ladies*”: *Women, Civic Obligation, and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 96 (1993).

partake in combat-ready positions in the military.⁶ In 2013, the Pentagon reversed its policy regarding women and combat roles. Defense Secretary Leon Panetta announced that women would now be eligible to serve in approximately 237,000 military jobs once off-limits to them.⁷ There are currently 1.4 million members of the active-duty military, of which 14% are women.⁸ The services have until January 1, 2016, to integrate women into combat roles in accordance with the new policy.⁹ The announcement by the Pentagon overturned a 1994 Pentagon policy prohibiting women from being assigned to ground combat units below the brigade level.¹⁰

In 1981, the Supreme Court addressed the issue of whether the exclusion of women from the MSSA's mandate is constitutional. The Court, in *Rostker v. Goldberg*, ruled that the exclusion of women from the registration requirement is not a violation of the Equal Protection Clause because women are not able to perform combat-related positions.¹¹ The Court concluded that men and women are not similarly situated, and no Equal Protection claim can be sustained because of this difference in ability to perform in combat positions.¹² However, the Pentagon's recent announcement, which overturned a decades-long policy of excluding women from combat roles, should prompt the Court to reexamine its conclusion in *Rostker*. As women are not excluded from combat positions as of 2013, the argument that men and women are not similarly situated is no longer supportable. The *Rostker* decision's rationale should be reviewed in light of the Pentagon's recent choice to allow women in combat positions. If reexamined, the Supreme Court would likely hold that the categorical exclusion of women from the MSSA's registration requirement is a violation of the Equal Protection Clause. The Fourteenth Amendment prohibits any state from denying "any person within its jurisdiction the equal protection of the laws."¹³ The Fifth Amendment, which applies to the federal government, does not contain an equal protection clause, but the Supreme Court has held that equal protection is implicit in the Due Process

6. *Women and the Draft*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/FSwomen.htm> (last updated Feb. 25, 2014); see also *Registration Information, Backgrounder: Women and the Draft in America*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/wmbkgr.htm> (last updated Feb. 25, 2014).

7. Tom Vanden Brook, *Pentagon Opening Front-Line Combat Roles to Women*, USA TODAY, June 18, 2013, available at <http://www.usatoday.com/story/news/politics/2013/06/18/women-expected-on-front-lines-by-2016/2434911/>.

8. *Id.*; see also Lolita C. Baldor, *AP Sources: Pentagon Opens Combat Roles to Women*, THE BIG STORY (Jan. 23, 2013), <http://bigstory.ap.org/article/panetta-opens-combat-roles-women>.

9. David Alexander & Phil Stewart, *Pentagon Unveils Places for Moving Women into Combat Roles*, REUTERS (June 18, 2013), http://www.reuters.com/article/2013/06/19/us-usa-defense-women-idUSBRE95H1G720130619_2.

10. Baldor, *supra* note 8.

11. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

12. *Id.* at 78–79.

13. U.S. CONST. amend. XIV, § 1.

Clause of the Fifth Amendment.¹⁴ When the government classifies individuals, such classifications are subject to review under the Equal Protection Clause.¹⁵ The MSSA should be re-evaluated under the Equal Protection Clause due to the unprecedented change in women's military status with respect to combat positions.

Part I of this Article examines the impact of the exclusion of women from the MSSA's registration requirement. Part II analyzes the Supreme Court's decision in *Rostker v. Goldberg*, where the Court upheld the exclusion of women from the draft requirement based, in part, on the fact that women were not eligible to serve in combat roles in the military. Part III revisits the *Rostker* decision and examines its reasoning given the Pentagon's recent decision to allow women to serve in combat roles.

I. THE IMPACT OF THE MILITARY SELECTIVE SERVICE ACT'S EXCLUSION OF WOMEN

A. *Explanation of the Military Selective Service Act*

The MSSA requires every male citizen and male alien between the ages of eighteen and twenty-six to register with the Selective Service System for preparation for a future draft.¹⁶ Women are exempt from this requirement, primarily because the registration has been viewed as a method of preparing combat troops.¹⁷ In 1981, the Supreme Court announced in *Rostker v. Goldberg* that it was not a violation of the Equal Protection Clause to exclude women from the Selective Service Act's mandate to register for the draft.¹⁸ Several men brought suit challenging the constitutionality of the Selective Service Act.¹⁹

The MSSA was enacted in 1948 and today is very similar to its original version.²⁰ The Selective Service System was designed to provide the Department of Defense with a list of potential male soldiers.²¹ Failure to comply with the registration requirement is punishable by a fine of up to \$250,000 and/or imprisonment for up to five years.²² All male citizens and

14. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see also Leslie Ann Rowley, *Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?*, 36 DUQ. L. REV. 171, 174 (1997).

15. Rowley, *supra* note 14.

16. See *Fast Facts*, *supra* note 1; see also Dunn, *supra* note 2, at 1.

17. Dunn, *supra* note 2, at 1.

18. *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981).

19. *Id.* at 61.

20. Rowley, *supra* note 14, at 172.

21. *Id.* at 172-73.

22. *Selective Service and You*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/sssyu/sssyu.htm> (last updated Feb. 7, 2013).

male aliens residing in the United States must register within thirty days of their eighteenth birthday.²³ The relevant part of the MSSA states:

[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . 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.²⁴

In 1975, President Ford discontinued the registration for the draft.²⁵ President Carter reactivated the registration requirement for the draft in 1980.²⁶ He requested that Congress amend the MSSA to authorize the inclusion of women in the registration requirement.²⁷ However, Congress refused to amend the MSSA²⁸ and allocated funds for the registration of males but declined to authorize funds for females.²⁹ The rationale for excluding women from the registration requirement was based primarily on the prohibition of women from combat roles.³⁰

B. Military's Use of Conscription

The military's use of conscription is advantageous for two primary reasons. First, conscription guarantees maintenance of a certain level of forces that may be called upon to address national defense needs.³¹ Proponents of the registration requirement argue that an all-volunteer force would be inadequate in the event of a major national crisis.³² Second, conscription brings talented individuals into the military that would not otherwise voluntarily join.³³ Individuals that have achieved a higher level of education or socio-economic status do not normally volunteer for military service, and drafting those individuals would greatly benefit the military.³⁴ Additionally, proponents argue that the draft requirement

23. *Id.*

24. 50 U.S.C. app. § 453 (2012).

25. Rowley, *supra* note 14, at 173.

26. *Rostker v. Goldberg*, 453 U.S. 57, 60 (1981).

27. Dunn, *supra* note 2, at 9; *see also Rostker*, 453 U.S. at 57.

28. Dunn, *supra* note 2, at 9.

29. Rowley, *supra* note 14, at 173.

30. Dunn, *supra* note 2, at 9.

31. *Id.* at 11.

32. *Id.*

33. *Id.*

34. *Id.*

spreads the burden of national defense in the event of a draft,³⁵ while the current voluntary military system concentrates that burden among those who are economically disadvantaged.³⁶

Excluding women from the registration requirement fundamentally hinders the attainment of these two goals. “During World War I, approximately 34,000 women served in the war.”³⁷ In World War II, “350,000 women served in nursing and administrative positions, as well as all other types of non-combat service [positions].”³⁸ Women were able to serve in and aid the military in non-combat positions, demonstrating that one does not need to be eligible for combat to be a necessary asset to the military. By systematically excluding women from registration, the military disregards a large pool of citizens who would be eligible to serve in both combat and non-combat-related roles. Including women in the registration would further advance the MSSA’s goals of providing an adequate military force in the event of a national crisis and of providing the military with a broader range of individuals who have attained various education levels.³⁹

II. *ROSTKER V. GOLDBERG* ANALYZED

A. *The Majority Opinion*

In the most significant challenge to the MSSA’s exemption of women, the Supreme Court held that men and women were not similarly situated for purposes of the draft.⁴⁰ The Court held that Congress’s exclusion of women was closely related to its purpose in authorizing draft registration.⁴¹ Thus, the MSSA did not violate the equal protection guarantee implicit in the Fifth Amendment.⁴² In the 6-to-3 decision, Justice Rehnquist delivered the majority opinion of the Court.⁴³

The Court began by examining the district court’s decision. Pursuant to Congress’s power “[t]o raise and support Armies,” Congress enacted the MSSA.⁴⁴ The Act allows the President to require every male citizen and male alien between the ages of eighteen and twenty-six to register for the

35. *Id.* at 12.

36. *Id.*

37. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 325 (2005).

38. *Id.*

39. Kerber, *supra* note 5, at 114 (discussing the advantages of recruiting women for military service, including drawing in troops with higher levels of education).

40. *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981); *see* Dunn, *supra* note 2, at 15.

41. *Rostker*, 453 U.S. at 79; *see* Dunn, *supra* note 2, at 15.

42. *Rostker*, 453 U.S. at 78–79.

43. *Id.* at 59.

44. *Id.*

draft.⁴⁵ The district court found that the Act violated the Due Process Clause of the Fifth Amendment by requiring only men to register for the draft, and the court permanently enjoined the government from requiring registration under the Act.⁴⁶ The district court rejected the argument that the equal protection claim should be tested under “strict scrutiny” and also rejected the defendant’s argument that due to the deference that should be given to Congress in areas of military affairs the “minimum scrutiny” test should instead be applied.⁴⁷ The lower court applied the “important government interest” test articulated by the Supreme Court in *Craig v. Boren*.⁴⁸ In applying this test, the district court struck down the Act as a violation of the Fifth Amendment.⁴⁹ The Director of Selective Service filed an appeal.⁵⁰

The Court then began its analysis of the constitutionality of the Act.⁵¹ The Supreme Court noted that it accords “great weight to the decisions of Congress,” and since it is a coequal branch whose members take the same oath as the members of the Supreme Court, its decisions should be given deference.⁵² The Court has been especially deferential with respect to Congress’s authority over national defense and military affairs.⁵³ Congress relied upon its constitutional powers under Article I, Section 8, Clauses 12 through 14 in enacting the MSSA and in excluding women from those classes of individuals required to register.⁵⁴ The Judicial Branch has long recognized that the “constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.”⁵⁵ In *Gilligan v. Morgan*, the Court noted that in the area of military affairs, the Court is markedly incompetent.⁵⁶ Justice Rehnquist quoted the *Gilligan* decision to emphasize this point:

[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

45. *Id.*

46. *Id.* at 63 (discussing *Goldberg v. Rostker*, 509 F. Supp. 586, 590 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981)).

47. *Id.*

48. *Id.*; see *Craig v. Boren*, 429 U.S. 190, 197 (1976).

49. *Rostker*, 453 U.S. at 63.

50. *Id.* at 64.

51. *Id.*

52. *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973)).

53. *Id.* at 64–65.

54. *Id.* at 65.

55. *Id.* (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

56. *Id.* (discussing *Gilligan v. Morgan*, 413 U.S. 1 (1973)).

judgments, subject *always* to civilian control of the Legislative and Executive Branches.⁵⁷

When the statute at issue governs military society, “Congress is permitted to legislate both with greater breadth and with greater flexibility.”⁵⁸ However, the Court stressed that although Congress is given greater deference, Congress is not free to “disregard the Constitution when it acts in the area of military affairs.”⁵⁹

Congressional judgments regarding registration under the MSSA are “based on judgments concerning military operations and needs,”⁶⁰ and “the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat.”⁶¹ The Solicitor General argued that the Court should scrutinize the MSSA under “rational basis” review to determine only if the MSSA bears a rational relation to some legitimate government purpose.⁶² The Court refused to further refine its standards of review and noted that labeling the issue as either a gender discrimination issue or military issue does not automatically lead the Court to the correct result.⁶³ The Court then discussed *Craig v. Boren*,⁶⁴ without stating that the standard of intermediate scrutiny from *Craig v. Boren* is the one that ought to be used in the present case.⁶⁵ Under *Craig v. Boren*, it is undeniable that raising and supporting armies is an “important governmental interest.”⁶⁶ According to the majority opinion, Congress had two alternatives to choose from when enacting the MSSA.⁶⁷ Congress could have either chosen to require only males to register for the draft or both sexes to register for the draft.⁶⁸ The Court noted that when a party challenges the decision Congress has made, it is not for the Court to decide which alternative it would have chosen, but rather whether the choice Congress has made is a denial of equal protection of the laws.⁶⁹

57. *Id.* at 65–66 (quoting Gilligan, 413 U.S. at 10).

58. *Id.* at 66 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

59. *Id.* at 67.

60. *Id.* at 68.

61. *Id.* (quoting S. REP. NO. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647).

62. *Id.* at 69.

63. *Id.* at 69–70.

64. *Id.* at 70.

65. *Id.*

66. *Id.*

67. *Id.* Note though that the Congress really had three alternatives. Congress could have chosen an all-female draft requirement. However, the Supreme Court discounted this alternative and instead stated that Congress was only faced with two alternatives to choose from.

68. *Id.*

69. *Id.*

The Court continued by recognizing that deference is not the same as abdication.⁷⁰ In citing its decision in *Schlesinger*, the Court stated that reconciliation must occur between the deference for Congress and the Court's own constitutional responsibility.⁷¹ The Supreme Court acknowledged that the responsibility for determining how to manage the military rests with Congress.⁷² However, in *Schlesinger*, the Court did not apply a different equal protection standard because the issue at hand involved the military, although the Court did stress that congressional deference must be accorded.⁷³ The Court emphasized that, in light of the Congressional Record surrounding the MSSA, Congress was aware of the "current thinking as to the place of women in the Armed Services."⁷⁴

Justice Rehnquist distinguished the case in *Rostker* from other gender-based discrimination cases.⁷⁵ The opinion noted that Congress thoroughly considered the question of registering women for the draft.⁷⁶ Both Houses of Congress held hearings after President Carter requested that the MSSA include a requirement that women, as well as men, register under the Act.⁷⁷ Such an extensive inquiry into the issue of women registering for the MSSA established that Congress's ultimate decision to exempt women from registration was not a result of the traditional view of females.⁷⁸ The registration scheme facilitates any future need for the draft, and subsequently, any combat troops.⁷⁹ Women, unlike men, are not eligible for combat.⁸⁰ The restriction against women in combat in the Navy and Air Force are statutory.⁸¹ Quoting the Senate Report, the Court noted, "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee"⁸² The Senate Report quoted by the Court found that women should not intentionally be placed in combat positions, and

70. *Id.*

71. *Id.* at 70–71 (discussing *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)).

72. *Id.* at 71 (discussing *Schlesinger*, 419 U.S. at 510).

73. *Id.*

74. *Id.*

75. *Id.* at 72.

76. *Id.*

77. *Id.*

78. *Id.* at 72–74.

79. *Id.*

80. *Id.* at 76.

81. See 10 U.S.C. § 6015 (Supp. III 1976) (repealed 1993); 10 U.S.C. § 8549 (Supp. III 1976) (repealed 1991).

82. *Rostker*, 453 U.S. at 77 (quoting S. REP. NO. 96-826, at 157 (1980), reprinted in 1980 U.S.C.A.N. 2612, 2647). This reasoning appears to be circular. The Court is attempting to justify a policy by saying that it is fundamental because it enjoys widespread support, and because it has widespread support, it is fundamental.

President Carter intended to continue that policy.⁸³ Since the purpose of the registration is to prepare for a draft of combat troops, Congress concluded that women would not be needed in the event of a draft due to the fact that they could not fulfill these combat roles.⁸⁴ The Court again quoted the relevant section of the Senate Report:

In the Committee's view, the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat 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.⁸⁵

The district court analogized that Congress could not constitutionally exclude black citizens or white citizens from registration simply because one of those groups would "contain sufficient persons to fill the needs of the Selective Service System."⁸⁶ However, the Supreme Court rejected this reasoning. Congress did not "arbitrarily choos[e] to burden one of two similarly situated groups" as would be the case if Congress excluded all blacks or all whites.⁸⁷ Men and women are not similarly situated due to the restriction on women in combat roles.⁸⁸ Thus, the Court held that Congress's decision to authorize the registration of men and not women was not a violation of the Due Process Clause.⁸⁹ The classification was not invidious, but instead "realistically reflects the fact that the sexes are not similarly situated."⁹⁰

B. The Dissenting Opinions

Justice White wrote a short dissenting opinion in which he argued that the exclusion of women from the MSSA's mandate was unconstitutional because women could serve in other roles in the military besides combat positions.⁹¹ Justice Marshall, with whom Justice Brennan joined, wrote the

83. *Id.* at 78.

84. *Id.*

85. *Id.* at 77–78 (quoting S. REP. NO. 96-826, at 157 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2647).

86. *Goldberg v. Rostker*, 509 F. Supp. 586, 596 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

87. *Rostker*, 453 U.S. at 78–79.

88. *Id.* at 79.

89. *Id.* at 82.

90. *Id.* at 79 (quoting *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 469 (1981)).

91. *Id.* at 85 (White, J., dissenting). This paper focuses on the dissenting opinion by Justice Marshall as that opinion provided more analysis as to the unconstitutionality of the MSSA.

main dissenting opinion.⁹² Justice Marshall argued that the majority essentially authorized “one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’”⁹³ The Court upheld a statute that excludes women from a fundamental civic obligation and is inconsistent with the Constitution’s Equal Protection Clause. The only question at issue is whether the exclusion of women from registration under the MSSA violates the equal protection component of the Due Process Clause of the Fifth Amendment.⁹⁴ The MSSA discriminates on the basis of gender and therefore must be examined under “heightened” scrutiny as articulated in *Craig v. Boren*.⁹⁵ To meet this standard, the classification must be substantially related to the achievement of an important governmental objective.⁹⁶ The party defending the classification has the burden of demonstrating the importance of the governmental objection and the substantial relationship between the discriminatory means used and the purported end.⁹⁷ Thus, for the Court to uphold the MSSA, “the Government must demonstrate that the gender-based classification it employs bears ‘a close and substantial relationship to [the achievement of] important governmental objectives.’”⁹⁸

The government has a strong interest in raising and supporting armies.⁹⁹ The first part of the *Craig v. Boren* test is therefore satisfied.¹⁰⁰ However, the second part of the test, which requires that the discriminatory means employed substantially serve the statutory end, must still be met.¹⁰¹ Justice Marshall states, “[T]here simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense.”¹⁰² The government does not contend that the exclusion of women from registration is substantially related to the effectiveness of the military.¹⁰³ Representatives of both the Department of Defense and the Armed Services testified at congressional hearings that participation of women in the military has contributed substantially to the

92. *Id.* at 86 (Marshall, J., dissenting).

93. *Id.* (Marshall, J., dissenting) (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971)).

94. *Id.* at 86–87 (Marshall, J., dissenting).

95. *Id.* at 87.

96. *Id.*

97. *Id.*

98. *Id.* at 88 (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 90.

103. *Id.*

effectiveness of the military.¹⁰⁴ Therefore, Congress's decision to exclude women from registration cannot be based upon a desire to prevent women from serving in the Armed Forces.¹⁰⁵ A report prepared by the Senate Armed Services Committee sets out the objectives that Congress sought when excluding women from registration. As the Senate Report notes, "The policy precluding the use of women in combat is . . . the most important reason for not including women in a registration system."¹⁰⁶

Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the committee finds militarily unwarranted and dangerous. Moreover, the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources.¹⁰⁷

Justice Marshall argued, however, that the exclusion of women from registration is not substantially related to the government's interest of precluding women from combat positions.¹⁰⁸ The majority opinion stated that since women are not eligible for combat, they are not similarly situated for registration for a draft.¹⁰⁹ While the majority purported to apply the *Craig v. Boren* test, the Court's analysis was significantly different from the *Craig v. Boren* approach.¹¹⁰ The majority reasoned that women could be excluded from registration because they will not be needed in the case of a draft.¹¹¹ However, according to the dissent, this focuses on the wrong question.¹¹² "The relevant inquiry . . . is not whether a *gender-neutral*

104. *Id.*

105. *Id.* at 91.

106. *Id.* at 92 (quoting S. REP. No. 96-826, at 157 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2647).

107. *Id.* (quoting S. REP. No. 96-826, at 157 (1980)). Similar arguments were made to exclude African-Americans and homosexuals from the military. African-Americans served in segregated units to avoid "racial conflict" and many registered African-Americans were not drafted to minimize racial tension. See also *Meinhold v. U.S. Dept. of Def.*, 34 F.3d 1469, 1479 (9th Cir. 1994) ("[T]he presence of persons who engage in homosexual conduct . . . impairs the military mission."); Heather S. Ingrum Gipson, *The Fight for the Right to Fight: Equal Protection & the United States Military*, 74 UMKC L. REV. 383, 410 (2005) ("Though many young African American men were willing to serve their country, the draft numbers provided startling information: thirty-one percent of the two million African-Americans who registered for the draft were accepted.").

108. *Rostker*, 453 U.S. at 93 (Marshall, J., dissenting).

109. *Id.*

110. *Id.* at 94.

111. *Id.*

112. *Id.*

classification would substantially advance important governmental interests. Rather, the question is whether the gender-based classification is itself substantially related to the achievement of the asserted governmental interest.”¹¹³ Therefore, the government must demonstrate that the exclusion of women furthers the government’s goal of “preparing for a draft of combat troops. Or to put it another way, the Government must show that registering women would substantially impede its efforts to prepare for such a draft.”¹¹⁴ The dissent argued that registering women does not impede the government’s goal of providing a combat-ready army.¹¹⁵ Registration merely provides an account of those available to serve in the Armed Forces and does not equate to conscription.¹¹⁶ Additionally, combat eligibility is not a prerequisite for all positions available in the military.¹¹⁷ The majority also claims that excluding women from registration is necessary to preserve “military flexibility.”¹¹⁸ The Senate Report states,

Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of non-combat positions must be available to which combat troops can return for duty before being redeployed.¹¹⁹

However, as the dissent points out, the majority gives no reason as to why drafting only a limited number of women would also impede military flexibility.¹²⁰ If the presence of female volunteers in the military does not hinder military flexibility, it is difficult to understand how a limited number of female draftees would hinder military flexibility.¹²¹

Justice Marshall noted that when an Act of Congress appears to conflict with a constitutional provision, the Court has no choice but to

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 96.

117. *Id.* at 97.

118. *Id.* at 106.

119. *Id.* at 107 (quoting S. REP. No. 96-826, at 158 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2648).

120. *Id.* (“This discussion confirms the Report’s conclusion that drafting ‘very large numbers of women’ would hinder military flexibility. The discussion does not, however, address the different question whether drafting only a *limited* number of women would similarly impede military flexibility.”).

121. *Id.*

enforce the commands of the Constitution.¹²² While the dissenting opinion agrees that the Court adopted an appropriately deferential treatment of Congress's findings, Justice Marshall writes that the majority supplemented Congress's findings with findings the Court believes Congress could or should have made.¹²³ Congress's actions, even those involving military affairs, must be "*judged* by the standards of the Constitution."¹²⁴ The dissenting opinion found that the government failed to show that the discriminatory means used were substantially related to the important government interest, and the MSSA therefore failed the intermediate scrutiny test.¹²⁵

III. *ROSTKER* REVISITED

A. *Current Role of Women in the Military*

While traditional notions of women's roles in society have faded over the years,¹²⁶ some historical restrictions regarding a woman's role in the military remain in effect.¹²⁷ The women's rights movement in the 1970s led courts and legislatures to repeal most laws that created different rules for women based solely on traditional notions of proper roles in society.¹²⁸ However, Congress ultimately rejected President Carter's suggestion that women, as well as men, be required to register for the draft.¹²⁹ Since *Rostker*, "few court cases have challenged restrictions on women's military service, and none have reached the Supreme Court."¹³⁰ Yet, public opinions have changed, and most people are now supportive of women in combat.¹³¹ The Supreme Court in *Rostker* based its decision on "congressional, executive, military, and popular opposition to women in combat."¹³² As the "extrajudicial developments" have continued to change since the *Rostker* decision, the decision seems less compelling.¹³³ As Professor Hasday¹³⁴

122. *Id.* at 113.

123. *Id.* at 112.

124. *Id.*

125. *Id.* at 113.

126. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 97 (2008) ("Congress, the executive branch, the military, and the public have become much more supportive of women's military service, including in combat.").

127. *Id.* at 96 ("Some of the most important historical restrictions on women's military role persist: women are still excluded from military registration, draft eligibility . . .").

128. *Id.* at 96–97.

129. *Id.* at 97.

130. *Id.*

131. *See id.*

132. *Id.* at 99.

133. *Id.* at 100.

134. Jill Elaine Hasday is a professor at the University of Minnesota Law School.

notes, the *Rostker* analysis was “inextricably intertwined with the factual premise that opposition to women’s combat service was widespread and the cultural assumption that this opposition was too reasonable to need explanation.”¹³⁵ While normally the Court is praised for its progressive decisions in the face of public hostility, the Court in *Rostker* failed to look at the issue solely from the perspective of an impartial judicial body.¹³⁶ Rather, the Court took into account the pre-existing opposition toward women with respect to the military. The Court reasoned that due to this popular opinion, women must not be suited for combat positions and therefore should not be required to register under the MSSA. This reasoning is out-of-date given the Pentagon’s recent proclamation. Women are now allowed to serve in all combat positions, and the argument that requiring women to register would inhibit “military flexibility” fails on its face. Furthermore, even if there are some military roles that women would be unable to fill, this should not be sufficient to meet the “intermediate scrutiny” test that the Court should have applied. The MSSA only requires registration, not actual service. There are clearly some men that would not be fit for combat positions, yet the MSSA does not exclude those men from registration. In light of recent developments, the relationship between the government’s interest in maintaining a combat-ready military and excluding women from the MSSA’s registration requirement seems illogical.

There have been very few cases challenging the *Rostker* decision. In *Schwartz v. Brodsky*, a district court held that the male-only registration requirement was not a violation of the Equal Protection Clause.¹³⁷ The plaintiffs argued that the constitutionality of the MSSA should be reconsidered because women are permitted to serve in virtually all of the military units except direct ground combat roles.¹³⁸ The Court noted that the *Rostker* decision rested on two key underpinnings, one of which would need to be disproved in order for the plaintiff to prevail.¹³⁹ First, the Supreme Court determined that the government had a compelling interest in establishing a system that would facilitate a draft of combat troops.¹⁴⁰ The second underpinning of the Supreme Court’s decision was that women

135. Hasday, *supra* note 126, at 100.

136. *Id.* at 102 (“Commentators often praise the Court’s ability to settle constitutional disputes, but *Rostker*’s judgment that women’s rights to equality were not at risk did not stop Congress, the executive, and the military from debating the issue, or enforcing their own evolving judgment that sex equality, along with the volunteer military’s personnel needs, called for granting women an increasingly large military role, including in combat.”) (footnote omitted).

137. *Schwartz v. Brodsky*, 265 F. Supp. 2d 130 (D. Mass. 2003).

138. *Id.* at 132.

139. *Id.*

140. *Id.* at 133.

are not eligible for combat,¹⁴¹ and “[i]t was . . . with that fact ‘firmly in mind’ that the Supreme Court considered the constitutional claim before it.”¹⁴² The district court noted that since that fact remained unchanged, men and women were not similarly situated and the Constitution does not require “gestures of superficial equality.”¹⁴³ As of 2013, one of those underpinnings has been rejected; women are now eligible for all combat roles. Based on the district court’s own rationale, this requires the court to find the MSSA unconstitutional under the equal protection analysis. While Congress does have a compelling interest in creating a registration system, it no longer has a compelling interest—or even a logical reason—for excluding women from the draft requirement.

B. *What Standard Should Be Applied?*

The Court’s majority opinion failed to clearly articulate the standard used to determine the constitutionality of the MSSA’s exclusion of women.¹⁴⁴ The Court continuously referenced its deference to Congress in the realm of military policy and accepted Congress’s characterization of the purpose of the draft.¹⁴⁵ However, the Court did not accept the argument that the gender distinction should be judged under the rational basis review for which the Solicitor General argued.¹⁴⁶ The Court also failed to explicitly reject the heightened form of scrutiny used in *Craig v. Boren* for gender-based distinctions.¹⁴⁷ The heightened form of scrutiny requires that the gender-based discrimination be “substantially related to the achievement of an important governmental objective.”¹⁴⁸ Instead, the *Rostker* court stated that the law would not be “advanced by any further ‘refinement’ in the applicable tests.”¹⁴⁹ The Court essentially rejected the notion that any clear standard applied but implied that the MSSA’s exclusion of women would survive “any test that could reasonably be applied.”¹⁵⁰

The Court basically punted the issue of deciding the applicable standard. The majority refused to provide a full equal protection analysis, effectively rationalizing that because women were not eligible to perform

141. *Id.*

142. *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981)).

143. *Schwartz*, 265 F. Supp. 2d at 133 (quoting *Rostker*, 453 at 79).

144. *Dunn*, *supra* note 2, at 16.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Rostker*, 453 U.S. at 87 (Marshall, J., dissenting) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)); *see also* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Caban v. Mohammed*, 441 U.S. 380, 393 (1979).

149. *Rostker*, 453 U.S. at 69 (majority opinion).

150. *Dunn*, *supra* note 2, at 16.

combat roles, men and women were not similarly situated for the purposes of the MSSA's registration requirement.¹⁵¹ While the Court accepted the rationale that Congress excluded women from registration because of their ineligibility to perform in combat-related positions, the Court also implicitly accepted the disparate treatment of women in combat.¹⁵² However, whether the MSSA violates the Due Process Clause of the Fifth Amendment must be evaluated in light of the Supreme Court's overall treatment of gender-discrimination cases.¹⁵³ The Court has adopted various standards over the years for testing whether a classification violates the Equal Protection Clause.¹⁵⁴

In *Frontiero v. Richardson*, the Court decided the constitutionality of distributing benefits to members of the military differently because of gender.¹⁵⁵ The plurality used strict scrutiny in finding that the policy violated the Due Process Clause of the Fifth Amendment.¹⁵⁶ However, the strict scrutiny standard for gender-discrimination cases never gained support. The current standard for gender-discrimination cases was first announced in *Craig v. Boren*.¹⁵⁷ The applicable standard in gender-discrimination cases is "heightened scrutiny" whereby the classification must be substantially related to achieving an important government objective.¹⁵⁸ This test is applicable in all gender-discrimination cases, irrespective of whether the classification discriminates against males or females.¹⁵⁹ The defending party bears the burden of establishing the importance of the governmental objective and the substantial relationship between the discriminatory means and the asserted end.¹⁶⁰ Thus, to comply with its holding in *Craig v. Boren*, the Court should have analyzed the MSSA under the heightened scrutiny standard. Such an analysis would have centered on whether the exclusion of women from registration is substantially related to the government's asserted goal of providing a combat-ready military. The purported justification for such exclusion was that women were ineligible to provide combat support and requiring them

151. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1049 (2007).

152. Angela Rollins, Comment, *Act Like A Lady!: Reconsidering Gender Stereotypes & the Exclusion of Women from Combat in Light of Challenges to "Don't Ask, Don't Tell"*, 36 S. ILL. U. L.J. 355, 359 (2012) ("[U]nderlying this holding was the idea that the Court accepted the differential treatment of women in combat.").

153. Rowley, *supra* note 14, at 174.

154. *Id.* at 175.

155. *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).

156. *See id.* at 690-91.

157. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

158. *Rostker v. Goldberg*, 453 U.S. 57, 87 (1981) (Marshall, J., dissenting); *Califano v. Webster*, 430 U.S. 313, 316 (1977).

159. *See Orr v. Orr*, 440 U.S. 268, 279 (1979).

160. *Rostker*, 453 U.S. at 88 (Marshall, J. dissenting).

to register would therefore not further the interest of maintaining a combat-ready pool of troops.¹⁶¹

In a case decided in the same year as *Rostker*, the Supreme Court stated that the differential treatment of the sexes was justifiable where the difference “realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”¹⁶² In *Michael M. v. Superior Court of Sonoma County*, the Court held that a statutory rape law that defined statutory rape so that only a male could be convicted of the crime was not a violation of the Equal Protection Clause.¹⁶³ The Court noted that the sexes were not similarly situated because intercourse for females could result in pregnancy and the law was realistically related to the state’s objective in curbing teen pregnancy.¹⁶⁴ The Court found that the state has an important interest in preventing teenage pregnancies and therefore “may accommodate women for this ‘special problem.’”¹⁶⁵ Justice Ginsburg in *United States v. Virginia* articulated yet another standard for gender classifications.¹⁶⁶ She advocated for an “exceedingly persuasive” justification standard in this case, which appeared to add a higher level of scrutiny to the intermediate scrutiny test used for sex classifications.¹⁶⁷ However, many argue that the Court used the term “exceedingly persuasive justification” interchangeably with the term “important government interest” and that the Court merely employed the intermediate scrutiny test.¹⁶⁸ The Court explained that states may not use claims of gender difference to “demean women or ‘to create or perpetuate the legal, social, and economic inferiority of women.’”¹⁶⁹ While the Supreme Court has used a variety of phrases to describe the applicable standard of review for gender classifications, what is clear is that the Court, under *Craig v. Boren*, should apply at least the intermediate scrutiny standard to gender classifications and require that the classification “must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁷⁰

161. *See id.*

162. *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981).

163. *Id.* at 476.

164. *Id.* at 473.

165. Rowley, *supra* note 14, at 177 (quoting *Michael M.*, 450 U.S. at 469–70).

166. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

167. Rollins, *supra* note 152, at 363 (citing *United States v. Virginia*, 518 U.S. 515, 545 (1996)).

168. Rowley, *supra* note 14, at 178–79.

169. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 303 (2005) (citing *United States v. Virginia*, 518 U.S. 515, 534 (1996)).

170. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

C. *The Supreme Court Should Reverse Its Decision in Rostker*

The Supreme Court failed to apply the correct standard of review to the gender classification of the MSSA. The Court did a surface-level analysis based primarily on its great deference to the military with respect to military policy as well as the categorical exclusion of women from combat roles.¹⁷¹ The Court relied on the exclusion of women in combat to conclude that men and women are not similarly situated and that there is therefore no Equal Protection violation.¹⁷² However, if the Court were to revisit its decision in *Rostker* again today, it would likely hold the MSSA's exclusion of women from the draft to be unconstitutional.

The majority in *Rostker* held that the exclusion of women was closely related to its purpose in authorizing the draft yet failed to apply any clear test to the issue.¹⁷³ The district court, on the other hand, correctly applied the intermediate scrutiny standard from *Craig v. Boren* and held the MSSA unconstitutional.¹⁷⁴ The district court noted that the burden is on the government defending the classification to show that the classification is substantially related to an important governmental interest.¹⁷⁵ The Supreme Court in *Rostker* argued that the ultimate decision to exclude women from the MSSA's registration requirement was not based on traditional notions of the proper role of women, but rather on the fact that registration is meant to facilitate any need for a future draft.¹⁷⁶ The problem with this rationale is that the Court did not consider that the exclusion of women from combat was itself due to the traditional roles of women in society. As the Court in *Craig v. Boren* noted, outdated notions concerning the role of females are "incapable of supporting state statutory schemes that were premised upon their accuracy."¹⁷⁷ Thus, although the Court concluded that the MSSA was not based on stereotypes of women's roles in society, it failed to consider that the exclusion of women as a whole from combat positions was based on such anachronistic notions. However, such an inquiry has been rendered moot by the Pentagon's decision to allow women to serve in combat roles. Even if the Court had used the intermediate scrutiny test in *Rostker* and concluded that excluding women from the MSSA was substantially related to the important government purpose of facilitating registration of combat-ready troops, such analysis would no longer hold up in light of the current status of women in combat. Since

171. See *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

172. *Id.* at 72.

173. Dunn, *supra* note 2, at 15–16.

174. *Goldberg v. Rostker*, 509 F. Supp. 586, 593 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

175. *Id.* at 597.

176. *Rostker*, 453 U.S. at 75.

177. *Craig v. Boren*, 429 U.S. 190, 199 (1976)

women are now eligible to perform combat-related roles in the military, the Court's reasoning would fail the intermediate scrutiny test. The Senate Committee Report that *Rostker* quoted expressly stated that the policy precluding women in combat was the most important reason for not including women in the registration system.¹⁷⁸ Given that the only apparent reason for the discrimination in the MSSA was the exclusion of women from combat, the constitutionality of the MSSA's classification would almost certainly fail the intermediate scrutiny test if challenged today due to the fact that the exclusion would no longer be substantially related to the important governmental interest of maintaining combat-ready troops.

Perhaps the government may argue that another compelling interest is advanced by the classification in the MSSA, such as protecting the family unit from having both parents drafted. However, as Justice Marshall notes, the government would have to demonstrate that the gender-based classification bears a close and substantial relationship to the achievement of an important governmental objective.¹⁷⁹ This would likely prove very troublesome given the fact that the distinction between men and women in the eyes of the military is all but extinct, and the military could almost assuredly institute some other policy that furthered this goal.¹⁸⁰ It may also be argued that there are physical differences between men and women that justify excluding women from the registration requirement. A better classification would be those who are strong enough to complete certain tasks and those who are not, rather than distinguishing between men and women. Thus, the fit between the goal and the classification would likely fail the intermediate scrutiny test.

While the United States is moving away from the traditional notions of a woman's place in society,¹⁸¹ excluding women from the registration requirement sends a clear message that women are in fact not equal. As the military's view of a woman's capability in combat has evolved, so too should the Equal Protection analysis under the MSSA. Many scholars view *Virginia* as a signal of the Court's gender equality jurisprudence.¹⁸² In *Virginia*, the Court reviewed VMI's policy under "skeptical scrutiny" in rejecting Virginia's justifications for the discriminatory policy.¹⁸³ The

178. S. REP. No. 96-826 at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647.

179. *Rostker*, 453 U.S. at 88 (Marshall, J., dissenting).

180. For instance, the military could have a policy that only one parent could be drafted.

181. Many cases openly acknowledged the stereotypical view of women in society. *See* *United States v. St. Clair*, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) ("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.").

182. *Vojdik*, *supra* note 169, at 303.

183. *United States v. Virginia*, 518 U.S. 515, 531 (1996). The Court addressed the constitutionality of a military college that excluded women and ultimately struck down the gender classification as unconstitutional under the Equal Protection Clause. *Id.* at 558.

district court in *Virginia* concluded that there were no less than 120 physical differences between men and women, meaning that women could not handle the stress of attending the Virginia Military Institute.¹⁸⁴ The Supreme Court held that, even assuming such factual findings were true, Virginia could not exclude *qualified* women from VMI based upon generalizations regarding women as a whole.¹⁸⁵

Even assuming—as the Court did in *Virginia*—that there are physical differences between the sexes that may lead certain women to be unable to perform combat roles, Equal Protection analysis requires more than simply showing that there exists a difference between the classes.¹⁸⁶ While the government may argue that the purpose of the draft is to build and maintain a combat-ready arsenal of potential soldiers,¹⁸⁷ not every man currently registered is fit for combat. The registration merely provides the government with a pool of potential candidates. Some of those fit for combat will be men, and some will be women. Thus, the nexus between excluding women from registration and maintaining a combat-ready pool of draftees under the MSSA is, at best, weak.

Additionally, given the great deference to the military that the Court showed in *Rostker*, it seems unlikely that the Court would question the Pentagon's decision to allow women in combat roles. The Court in *Rostker* based the constitutionality of the MSSA primarily on the fact that the military decided women were not fit for combat roles. Now that the military has said that women are eligible for such roles, the Court will likely hold that both sexes must register for the draft since there is no longer a clear difference between the sexes. As the Court itself has noted, “[T]he war power does not remove constitutional limitations safeguarding essential liberties.”¹⁸⁸ Even if the military were to assert some other reason for excluding women from the registration requirement of the MSSA, the Court would likely hold that since the military now recognizes men and women as equal, the MSSA must also treat the sexes equally.

D. Standing to Challenge the MSSA

Assuming that the Supreme Court would indeed strike down the MSSA's exclusion of women as unconstitutional in light of the Pentagon's recent announcement, the issue becomes one of standing. The Supreme Court has held that for a plaintiff to have standing to bring a claim, the

184. *United States v. Virginia*, 766 F. Supp. 1407, 1432, 1438 (W.D. Va. 1991).

185. *Virginia*, 518 U.S. at 550.

186. *Id.* at 533.

187. *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981).

188. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

party must face a “distinct and palpable” injury with a causal connection between the claimed injury and the conduct challenged in court.¹⁸⁹

The essence of the standing inquiry is whether the parties seeking to invoke the court’s jurisdiction have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹⁹⁰

In *Rostker v. Goldberg*, the plaintiffs were a class of all male citizens who were under an affirmative obligation to register for the draft under the MSSA.¹⁹¹ The district court determined,¹⁹² and the Supreme Court affirmed,¹⁹³ that the plaintiffs in the case had standing. The district court stated that the plaintiff’s harm was neither remote nor hypothetical and that because the plaintiffs were under a continued legal obligation to register under the MSSA, “it is clear that the class has standing to raise the issue before us.”¹⁹⁴ However, interestingly the court goes on to subdivide the class of people affected by the registration requirement into three subclasses, two of which would have standing but one of which would not.¹⁹⁵

1. Those individuals registered with the Selective Service System before Presidential Proclamation No. 4360 terminated registration on April 1, 1975, and who remain liable for involuntary training and service.
2. Those individuals required to register with the Selective Service System between July 21, 1980, and August 4, 1980.
3. Those individuals who have never been registered with the Selective Service System and are not under any compulsion to register in the near future.¹⁹⁶

The Court noted that because the old and new selective service systems¹⁹⁷ placed registration requirements on individuals sufficient to constitute an

189. *Duke Power Co. v. Carolina Env’t Study Group, Inc.*, 438 U.S. 59, 72 (1978).

190. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

191. *Rostker*, 453 U.S. at 62.

192. *Goldberg v. Rostker*, 509 F. Supp. 586, 590–91 (E.D. Pa. 1980), *rev’d*, 453 U.S. 57 (1981).

193. *Rostker*, 453 U.S. at 63.

194. *Goldberg*, 509 F. Supp. at 590–91.

195. *Id.* at 591.

196. *Id.*

197. The Court refers to the “old” and “new” selective service systems in its opinion. This is merely a distinction between the requirement to register under the MSSA before Presidential Proclamation No. 4360 temporarily halted the registration requirements (what the court refers to as the

“intrusion on an individual’s rights,” those members of the first two classes would have standing to challenge the registration requirement.¹⁹⁸ However, the court held that those in the third subcategory—members who have no obligation to register under either the new or old registration system—do not have standing.¹⁹⁹ There is “no distinct and palpable harm nor imminent threat of concrete harm to the third subclass of individuals sufficient to establish standing in the instant case. Therefore, in the order accompanying this opinion we will redefine the class to exclude this third subclass.”²⁰⁰

Based on the district court’s reasoning in *Goldberg v. Rostker*, it appears that a woman lacks standing to challenge her exclusion from registration under the MSSA since the MSSA does not require her to affirmatively register.²⁰¹ In *Schwartz v. Brodsky*, one of few cases that challenged the Supreme Court’s decision in *Rostker*, one of the plaintiffs was a seventeen-year-old female high school student.²⁰² Had the plaintiff been a male, the plaintiff would have been required to register with the Selective Service System upon turning eighteen.²⁰³ The court, citing the district court’s decision in *Goldberg v. Rostker*, found that the plaintiff lacked standing.²⁰⁴ “Individuals ‘who have never been registered with the Selective Service System and are not under any compulsion to register in the near future’ suffer no ‘distinct and palpable harm nor imminent threat of concrete harm . . . sufficient to establish standing . . .’”²⁰⁵ Since women in the United States appear to lack the necessary harm to have standing to bring a case under the MSSA, a male who is under a legal duty to register would need to bring suit. As in *Goldberg v. Rostker*, the plaintiff could argue that he is being denied equal protection under the law because the MSSA only requires males to register for the draft, and as a male, his chances of being drafted are increased because the pool of potential candidates has been decreased by the exclusion of females from the registration requirement.²⁰⁶

“old” selective service system) and the requirement to register under the MSSA following President Carter’s re-activation of the registration requirement in 1980. *Id.* at 590 n.8; *see also Selective Service System: History and Records*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/backgr.htm> (last updated Apr. 30, 2002). Subcategory one refers to those required to register under the “old” system and subcategory two refers to those required to register under the “new” system.

198. *Goldberg*, 509 F. Supp. at 591.

199. *Id.*

200. *Id.*

201. *See id.*

202. *Schwartz v. Brodsky*, 265 F. Supp. 2d 130, 131 (D. Mass. 2003).

203. *Id.*

204. *Id.* at 131 n.1.

205. *Id.* (omissions in original) (quoting *Goldberg*, 509 F. Supp. at 591).

206. *Goldberg*, 509 F. Supp. at 588.

CONCLUSION

The *Rostker* Court relied on the conclusion that women should not engage in combat and that this is a fundamental principle that has widespread support.²⁰⁷ However, it is debatable whether such a principle continues to receive such support. What is clear is that the Pentagon no longer supports the exclusion of women from the military. Over the past twenty years, the percentage of women in the military has increased from 5% in 1979 to 15% in 2005,²⁰⁸ making women even more valuable to the military. After the first Gulf War, Defense Secretary Dick Cheney noted that the United States “could not have won [the war] without [women].”²⁰⁹ This statement rings even more true now that women are eligible for combat roles. Given the prominent role women play in the military, the exclusion of women from registration appears to be a clear example of the stereotyping the court vehemently rejected under *Virginia*.²¹⁰ While the issue of the exclusion of women from the MSSA registration requirement has not been revived in Congress or the courts since the Pentagon’s announcement of its reversal regarding women in combat roles, it seems that if the constitutionality of the MSSA were challenged today, the classification would fail intermediate scrutiny analysis and be held unconstitutional.

*Katie McGuire**

207. *See* Vodjik, *supra* note 37, at 323.

208. *Id.*

209. *Id.* (alterations in original) (quoting JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 470 (rev. ed. 1992)).

210. *Id.*

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