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REDRAFTING THE SELECTIVE SERVICE ACT: Women and the Military Draft

Andrew J. Haile

ABSTRACT

Since its enactment in 1948, the Military Selective Service Act (MSSA) has required men, but not women, to register for a potential military draft. The MSSA previously withstood constitutional review when, in 1981, the U.S. Supreme Court upheld the statute's sex-based¹ classification under the rationale that the purpose of the MSSA was to raise combat troops in the event of a military crisis. Because women were not allowed to participate in combat, the Court held that the statute did not need to extend the registration requirement to women.

In 2013, however, the Department of Defense eliminated all combat restrictions on women. With that policy change, the rationale for the Supreme Court's earlier decision collapsed. Since the change allowing women to participate in combat, the MSSA has come under renewed scrutiny, with a 2019 federal district court decision holding that the statute violates the Fifth Amendment's Due Process Clause.² That decision was subsequently reversed by the U.S. Court of Appeals for the Fifth Circuit, but the Fifth Circuit declined to consider the merits of the district court decision

1. In general, the term "sex" is used throughout this Article to refer to an individual's assignment at birth as male or female based on physical characteristics; "gender" refers to an individual's identity as a man, woman, or non-binary individual. Exceptions to this general approach apply when quoting sources that use the terms in a different manner.

2. The plaintiff in the case, the National Coalition for Men, is a self-described "men's rights" organization and has stated that it was established, in part, "to examine how sex discrimination adversely affects males in military conscription . . ." Harry Crouch, *History of the Coalition of Free Men, Inc. (NCFM)*, NAT'L COAL. FOR MEN, <https://ncfm.org/lead-with-us/history> [<https://perma.cc/P4WG-5LAZ>]; Complaint for Declaratory and Injunctive Relief at ¶ 8, *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020) (No. 13-02391). In contrast, this Article argues for the extension of draft registration to women as a means of ensuring full equality for women.

and, instead, based its reversal solely on the rationale that only the Supreme Court may reverse itself. In addition, a blue-ribbon commission established by the U.S. Congress recommended in 2020 that lawmakers amend the MSSA to extend the registration requirement to women.

This Article provides background relating to the current controversy over whether to amend the MSSA to require women to register for the draft. It argues that the existing sex-based classification in the statute fails to advance the MSSA's purposes. Moreover, the sex-based classification relies on archaic generalizations about the role of women, is a detriment to America's national security, and undermines sex equality. The Article contends that the MSSA violates the Fifth Amendment and should be amended by Congress.

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INTRODUCTION

Women have long served and sacrificed for the United States during times of war.³ It was not until 2013, however, that the Department of Defense rescinded the rule excluding women from direct ground combat.⁴ The formal rescission of the ground-combat rule recognized the reality that women were already serving in conflict zones with no definite “front lines” in both Afghanistan and Iraq.⁵ Eliminating the ground combat rule has opened all positions in the military to women, including infantry, armor, and special operations.⁶ It has also triggered a renewed dispute about whether women should be required by law to register for the military draft.⁷ At present, registration for the draft is still limited to men.⁸

Whether women should be required to register for the draft has previously been considered and decided by the U.S. Supreme Court. In the 1981 case of *Rostker v. Goldberg*, the Court held

3. See INSPIRED TO SERVE: THE FINAL REPORT OF THE NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE, NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV. (2020), <https://inspire2serve.gov/reports/final-report> [<https://perma.cc/853J-Y45K>] [hereinafter INSPIRED TO SERVE] (discussing the historic and expanding role of women in the U.S. military).

4. See Leon E. Panetta, U.S. Sec’y of Def., Statement on Women in Service (Jan. 24, 2013), in DEP’T DEF. ARCHIVES, <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1746> [<https://perma.cc/X88H-3DCS>]; Phil Stewart & David Alexander, *Pentagon Lifts Ban on Women in Combat*, REUTERS (Jan. 24, 2013, 8:15 AM), [https://www.reuters.com/article/us-usa-military-women-pentagon/pentagon-lifts-ban-on-women-in-idUSBRE90N0SI20130124#:~:text=WASHINGTON%20\(Reuters\)%20%2-D%20The%20Pentagon,were%20often%20not%20clearly%20defined](https://www.reuters.com/article/us-usa-military-women-pentagon/pentagon-lifts-ban-on-women-in-idUSBRE90N0SI20130124#:~:text=WASHINGTON%20(Reuters)%20%2-D%20The%20Pentagon,were%20often%20not%20clearly%20defined) [<https://perma.cc/Z5CD-PF5A>] (noting that “Defense Secretary Leon Panetta and General Martin Dempsey, chairman of the Joint Chiefs of Staff, signed an order at a Pentagon news conference rescinding the rule that prevented women from serving in direct combat jobs”).

5. See, e.g., Stewart & Alexander, *supra* note 4 (stating that the rescission was “a historic step toward gender equality in the U.S. armed forces after 11 years of nonstop war, during which the front lines were often not clearly defined”).

6. See David Vergun, *Secretary of Defense Rescinds ‘Direct Ground Combat Definition and Assignment Rule’*, U.S. ARMY (Feb. 7, 2013), https://www.army.mil/article/94932/secretary_of_defense_rescinds_direct_ground_combat_definition_and_assignment_rule#:~:text=The%20memo%20rescinds%20the%201994,primary%20mission%20is%20to%20engage [<https://perma.cc/WN2D-RELZ>] (stating that the rescission “pav[ed] the way for more women to serve in direct combat roles and in more military occupational specialties” that were traditionally only open for men).

7. See, e.g., Sarah Mervosh & John Ismay, *Women Should Have to Register for Military Draft, Too, Commission Tells Congress*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/us/women-military-draft-selective-service.html> [<https://perma.cc/XKT5-NLEN>].

8. Military Selective Service Act, 50 U.S.C. § 3802(a) (2018).

that "Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act."⁹ The Court's rationale for reaching this conclusion was that the primary purpose for any future draft "would be . . . a need for combat troops."¹⁰ At the time of the *Rostker* decision, women were excluded from combat.¹¹ Thus, as stated by the Court, "Congress [already] concluded that [women] would not be needed in the event of a draft, and therefore decided not to register them."¹² According to the Court, this conclusion by Congress satisfied the Fifth Amendment's Due Process Clause because, based on the then-applicable combat restrictions, men and women were "simply not similarly situated for purposes of a draft or registration for a draft."¹³ With the recent elimination of combat restrictions on women, however, the continued validity of the *Rostker* decision has come into question and a public discussion has begun once again over the issue of draft registration.

Views over whether to expand draft registration to women turn on various factors and may cause those firmly positioned at different ends of the political spectrum to reach the same conclusion. For example, in comments submitted to the blue-ribbon commission created by Congress to study the question, a conservative theologian and a group of feminist activists both submitted comments opposing the expansion, though for very different reasons.¹⁴ In contrast, gender equality groups such as Gender Justice and the National Women's Law Center joined an amicus brief filed

9. 453 U.S. 57, 83 (1981).

10. *Id.* at 76.

11. *Id.* at 77.

12. *Id.*

13. *Id.* at 78.

14. See INSPIRED TO SERVE, *supra* note 3 (quoting Dr. Mark Coppenger of the Southern Baptist Theological Seminary as stating that "women, in the prime years for bearing and raising children, should not be consigned by the state away from hearth and home should they choose to work there") (emphasis added); see also comments submitted by CODEPINK in opposition of expanding draft registration to women:

While we demand equal pay for women in all areas of our economy, it is irresponsible for the fight for women's rights to seek equal moral injury, equal PTSD, equal brain injury, equal suicide rates, equal lost limbs, or equal violent tendencies that military veterans suffer from. When it comes to the military, women's equality is better served by ending draft registration for everyone.

Special Statement: September 24, CODEPINK, https://www.codepink.org/codepink_opposes_compulsory_draft_registration_for_all_genders [<https://perma.cc/DJW7-3PRW>].

with the Fifth Circuit supporting the expansion of the draft.¹⁵ Some thoughtful commentators have taken the position that rather than expand draft registration, policymakers should eliminate the draft altogether.¹⁶

While elimination of the draft, and thereby the need for registration, may be ideal, this Article assumes the continued possibility of a future draft and, therefore, the need to consider the question of whether to expand registration. The Article examines the current controversy in Part I by providing a chronological history of legislative and judicial developments relating to the draft registration of women. Part II of the Article examines the constitutionality of the Military Selective Service Act (MSSA) now that women are permitted to participate in combat. Part III argues that for women to achieve full equality, the MSSA must be amended so that women, as well as men, register for the draft.

I. LEGISLATIVE AND JUDICIAL BACKGROUND ON THE REGISTRATION OF WOMEN

The MSSA provides that:

[I]t shall be the duty of every male citizen of the United States . . . who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration [for the military draft] 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.¹⁷

Registration is the first step of the Selective Service System, which establishes a pool of available individuals in case Congress and the President determine the need for a draft.¹⁸ There has not

15. Brief for American Civil Liberties Union Foundation of Texas et al. as Amici Curiae Supporting Plaintiffs-Appellees, Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020) (No. 19-20272), 2019 WL 5541177 (“Amici write solely to challenge the government’s arguments that this Court should not apply a heightened scrutiny approach in the instant case, and to challenge a selective service system that exempts women due to archaic stereotypes about their interests and capacities.”).

16. Sydney Stewart, *We Can Do It! (But We Don't Want To): A Feminist Perspective on Women and Conscription*, GEN. ASSEMBLY (Apr. 17, 2020), <https://www.generalassembly.ca/archive/we-can-do-it-but-we-dont-want-to> [<https://perma.cc/8RDR-S244>] (stating that “[p]erhaps feminists should not be advocating for their inclusion or exclusion, but rather push for an abolishment of Selective Service registration because nobody, regardless of their gender, should be subjected to involvement in a war against their will”).

17. 50 U.S.C. § 3802(a) (2018).

18. See INSPIRED TO SERVE, *supra* note 3; 50 U.S.C. § 3809 (2018); see also *Rostker*, 453 U.S. at 75 (providing that “[r]egistration is the first step in a united

been a draft since 1973 when then-Secretary of Defense Melvin Laird announced the end of conscription and a shift to an all-volunteer military.¹⁹ President Ford subsequently suspended the registration requirement in 1975,²⁰ but President Carter reinstated registration in 1980, shortly after the Soviet Union invaded Afghanistan.²¹ Consequently, despite having no draft for almost 50 years, young men have continually been required to register for a potential draft since 1980. In 2018, the Selective Service maintained information on a pool of approximately 16.4 million registrants between the ages of 18 and 26.²²

Although the government places the responsibility of registering for the draft in the hands of those required to register,²³ the consequences for failing to do so ensure the provisions of the MSSA are met. Specifically, the penalties for failure to register for the draft include fines of up to \$10,000 and imprisonment for up to five years.²⁴ In addition, young men who fail to register are pro-

and continuous process designed to raise an army speedily and efficiently") (internal quotations omitted).

19. CONG. RSCH. SERV., R44452, *THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS*, 13 (2019) <https://fas.org/sgp/crs/misc/R44452.pdf> [<https://perma.cc/56YV-AQH7>]. Interestingly, the last man inducted into the military through the draft on June 30, 1973 was Dwight Elliott Stone, "a draft evader who actually had been called in 1969, but fought his induction." *Id.* at 13 n.79.

20. Proclamation No. 4360, 40 Fed. Reg. 14,567 (Apr. 1, 1975).

21. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980). In his 1980 State of the Union address, President Carter explained his reinstatement of the registration requirement as follows:

[T]he Soviet Union has taken a radical and an aggressive new step [by invading Afghanistan]. . . . I believe that our volunteer forces are adequate for current defense needs, and I hope that it will not become necessary to impose a draft. However, we must be prepared for that possibility. For this reason, I have determined that the Selective Service System must now be revitalized.

President Jimmy Carter, 1980 State of the Union Address, <https://www.jimmy-carterlibrary.gov/assets/documents/speeches/su80jec.phtml> [<https://perma.cc/GZ9J-R9LU>].

22. DONALD BENTON, *SELECTIVE SERVICE SYSTEM: ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES* 22 (2019), <https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-FY2019.pdf> [<https://perma.cc/BYP8-J7C4>].

23. See *Selective Service*, USA.GOV, <https://www.usa.gov/selective-service> [<https://perma.cc/5GGQ-5HAA>] (last visited Mar. 26, 2021) (describing how to register for the draft).

24. 50 U.S.C. § 3811(a) (2018). In addition, several states condition the receipt of state benefits on registration. See Gregory Korte, *For a Million U.S. Men, Failing to Register for the Draft Has Serious, Long-Term Consequences*, USA TODAY (Apr. 3, 2019, 11:07 AM), www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002 [<https://>

hibited from receiving federal student aid²⁵ and certain federal job training assistance.²⁶ Those who knowingly and willfully fail to register are also ineligible for federal civil service appointments.²⁷

A. *Congressional Rejection of President Carter's Recommendation to Extend Registration to Women*

Prior to reinstating registration in 1980, President Carter recommended to Congress that it amend the MSSA to “provide Presidential authority to register, classify and examine women for service in the Armed Forces.”²⁸ President Carter explained this recommendation by citing the increased number of women serving effectively in the military.²⁹ The President also noted that by registering women, “the pool of people available to be drafted would be doubled” and although women could not be used in combat, “[t]heir presence could free more men for close combat jobs.”³⁰ Finally, the President grounded his recommendation in equity, stating that “it would be inequitable to impose registration and induction only on males” and “[e]quity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively.”³¹

perma.cc/X34F-AFLF].

25. Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113, 96 Stat. 718 (1982), amended in 1983.

26. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 189(h), 112 Stat. 936 (1998).

27. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 1622, 99 Stat. 583 (1985), amended in 1986.

28. H. COMM. ON ARMED SERVS., 96TH CONG., PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM: A REPORT TO CONGRESS PREPARED PURSUANT TO PUB. L. 96-107, 23 (Comm. Print 1980).

29. *Id.* at 20 (“The influx of women into the military during this decade has provided substantial evidence that women are capable of high quality performance in many military skills”).

30. *Id.* at 22.

31. *Id.* at 22–23. President Carter further explained his recommendation to register women as follows:

My decision to register women is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious throughout our society. . . . that women are now providing all types of skills in every profession. The military should be no exception. . . . There is no distinction possible, on the basis of ability or performance, that would allow me to exclude women from an obligation to register.

THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS, *supra* note 19, at 15 & n.92 (citing Statement by the President, Feb. 8, 1980).

Congress, however, rejected the recommendation to amend the MSSA to require women to register.³² A report by the U.S. Senate Armed Service Committee (the "Senate Report") explained this rejection by stating that, "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."³³ According to the Committee, the "principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."³⁴ The Committee proceeded to state that the exclusion of women from combat "forms the linchpin for any analysis of the problem" of whether to require women to register for the draft.³⁵ After reaffirming the policy then in effect of excluding women from combat, the Committee concluded that the policy was "the most important reason for not including women in a registration system."³⁶ Thus, the Senate Report expressly and unequivocally identified the policy excluding women from combat as the main justification for not requiring women to register for the draft.

House and Senate conferees subsequently endorsed these findings in their conference report and "[l]ater both Houses [of Congress] adopted the findings by passing the Report."³⁷ Thus, when President Carter reinstated registration in 1980, the requirement was limited to men and not expanded to include women, despite the President's recommendations.

B. *The Rostker Decision*

Congress's decision not to extend registration to women was challenged in the courts under the Fifth Amendment's Due Process Clause, with the issue eventually reaching the Supreme Court in *Rostker v. Goldberg*.³⁸ Justice Rehnquist authored the majority

32. S. REP. NO. 96-826, at 157 (1980).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (stating that both the U.S. House of Representatives and the U.S. Senate adopted the findings of the Senate Armed Services Committee and therefore the Committee's "findings are in effect findings of the entire Congress"). See also H.R. REP. NO. 96-1222, at 104 (1980) (Conf. Rep.) ("The Conferees endorse the specific findings on registration of women contained in the Senate report.").

38. 453 U.S. 57. The initial lawsuit in *Rostker* was filed in 1971, during the Vietnam War. *Id.* at 61. That action became inactive for several years, however, with registration suspended by President Ford. *Id.* at 62. President Carter's reinstatement of registration "breathed new life" into the lawsuit in 1980. *Id.* at 61-63 (explaining the procedural background to the case).

opinion in *Rostker*, with five other justices joining in the majority. Justices White and Marshall each filed dissenting opinions, with Justice Brennan joining both of their dissents.

Justice Rehnquist began the majority opinion in *Rostker* by emphasizing Congress's power under the U.S. Constitution to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces."³⁹ Pursuant to this constitutional authority, Congress initially enacted the MSSA in 1948, limiting registration to men.⁴⁰ Justice Rehnquist explained that in 1980, Congress considered "at great length" President Carter's recommendation to amend the MSSA to require women to register for the draft, but rejected the recommendation after extensive debate and deliberation.⁴¹ The majority opinion went on to state that the deliberative approach taken by Congress with respect to whether women should be required to register for the draft distinguished *Rostker* from other cases where the Court had struck down sex-based classifications as the "accidental by-product of a traditional way of thinking about females."⁴²

According to Justice Rehnquist, the Supreme Court had historically granted Congress great deference in matters relating to national defense and military affairs because of (1) Congress's explicit constitutional authority in these areas, and (2) "the lack of competence on the part of the courts" with respect to these matters.⁴³ That said, Justice Rehnquist noted that Congress was not "free to disregard the Constitution" and "remain[ed] subject to the limitations of the Due Process Clause," even in the area of military affairs.⁴⁴

The majority acknowledged the heightened judicial scrutiny that sex-based classifications received under the Court's previous jurisprudence.⁴⁵ In light of those earlier decisions, the Court rejected the Government's argument that the MSSA's sex-based classification should come under extremely deferential rational

39. *Id.* at 59 (quoting U.S. CONST. art. I, § 8, cls. 12–14).

40. *Id.* at 74 (noting that "the MSSA was first enacted in its modern form" in 1948).

41. *Id.* at 61, 72–75.

42. *Id.* at 74 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)).

43. *Id.* at 64–65.

44. *Id.* at 67.

45. *Id.* at 69 (citing *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464 (1981); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971)).

basis review.⁴⁶ Instead, just five years before *Rostker*, the Court in *Craig v. Boren*⁴⁷ had finally settled on the standard of review to be applied in sex-based classification cases. To withstand a constitutional challenge under the *Craig* standard, a sex-based classification must serve important governmental objectives and must be substantially related to those objectives.⁴⁸ The standard introduced in *Craig* has become known as the “intermediate scrutiny standard.”⁴⁹

Justice Rehnquist dissented in *Craig*, however, and argued that the intermediate scrutiny standard “apparently [came] out of thin air,” as none of the Court’s previous cases had applied the standard.⁵⁰ Justice Rehnquist’s *Craig* dissent further criticized the intermediate scrutiny standard, stating:

I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of “rational basis,” and the “compelling state interest” required where a “suspect classification” is involved—so as to counsel weightily against the insertion of still another “standard” between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is “substantially” related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at “important” objectives or, whether the relationship to those objectives is “substantial” enough.⁵¹

46. Under the rational basis standard of review, the imposition of the registration requirement on men but not women would be upheld as constitutional if the “distinction drawn between men and women bears a rational relation to some legitimate Government purpose” *Id.* In response to the government’s argument that the Court should apply rational basis review rather than the heightened form of scrutiny typically applied in cases involving sex-based discrimination, the Court stated, “We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further ‘refinement’ in the applicable tests as suggested by the Government.” *Id.*

47. 429 U.S. 190, 210 (1976) (striking down an Oklahoma law that permitted the sale of beer to women between the ages of eighteen and twenty-one but prohibited sales to men until they reached the age of twenty-one).

48. *Id.* at 197–98.

49. See *Intermediate Scrutiny*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/intermediate_scrutiny [<https://perma.cc/LY9J-7GKP>] (last visited Mar. 26, 2021) (stating that the “Supreme Court created the Intermediate Scrutiny Test in *Craig v. Boren*”).

50. *Craig*, 429 U.S. at 220 (Rehnquist, J., dissenting).

51. *Id.* at 220–21.

Thus, rather than simply apply the intermediate scrutiny formulation in *Rostker*, Justice Rehnquist contended that a more deferential form of scrutiny should apply when dealing with military affairs.⁵² Justice Rehnquist relied on an earlier case, *Schlesinger v. Ballard*, to support this proposition.⁵³

In *Ballard*, decided a year before *Craig* and six years before *Rostker*, the Court upheld a sex-based classification relating to opportunities for promotion in the Navy—female Naval officers were given a longer period of time than their male counterparts to earn a promotion before being forced to retire.⁵⁴ Despite the different treatment of male and female Navy officers in *Ballard*, the Court upheld the relevant statute because female officers were unable to serve in combat and therefore had less opportunity to garner the accomplishments necessary for promotion.⁵⁵ The Court found that male and female Naval officers were not similarly situated with respect to their prospects for promotion, and therefore different treatment under the statute in question was justified and constitutional.⁵⁶

In reviewing this earlier decision, the *Rostker* majority contended that the Court in “*Schlesinger v. Ballard* did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance.”⁵⁷ Thus, the majority in *Rostker* purported to apply a more deferential form of intermediate scrutiny—what might be thought of as “intermediate scrutiny light”—to the MSSA’s obligation that men, but not women, register for the draft.

Despite this lack of precision about the standard of review applicable to sex-based classifications in the military context, the majority in *Rostker* ultimately determined that the MSSA’s sex-based classification satisfied both parts of the traditional intermediate scrutiny standard.⁵⁸ First, the Court stated conclusively that “[n]o one could deny that under the test of *Craig v. Boren* [the usual intermediate scrutiny standard], the Government’s interest in raising and supporting armies is an ‘important governmental

52. *Id.* at 218–21.

53. *Id.* at 219–20 n.2 (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)).

54. *Ballard*, 419 U.S. at 499–500, 510.

55. *Id.* at 508–09.

56. *Id.* at 508–10.

57. *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981).

58. *Id.* at 83.

interest.”⁵⁹ The Court went on to say that because the “purpose of registration . . . was to prepare for a draft of *combat troops*” and because women were prohibited by statute and by military policy from serving in combat, “[t]he exemption of women from registration [was] not only sufficiently but also closely related to Congress’ purpose in authorizing registration.”⁶⁰ In making this statement, the Court implied that something less than a “closely related” connection between the government’s objectives and the sex-based classification used to achieve those objectives would suffice to meet constitutional review in the context of military affairs. Nevertheless, the Court found that the relationship between the government’s interest in raising combat troops and the MSSA’s requirement that only men must register for the draft was close enough to satisfy even the intermediate scrutiny standard typically applied to sex-based classifications outside the military context.⁶¹

In summarizing its reasoning for upholding the sex-based classification under the MSSA, the Court stated, “[t]he fact that congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.”⁶² Like the distinction between male and female Navy officers in *Schlesinger v. Ballard*, the Court found that the sex-based classification under the MSSA was “not invidious, but rather realistically reflects the fact that the sexes are not similarly situated.”⁶³

Justice White dissented from the majority decision because, as he understood the factual record, military experts estimated that in the event of a conflict requiring a draft, approximately 80,000 non-combat positions would need to be filled through the draft.⁶⁴ According to those same experts, these positions could be filled by men or women without adversely affecting military effectiveness.⁶⁵ Justice White stated that he could “discern no adequate justification” for the view that Congress was “free to register and draft only men” for these non-combat positions.⁶⁶ In other words, with respect to those positions for which men and women were eligible

59. *Id.* at 70.

60. *Id.* at 76, 79.

61. *Id.* at 79.

62. *Id.*

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

64. *Id.* at 84 (White, J., dissenting).

65. *Id.* at 85.

66. *Id.*

to serve and for which there would be no diminishment in military effectiveness by either sex serving, the Fifth Amendment's Due Process Clause required registration and even conscription of both men and women.

Justice Marshall also filed a lengthy dissent in *Rostker*. At the outset, Justice Marshall expressly applied the *Craig v. Boren* intermediate scrutiny standard, stating that a sex-based classification must bear "a close and substantial relationship to [the achievement of] important governmental objectives."⁶⁷ Justice Marshall conceded that the government's interest in raising and supporting armies constitutes an important governmental objective.⁶⁸ He further acknowledged that the Court had in fact "accorded particular deference . . . in the context of Congress' authority over military affairs,"⁶⁹ but he qualified that deference by stating that military affairs may not be used as a "talismanic incantation" to sanction otherwise unconstitutional actions.⁷⁰ Given that background, Justice Marshall explained that "there 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."⁷¹

Justice Marshall criticized the majority's conclusion that the MSSA's sex-based classification was constitutional because women were not "similarly situated" to men on the basis that men could serve in combat and women could not. Marshall's dissent argued that the majority's "substantially similar" analysis focused on "the wrong question."⁷² Instead, the relevant question, according to Justice Marshall, was whether "excluding women from registration substantially further[ed] the goal of preparing for a draft of combat troops."⁷³ Stated differently, Justice Marshall contended that "the Government must show that registering women would substantially impede its efforts to prepare for such a draft."⁷⁴ According to him,

67. *Id.* at 88 (Marshall, J., dissenting) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

68. *Id.*

69. *Id.* at 89.

70. *Id.* (quoting *United States v. Robel*, 389 U.S. 258, 263–64 (1967)).

71. *Id.* at 90.

72. *Id.* at 94. According to Justice Marshall, the earlier case of *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), illustrated that the "similarly situated" standard was not the controlling standard in cases involving sex-based discrimination. *Id.* Rather, the proper standard to apply was the *Craig* standard: whether the sex-based classification substantially related to an important government interest. *Id.*

73. *Id.*

74. *Id.*

the government had failed to make that showing, as it made “no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by *registering* both men and women but *drafting* only men if only men turn out to be needed.”⁷⁵ Thus, Justice Marshall declared that the refusal to register women served to “reinforc[e] sexual stereotypes about the ‘proper place’ of women and their need for special protection.”⁷⁶

Justice Marshall also criticized the majority’s narrow view of the purpose of the draft.⁷⁷ According to the majority, the draft was intended to supply combat troops to the armed forces.⁷⁸ The government had conceded in its brief to the Court, however, that approximately one-third of all draft inductees would be needed for reasons other than “combat skills.”⁷⁹ In addition, the Court noted that the Department of Defense estimated that “[i]f we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs that we would be inducting 650,000 people for.”⁸⁰ Like Justice White, Justice Marshall contended that the majority failed to explain why registration should be limited only to men when so many non-combat jobs might be filled by women, particularly when—in many instances—women had the potential to perform those non-combat jobs more successfully than men.⁸¹ In effect, Justice Marshall took the position that limiting registration to men prevented the military from drafting the most qualified people for all positions in the military because some non-combat positions would best be filled by talented women, rather than by men who had less talent for the particular job.

Finally, Justice Marshall stated that the majority’s “intermediate scrutiny light” standard, described above, substituted “hollow shibboleths about ‘deference to legislative decisions’ for constitutional analysis.”⁸² According to him, “Congressional enactments in the area of military affairs must, like all other laws, be *judged*

75. *Id.* at 95.

76. *Id.* at 95 (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)).

77. *Id.* at 94.

78. *Id.* at 76 (majority opinion).

79. *Id.* at 97 (Marshall, J., dissenting) (The government’s brief stated that “in the event of mobilization, *approximately two-thirds* of the demand on the induction system would be for *combat skills*”).

80. *Id.* at 100 (quoting testimony of Principal Deputy Assistant Secretary of Defense Danzig in a Senate hearing).

81. *Id.* at 98 (quoting Assistant Secretary of Defense Pirie in stating that 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”).

82. *Id.* at 112.

by the standards of the Constitution.”⁸³ No legislation, including legislation relating to military affairs, should receive less than the otherwise applicable standard of constitutional review.

As previously mentioned, Justice Brennan joined in both Justice White’s and Justice Marshall’s dissents in *Rostker*. Justice Brennan had been the primary architect of the *Craig v. Boren* intermediate scrutiny standard and must have recoiled at the prospect of the “intermediate scrutiny light” standard that Justice Rehnquist introduced in *Rostker* being applied to even a subgroup of sex-based classifications. Despite his position not prevailing in *Rostker*, however, Justice Brennan may have taken some solace in the fact that Justice Rehnquist at least moved away from the position he had taken in *Craig v. Boren*, where Rehnquist argued in dissent that rational basis review, rather than any form of heightened scrutiny, should have applied to the sex-based statute in that case.⁸⁴

At the same time, Justice Brennan had also moved away from his own earlier position that strict scrutiny should apply in sex-based classification cases.⁸⁵ For example, Justice Brennan dissented in *Schlesinger v. Ballard*, the case upholding a statute with different standards for the promotion of male and female Navy officers, writing:

I believe . . . that a legislative classification that is premised solely on gender must be subjected to close judicial scrutiny. Such suspect classifications can be sustained only if the Government demonstrates that the classification serves compelling interests that cannot be otherwise achieved.⁸⁶

Earlier opinions by Justice Brennan in cases involving sex-based classification statutes had likewise argued for strict scrutiny as the appropriate standard of review, but Justice Brennan had never been able to persuade a majority of the Court of this position.⁸⁷ Thus,

83. *Id.*

84. *Craig v. Boren*, 429 U.S. 190, 217–18 (1976) (Rehnquist, J., dissenting) (stating “I think the Oklahoma statute challenged here need pass only the ‘rational basis’ equal protection analysis expounded in” earlier cases).

85. Justice Brennan’s dissent in *Schlesinger v. Ballard* provides a good example of this. 419 U.S. 498, 511–21 (1975) (Brennan, J., dissenting).

86. *Id.* at 511.

87. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (stating 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”); *Kahn v. Shevin*, 416 U.S. 351, 357–58 (1974) (Brennan, J., dissenting) (stating that sex-based classifications “can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the

while *Rostker* at least cemented some form of heightened scrutiny as the applicable standard in sex-based classification cases, it must have troubled Justice Brennan that his attempt to apply the most stringent form of judicial review, strict scrutiny, had failed. Moreover, his compromise position of intermediate scrutiny was being chipped away, at least in the context of military affairs.

One set of voices conspicuously absent in the *Rostker* decision was that of women. The plaintiffs in the case were men seeking to invalidate the single-sex registration requirement as a violation of their Due Process rights. The nominal defendant, Bernard Rostker, was the Director of Selective Service and, as such, was focused on maintaining the existing selective service system, rather than on women's rights. In addition, the Supreme Court, at the time, was comprised entirely of men, with Justice O'Connor not joining the Court until later in 1981.⁸⁸ Individual women and women's groups did express their views on the issue, however, through the filing of amicus briefs with the Court. Those briefs reflected the broad range of perspectives that women held on the issue of female registration for the draft.

In particular, the National Organization for Women (NOW) filed an amicus brief arguing that the exclusion of women from registration "reinforce[d] the sex-role stereotypes harmful to women that have proven so resistant to change."⁸⁹ The specific stereotype identified in the NOW brief was "that women constitute a different—and inevitably lesser—class from all men merely on the basis of gender."⁹⁰ The brief expounded on the effects of this stereotype, arguing that promulgating the misperception of women "as weak and unfit for service" resulted in higher instances of violence against women and in the internalization by women that they are "incapable of self-defense."⁹¹ Moreover, NOW argued that excluding women from "compulsory involvement in the community's survival" adversely affected women's ability to seek and obtain leading political roles.⁹² According to this argument, because women were

use of feasible, less drastic means").

88. Linda Greenhouse, *Senate Confirms Judge O'Connor; She Will Join High Court Friday*, N.Y. TIMES (Sept. 22, 1981), <https://www.nytimes.com/1981/09/22/us/senate-confirms-judge-o-connor-she-will-join-high-court-friday.html> [<https://perma.cc/5WBC-9XSP>].

89. Brief for National Organization for Women as Amicus Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (No. 80-251), 1981 WL 390369, at *3.

90. *Id.* at *4.

91. *Id.* at *20–21.

92. *Id.* at *24.

not “at risk” with respect to defending the country, they were also not perceived as “entitled” to hold leadership roles in government.⁹³

Several other women’s rights organizations joined together to also file an amicus brief. Participating organizations included the Women’s Equity Action League, the American Association of University Women, and the League of Women Voters.⁹⁴ While their amicus brief focused largely on the relevant standard of judicial review, these organizations also argued that the “exclusion of women from draft registration reinforces the notion that women are destined to remain in the home, and that only the male is fit for ‘the marketplace and the world of ideas.’”⁹⁵ The brief further argued that even though draft registration may be viewed as an obligation, and therefore detrimental if extended to women, true equality required an “equal division of societal obligations and duties.”⁹⁶ Otherwise, “the gains made in achieving rights for women will be threatened, viewed as magnanimous concessions to women’s demands instead of as prerogatives justly due to equally productive members of society.”⁹⁷

However, not all of the amicus briefs filed by women argued in favor of extending the MSSA to require female registration. Sixteen individual women, all of draft age, filed an amicus brief opposing the compulsory registration of women. Their brief contended that requiring women to register and, thereby, become subject to a potential draft would have negative “societal” impacts by placing unprecedented “strains on family life.”⁹⁸ According to the brief, focusing on stereotypes “miss[ed] the point.”⁹⁹ Rather, the historical exemption of women from the draft “ensured a certainty to the family unit that would not otherwise be there.”¹⁰⁰ That certainty afforded by excluding women from the draft was that a mother could always “choose to remain with [her] children, no matter what the emergency.”¹⁰¹ The individual amici further argued that other differences between men and women also justified women’s exemption from registration under the MSSA. These included that “women are less accustomed

93. *Id.* at *23–24.

94. Brief for Women’s Equity Action League and Legal Defense Fund et. al. as Amici Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (No. 80-251), 1981 WL 390514.

95. *Id.* at *6.

96. *Id.* at *11.

97. *Id.* at *11.

98. Brief for Stacey Acker et al. as Amici Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (No. 80-251), 1980 WL 339851, at *18.

99. *Id.* at *21.

100. *Id.* at *21.

101. *Id.* at *21.

to, and less willing to accept the invasions of personal privacy which are a hallmark of military life,” “women have more reason to fear sexual abuse than men do,” and “millions of women in this country — as well as millions of men — view military combat . . . as repugnant and inappropriate to the female gender.”¹⁰²

Ultimately, the Court’s decision in *Rostker* turned on the difference in combat eligibility between men and women, rather than the MSSA’s impact on societal perceptions of women, the potential effect on families of requiring women to register, or any of the other issues mentioned above. Even so, the amicus briefs in *Rostker* signaled the significant divergence of views among women on the issue of draft registration. The difference in combat eligibility has gradually been eliminated, as explained in Part I.C. The divergent views on women’s registration, however, persist.¹⁰³

C. *Post-Rostker Policy Developments*

In December 1991, a decade after the Court’s *Rostker* decision and in the wake of the Persian Gulf War, Congress established the Commission on the Assignment of Women in the Armed Forces (Commission on Assignment).¹⁰⁴ The Commission on Assignment was charged with “assess[ing] the laws and policies restricting the assignment of female service members” and “mak[ing] findings on such matters.”¹⁰⁵ One of the specific charges given to the Commission on Assignment was to consider the “legal and policy implications of requiring females to register for and to be subject to conscription under the Military Selective Service Act.”¹⁰⁶ Before addressing this charge, however, the Commission on Assignment examined whether women should be permitted to serve in military occupational specialties that engage in ground combat.¹⁰⁷ As to

102. *Id.* at *21–22.

103. *See, e.g.*, SERVICE WOMEN’S ACTION NETWORK <https://www.servicewomen.org/programs/#issues> [<https://perma.cc/NHP8-UEET>] (statement from the Service Women’s Action Network (SWAN) that “SWAN believes that women should be eligible for Selective Service”); David Welna, *Women and the Draft*, NPR (Apr. 27, 2019), <https://www.npr.org/2019/04/27/717756908/women-and-the-draft> [<https://perma.cc/9JJE-VH56>] (statement by conservative author Ashley McGuire that “the push to expand the selective service [to women] strikes me as yet another manifestation of the belief that women are only equal with men if we do exactly as men do”).

104. *See* Pub. L. No. 102-190, §§ 541–550, 105 Stat. 1290 (1991) (establishing the Commission on the Assignment of Women in the Armed Forces).

105. *Id.* § 542(a).

106. *Id.* § 542(c)(4)(A).

107. *See* PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES: REPORT TO THE PRESIDENT (1992) [hereinafter COMMISSION REPORT].

that issue, the Commission on Assignment strongly recommended against allowing women to participate in ground combat, for reasons discussed below. Consequently, and because it also took the view that registration and the draft were intended for the purpose of providing ground combat troops,¹⁰⁸ the Commission on Assignment further recommended against requiring women to register under the MSSA.¹⁰⁹

The Commission on Assignment delivered its report to the President, as required by statute, on November 15, 1992.¹¹⁰ As to the question of ground combat, the Commission on Assignment stated that women should be “excluded from direct land combat units and positions.”¹¹¹ It cited several reasons for this recommendation, including physiological differences between men and women, concerns over the effect women could have on the cohesion of ground combat units, the high risk of capture by the enemy, a lack of support for women participating in ground combat by those in the military, and the experience of other countries placing women into close combat situations.¹¹² Based on these factors, the Commission on Assignment stated that “[t]he case against women in ground combat is compelling and conclusive.”¹¹³

The recommendation against allowing women to participate in ground combat seemed to dictate the Commission on Assignment’s recommendation regarding whether women should be required to register for the draft. The Commission on Assignment summarized the Supreme Court’s reasoning in *Rostker* as resting on the argument that “the purpose behind the registration requirement is to create a pool of individuals to be called up in the event of a draft.”¹¹⁴ Because a draft is “used to obtain combat troops” and women are prevented from serving in combat positions, “men and women are dissimilarly situated in regard to the registration requirement and it is permissible to treat them differently.”¹¹⁵

The Commission on Assignment then explained its recommendation that “women should not be required to register for or be subject to conscription”¹¹⁶ as follows:

108. *Id.* at 26.

109. *Id.* at 40.

110. *Id.* at i.

111. *Id.* at 24. The vote on this issue was ten commissioners in favor of excluding women from ground combat, zero opposed, and two abstentions. *Id.* at 27.

112. *Id.* at 24–26.

113. *Id.* at 26.

114. *Id.*

115. *Id.*

116. *Id.* at 40. With respect to this recommendation, eleven commissioners

In the final vote, there was an overwhelming consensus among the Commissioners that women should not be drafted. The Commission adopted a blanket recommendation against imposing any requirements on women with regard to conscription, regardless of the assignments for which they are eligible in the Armed Forces. It determined that important government interests exist which are substantially related to excluding women from draft registration, e.g., the military effectiveness of our land combat forces. . . . Congress should prohibit women from serving in direct land combat positions . . . ; in so doing, the need for female conscription is obviated.¹¹⁷

Thus, the Commission on Assignment's assessment of the detrimental impact on military effectiveness of permitting women to participate in direct ground combat motivated its recommendation against amending the MSSA to require women to register for the draft.

Following the issuance of the Commission on Assignment's report and contrary to some of its recommendations, however, the Clinton administration and Congress moved to open some previously closed combat positions to women. Particularly, in April 1993, Secretary of Defense Les Aspin instructed the military services to allow women to compete for air combat positions.¹¹⁸ In November 1993, Congress repealed existing statutory prohibitions on women serving on combatant aircraft and vessels.¹¹⁹ But even with those changes, each of the military branches maintained internal policies that prevented women from serving in combat positions, or even in supporting units, that were confronted with a significant risk of direct combat, exposure to hostile fire, or capture.¹²⁰

voted in favor of not requiring women to register for the draft or be subject to conscription and three commissioners voted against. *Id.* at 41.

117. *Id.* at 40–41.

118. See *Combat Roles for Women a Step Closer*, 49 CQ ALMANAC 1993 463 (1994), <http://library.cqpress.com/cqalmanac/cqa193-1106255> [<https://perma.cc/W32S-U3T9>]; John Lancaster, *Aspin to Open Combat Roles to Women*, WASH. POST (Apr. 28, 1993), <https://www.washingtonpost.com/archive/politics/1993/04/28/aspin-to-open-combat-roles-to-women/78a7f11a-6d29-4539-bc10-ac908cff8498> [<https://perma.cc/9CT6-5WG3>].

119. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547 (1993) (repealing 10 U.S.C. § 6015, which prohibited the Navy and Marine Corps from assigning women to duty on vessels engaged in combat missions other than in narrow exceptions).

120. The policies prohibiting women from combat positions for each military branch are set forth in Appendix B of Section IV of the 1992 Commission Report. COMMISSION REPORT, *supra* note 107, at B-1–B-2. Prohibitions against women serving in some non-combat roles were based on the Department of Defense's so-called "Risk Rule," which stated:

Risks of direct combat, exposure to hostile fire, or capture are

In January 1994, Secretary Aspin rescinded the Department of Defense policy that prevented women from serving in combat support positions and replaced it with the Direct Ground Combat Definition and Assignment Rule (the Direct Combat Rule).¹²¹ The Direct Combat Rule stated that “[s]ervice members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.”¹²² It defined direct ground combat as:

[E]ngaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.¹²³

The Direct Combat Rule remained in place until January 2013, when Secretary of Defense Leon Panetta and Chairman of the Joint Chiefs of Staff General Martin Dempsey issued a memo rescinding it.¹²⁴ In that memo, Secretary Panetta and General Dempsey stated that they were “fully committed to removing as many barriers as possible to [women] joining, advancing, and succeeding in the U.S. Armed Forces.”¹²⁵ They further stated:

Today, women make up 15% of the U.S. military and are indispensable to the national security mission. In fact, thousands

proper criteria for closing non-combat positions or units to women, when the type, degree and duration of such risks are equal to or greater than the combat units with which they are normally associated within a given theater of operations. If the risk of non-combat units or positions is less than comparable to land, air or sea combat units with which they are associated, then they should be open to women. Non-combat units should be compared to combat land units, air to air and so forth.

Id. at B-2.

121. Memorandum from John Aspin, Sec’y of Def., to Sec’y of the Army, Sec’y of the Navy, Sec’y of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Sec’y of Def. (Pers. & Readiness), & Assistant Sec’y of Def. (Rsrv. Affs.) (Jan. 13, 1994), <https://www.govexec.com/pdfs/031910d1.pdf> [<https://perma.cc/BTC2-R5NH>].

122. *Id.*

123. *Id.*

124. Joint Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, & Leon E. Panetta, Sec’y of Def., to Sec’ys of the Mil. Dep’ts Acting Under Sec’y of Def. for Pers. & Readiness & Chiefs of the Mil. Servs. (Jan. 24, 2014), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/M3ML-H4RC>].

125. *Id.*

of women have served alongside men in Iraq and Afghanistan, and like men, have been exposed to hostile enemy action in those countries. However, many positions in our military remain closed to women because of the 1994 Direct Ground Combat Definition and Assignment Rule. . . .

[T]he 1994 Direct Ground Combat Definition and Assignment Rule excluding women from assignment to units and positions whose primary mission is to engage in direct combat on the ground is rescinded effective immediately. . . .

Integration of women into newly opened positions and units will occur as expeditiously as possible, considering good order and judicious use of fiscal resources, but must be completed no later than January 1, 2016. Any recommendation to keep an occupational specialty or unit closed to women must be personally approved first by the Chairman of the Joint Chiefs of Staff, and then by the Secretary of Defense; this approval authority may not be delegated.¹²⁶

Only the Marine Corps sought an exception to the full integration of women into all occupational specialties and units.¹²⁷ Secretary of Defense Ash Carter rejected the Corps' request in December 2015, stating "I have now determined that no exceptions are warranted to the full implementation of the rescission of the '1994 Direct Ground Combat Definition and Assignment Rule.' Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position."¹²⁸

And with that, all official barriers to women's participation in combat-related occupational specialties were eliminated. "Since 2016, more than 1,200 [women] have entered combat career fields[,] such as field artillery, armor[,] and infantry"¹²⁹ In addition, women have successfully completed some of the Armed Services'

126. *Id.*

127. Hope Hodge Seck, *Overruled on Women in Combat, Marine Corps Prepares to Integrate Units*, MILITARY.COM (Dec. 3, 2015), <https://www.military.com/daily-news/2015/12/03/overruled-on-women-in-combat-marine-corps-prepares-to-integrate.html> [<https://perma.cc/D6HE-4TCS>].

128. Memorandum from Ash Carter, Sec'y of Def., to the Sec'ys of the Mil. Dep'ts Acting Under Sec'y of Def. for Pers. & Readiness, Chiefs of the Mil. Servs., & Commander, U.S. Special Operations Command (Dec. 3, 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf> [<https://perma.cc/3N34-UWCS>].

129. Todd South, *First Female Army Guard Enlisted Soldiers Graduate Ranger School*, ARMY TIMES (Dec. 16, 2019), <https://www.armytimes.com/news/your-army/2019/12/16/first-female-army-guard-enlisted-soldiers-graduate-ranger-school> [<https://perma.cc/3ND4-P6PD>].

most rigorous and prestigious programs, such as Army Ranger School¹³⁰ and Green Beret training.¹³¹ Of course, once the prohibition against women serving in combat ended, so did the rationale behind the majority's decision in *Rostker*. As discussed earlier, the core principle in the majority's reasoning was the initial conclusion that the purpose of registration was to draft combat troops. Because women were prohibited from serving in combat, excluding them from the draft did not disrupt this purpose. Thus, the classification requiring only men to register for the draft was substantially related to the draft statute.¹³² With women now permitted to hold all positions in the military, including those that engage in ground combat, the logical basis for the *Rostker* decision no longer holds. Unsurprisingly, litigation and legislative activity have ensued.

D. *Recent Litigation on the Issue of Women's Registration*

Plaintiffs have recently brought two separate court cases challenging the constitutionality of the MSSA in light of the elimination of sex-based combat prohibitions. These cases are discussed below. Before beginning the analysis, the author would like to make clear that while he ultimately agrees with the position advocated by the plaintiffs in both actions—that the MSSA is unconstitutional—the author's reasons for that conclusion, as discussed in Part II and Part III of this Article, may differ significantly from the rationales and motivations of the parties and their attorneys in the two lawsuits.

In particular, one of the attorneys initially involved in *Kyle-Labell v. Selective Service System*, the first case discussed below, was a self-described “anti-feminist lawyer.”¹³³ This individual is alleged to have murdered the son and injured the husband of the federal district court judge originally assigned to the case before taking his own life.¹³⁴ In addition, the National Coalition for Men, a plaintiff in the second case discussed below, *National Coalition for Men*

130. *See id.* (discussing the first two women to graduate the “rigorous Army Ranger School”).

131. *See* Kyle Rempfer, *A Woman Became a Green Beret Thursday, a Huge Milestone for the Army and the Military, but She Isn't the First Female to Earn the Title*, *ARMY TIMES* (July 9, 2020), <https://www.armytimes.com/news/your-army/2020/07/09/a-woman-became-a-green-beret-today-a-huge-milestone-for-the-army-and-the-military-but-she-isnt-the-first-female-to-earn-the-title> [<https://perma.cc/NW7D-Z2UF>].

132. *Rostker v. Goldberg*, 453 U.S. 57, 76, 79 (1981).

133. Nathan Layne, *Anti-Feminist Lawyer, Sole Suspect in Killing of Judge's Son, Dead*, *REUTERS* (July 20, 2020, 1:47 PM), <https://in.reuters.com/article/uk-usa-shooting-salas-idUKKCN24L2MY> [<https://perma.cc/J6S5-SR8J>].

134. *Id.*

v. *Selective Service System*, is a “men’s rights” organization.¹³⁵ The Southern Poverty Law Center has characterized the “men’s rights” movement as a forerunner to the hateful ideology of male supremacy.¹³⁶ With respect to the National Coalition for Men, specifically, the Southern Poverty Law Center states that the organization “distort[s] or cherry-pick[s] statistics to indicate female privilege, blame women or create false equivalences between the oppression of men and of women, rather than simply seek to advance the cause of men and fathers.”¹³⁷ SPLC goes on to state that:

Groups like [the National Coalition for Men] NCFM use litigation to challenge what they perceive[] as discrimination in favor of women and try to influence policy on domestic violence, sexual assault, divorce and custody cases. In reality, they offer[] little help to men other than blaming women or advocating to deny women the structures that they did have to resort to discrimination or violence—one of the biggest grievances of the men’s rights movement, for instance, is the Violence Against Women Act in 1994.¹³⁸

Further, the attorney litigating on behalf of the National Coalition for Men to strike down the MSSA was murdered on July 11, 2020.¹³⁹ Authorities have reportedly investigated whether the “anti-feminist” attorney from the *Kyle-Label* case may have been involved in the murder, though no results from the investigation have been made public at the time of this Article.¹⁴⁰

As to the background of the recent cases challenging the MSSA, in July 2015, Allison Kyle filed a complaint on behalf of her daughter, Elizabeth Kyle-Label, in the U.S. District Court for the District of New Jersey in a case captioned *Kyle-Label v. Selective Service System*.¹⁴¹ The complaint claims that the MSSA violates the Fifth Amendment “by requiring only males and *not* females to

135. *Men’s Rights Issues*, NAT’L COALITION FOR MEN, <https://ncfm.org/know-the-issues/mens-rights-issues> [<https://perma.cc/W2HN-K7FZ>].

136. *Male Supremacy*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/male-supremacy> [<https://perma.cc/U8UD-L6H6>] (stating that “[a]s women gained ground in the workplace and family structures loosened, some men’s rights activists started blaming feminism for all of men’s ills, whether real or imagined”).

137. *Id.*

138. *Id.*

139. Nicole Hong, William K. Rashbaum, Mihir Zaveri & Katherine Roman, *Suspect in Death of N.J. Judge’s Son Is Linked to California Killing*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/22/nyregion/roy-den-hollander-esther-salas.html> [<https://perma.cc/M9FX-JL5D>].

140. *Id.*

141. Complaint Class Action for Injunctive Declaratory Relief, *Kyle v. Selective Serv. Sys.*, No. 15-05193 (July 3, 2015).

register with the Selective Service ('draft registration') and prohibiting females from registering."¹⁴² The complaint catalogs the numerous and extensive changes in statutes and policies allowing women to participate in combat and combat support since the *Rostker* decision.¹⁴³ The complaint also contends that "[w]ith both males and females available for [combat and combat support] roles today, the two sexes are now similarly situated for draft registration purposes and there is no legitimate reason for the Government to discriminate against the female class, so equal protection applies."¹⁴⁴ As of April 2021, more than five years after the filing of the case, the plaintiffs have survived the Government's motion to dismiss, but Elizabeth Kyle-Labelle still awaits a ruling on the merits of her claim.

In 2013, the National Coalition for Men and an eighteen-year-old male individual filed an action in the U.S. District Court for the Central District of California challenging the constitutionality of the MSSA through claiming that the statute "discriminate[s] against males by requiring only males to register for the draft."¹⁴⁵ This lawsuit, entitled *National Coalition for Men v. Selective Service System*, was subsequently transferred, in 2016, to the U.S. District Court for the Southern District of Texas.¹⁴⁶ In February 2019, Senior District Court Judge Gray H. Miller agreed with the plaintiffs' contention regarding the unconstitutionality of the MSSA and ruled in favor of the plaintiffs on summary judgment.¹⁴⁷ The district court denied the plaintiffs' request for an injunction of the registration requirement, however, while the case was appealed to the Fifth Circuit.¹⁴⁸

In his Memorandum Opinion and Order granting the plaintiffs' summary judgment motion, Judge Miller acknowledged Congress's view that the draft exists "for the 'mass mobilization of primarily combat troops.'"¹⁴⁹ Consequently, Judge Miller framed

142. Complaint Class Action for Injunctive Declaratory Relief, *supra* note 141, at ¶ 2; see also John Johnson, *Girl, 17, Sues for Right to Register for Military Draft*, NEWSER (July 14, 2015, 6:37 PM), <https://www.newser.com/story/209811/girl-17-sues-for-right-to-register-for-military-draft.html> [<https://perma.cc/ZF3D-PGLT>].

143. Complaint Class Action for Injunctive Declaratory Relief, *supra* note 141, at ¶¶ 36, 47.

144. *Id.* ¶ 49.

145. Complaint for Injunctive and Declaratory Relief at ¶ 17, *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020) (No. 13-02391).

146. Minute Order, *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020) (No. 13-02391) (on file with author).

147. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 571 (S.D. Tex. 2019).

148. *Id.* at 582.

149. *Id.* at 578 (quoting the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 552(b)(4), 130 Stat. 2000, 2131 (2016)).

the “court’s inquiry” as “whether the MSSA’s male-only registration requirement is substantially related to Congress’s important objective of drafting and raising combat troops.”¹⁵⁰ In examining this question, Judge Miller rejected the Selective Service System’s two proposed justifications for the sex-based classification.¹⁵¹ The first justification offered by the Selective Service was that “requiring women to register for the draft would [adversely] affect female enlistment by increasing the perception that women will be forced to serve in combat roles.”¹⁵² Judge Miller said that this argument smacked of “archaic and overbroad generalizations”¹⁵³ by resting on “the assumption that women are significantly more combat-adverse than men.”¹⁵⁴

The Selective Service next argued that maintaining the male-only registration requirement reduced the administrative burden that would exist if the Selective Service also had to register and draft women for combat.¹⁵⁵ In particular, the Selective Service noted that “administrative problems caused by ‘women’s different treatment with regard to dependency, hardship[,] and physical standards’” motivated Congress to limit registration to men only.¹⁵⁶ According to the Selective Service, “it would be inefficient to draft thousands of women when only a small percentage would be physically qualified to serve as part of a combat troop.”¹⁵⁷ Judge Miller also rejected this argument, stating that there was no evidence Congress compared the percentages of women and men who are physically combat-eligible.¹⁵⁸ He stated that instead of making this apt comparison, “at most, it appears that Congress obliquely relied on assumptions and overly broad stereotypes about women and their ability to fulfill combat roles.”¹⁵⁹

After rejecting the Selective Service’s proffered justifications for the differential treatment of men and women under the MSSA, Judge Miller stated that “[i]f there ever was a time to discuss ‘the place of women in the Armed Services,’ that time has passed,” as “men and women are now ‘similarly situated for purposes of a draft or registration for a draft.’”¹⁶⁰ Consequently, the federal district

150. *Id.*

151. *Id.* at 579–82.

152. *Id.* at 579.

153. *Id.* (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 507–08 (1975)).

154. *Id.*

155. *Id.* at 580.

156. *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981)).

157. *Id.* at 580–81.

158. *Id.* at 581.

159. *Id.*

160. *Id.* at 582 (quoting *Rostker*, 453 U.S. at 78).

court held that the Selective Service had not “carried the burden of showing that the male-only registration requirement continues to be substantially related to Congress’s objective of raising and supporting armies.”¹⁶¹

As previously noted, Judge Miller’s decision was subsequently reversed by the Fifth Circuit.¹⁶² In its decision, however, the Fifth Circuit did not address the substantive arguments made by the parties or the merits of Judge Miller’s opinion. Rather, the court stated that the “Fifth Circuit is a ‘strict stare decisis’ court and ‘cannot ignore a decision from the Supreme Court unless directed to do so by the Court itself.’”¹⁶³ Consequently, despite recognizing that the “factual underpinning of the controlling Supreme Court decision has changed,” the Fifth Circuit held that *Rostker* forecloses any reconsideration of the constitutionality of the MSSA.¹⁶⁴

The Fifth Circuit decision effectively invited the National Coalition for Men to file a petition for certiorari to request the Supreme Court revisit the *Rostker* decision, and the organization has now done so, represented by the ACLU.¹⁶⁵ At the time of this Article, the Supreme Court has not yet decided whether to grant certiorari and reconsider its earlier decision upholding the constitutionality of male-only draft registration.

E. *The National Commission on Military, National, and Public Service*

In addition to these legal challenges to the MSSA, Congress has again started considering a possible amendment to the statute that would require women to register for the draft. In 2016, the Senate passed a version of the 2017 National Defense Authorization Act (NDAA) that would have required women to register.¹⁶⁶ However, the final version of the 2017 NDAA enacted by Congress removed that requirement and instead established the National Commission on Military, National, and Public Service (the National Commission) to study the question of female registration, among other issues.¹⁶⁷ The National Commission, chaired by former U.S.

161. *Id.*

162. *Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020).

163. *Id.* at 549.

164. *Id.* at 549–50.

165. Petition for Writ of Certiorari, *Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020) (No. 20-928).

166. Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html> [<https://perma.cc/9NWC-4XCA>].

167. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 551–557, 130 Stat. 2130 (2016), as amended by the John S. McCain

Representative Dr. Joseph Heck, issued its final report to Congress in March 2020. The report, entitled *INSPIRED TO SERVE*, made forty-nine recommendations intended to advance military, national, and public service for the benefit of the nation.¹⁶⁸ With respect to the question of female registration, the National Commission recommended that Congress “amend the MSSA to eliminate male-only registration and expand draft eligibility to all individuals of the applicable age cohort.”¹⁶⁹ In explaining this recommendation, the National Commission’s final report stated that it is “necessary and fair” to amend the MSSA to make it “possible to draw on the talent of a unified Nation in a time of national emergency.”¹⁷⁰

The National Commission supported this position by arguing that extending registration to women:

[P]romotes the national security of the United States by allowing the President to leverage the full range of talent and skills available during a national mobilization. It also reaffirms the Nation’s fundamental belief in a common defense, and signals that both men and women are valued for their contributions in defending the Nation. The current disparate treatment of women unacceptably excludes women from a fundamental civic obligation and reinforces gender stereotypes about the role of women, undermining national security.¹⁷¹

Thus, the National Commission relied on two primary arguments for its recommendation to extend draft registration to women: registering women would (1) render the military more effective, and (2) recognize the value that women bring to military service.

As to making the military more effective, the National Commission stated that doubling the pool of potential draftees by including women in that group “would improve military readiness by raising the quality of those who might serve, as some women would be more qualified to serve than some men.”¹⁷² The need for a larger draft pool results, in part, from the low number of both young men and young women who are eligible to serve. According to the National Commission, “7 of 10 young Americans—male and female—are currently ineligible to serve because they fail to meet physical, moral, educational, and health standards, including

National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 594, 132 Stat. 1789 (2018).

168. *INSPIRED TO SERVE*, *supra* note 3.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

mental health criteria.”¹⁷³ Therefore, the National Commission stated its belief that “it is critical to create a broader pool [of potential inductees] that includes women.”¹⁷⁴

The National Commission further stated that, based on the changes in modern warfare, any future conflict is likely to require a significant number of individuals in positions such as “intelligence and communication specialists, linguists, logisticians, medical personnel, and drone or cyber operators, among others.”¹⁷⁵ In light of women’s performance in the conflicts in both Iraq and Afghanistan, experts anticipate that they will be equally likely as men to fill these new modern warfare roles successfully.¹⁷⁶ Moreover, adding women to the draft pool would reduce the need to lower standards to receive the necessary number of inductees. Lowering induction standards during the Vietnam War resulted in significant detrimental impacts on military performance and morale.¹⁷⁷ In contrast, expanding draft eligibility to women will avoid these negative effects and “will enable the military to access the most qualified individuals, regardless of sex [and] . . . strengthen U.S. national security by ensuring that the Nation has access to the full range of Americans’ skills and capabilities.”¹⁷⁸ In short, based on extensive testimony from numerous experts, the National Commission concluded that women make the military stronger, so adding them to the draft pool would improve overall military effectiveness if a draft were ever necessary.¹⁷⁹

As to the second rationale for the National Commission’s conclusion that the time is right to amend the MSSA, the National Commission noted that “the disparate treatment of women in the context of Selective Service registration unacceptably bars women from sharing in [the] fundamental civic obligation” of defending the Nation if called to do so.¹⁸⁰ The National Commission contended that registration and eligibility for the draft “is a necessary

173. *Id.* The report goes on to explain that a Department of Defense study found that 29.3 percent of female applicants were qualified to serve versus 29.0 percent of male applicants. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (providing that “[d]uring the 1960s, standards were lowered . . . [resulting in inductees who were] more likely than their peers to die in Vietnam, wash out of training, or be dishonorably discharged”).

178. *Id.*

179. For example, Assistant Secretary of Defense James Stewart testified to the Commission that “women are already contributing to increased force lethality.” *Id.*

180. *Id.*

prerequisite [to women] achieving equality as citizens, as it has been for other groups historically discriminated against in American history.”¹⁸¹

Several female members of the Armed Forces testified to the National Commission that precluding women from registration signaled that women's contributions to the nation's defense were somehow inferior to men's.¹⁸² One female service member told the National Commission that requiring women to register would place women on equal footing with men in any discussion about whether the nation should go to war and institute a draft.¹⁸³ At present, she testified, women's views on these issues may be diminished because they are viewed as having less at stake in the decision.¹⁸⁴

The National Commission also supported its recommendation to extend registration by noting that maintaining a male-only registration and draft regime furthers “gender stereotypes about the proper role for women and their need for special protection.”¹⁸⁵ According to the National Commission, “[i]n the eyes of many, the exclusion of women from Selective Service registration is a form of institutionalized, Government-sponsored prejudice against women that must be corrected.”¹⁸⁶ In summary, the National Commission found that including women would not only improve the operational effectiveness of the military, it would also signal the important role that women have played, and will continue to play, in protecting the nation.

The issue of whether women should be required to register for the draft has been a matter of political debate and judicial consideration numerous times over the last forty years, starting with the recommendation by President Carter in 1980 to amend the MSSA to extend registration to women. The issue was temporarily resolved by Congress's rejection of that recommendation and the Supreme Court's *Rostker* decision in 1981. But the factual predicate for that decision—the prohibition against women fighting in combat—gradually changed. In 2013, the theoretical underpinning for *Rostker* collapsed when women were deemed eligible for all positions in the military, including combat positions.¹⁸⁷

Since that change in military policy, Congress has again begun to deliberate the possibility of amending the MSSA to require

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. See Panetta, *supra* note 4; Stewart & Alexander, *supra* note 4.

women to register for the draft. As part of its deliberative process, Congress created the National Commission, which studied the issue extensively and recommended to Congress that it amend the MSSA to include women.¹⁸⁸ On the judicial front, a federal district court in *National Coalition for Men* held that the MSSA violates the Fifth Amendment's Due Process Clause based on its requirement that only men register for the draft.¹⁸⁹ The Fifth Circuit reversed that decision, but not on its merits.¹⁹⁰ A second federal district court, in the *Kyle-Labelle* case, is still in the process of considering the issue.¹⁹¹ And so, the time is ripe to examine the constitutionality of the MSSA and to engage in a national discussion about whether both men and women should be required to register for potential conscription into the military.

II. ANALYZING THE CONSTITUTIONALITY OF THE MSSA

Even with the change in military policy to allow women to hold all positions in the armed forces, including combat positions, the question persists as to whether the MSSA's sex-based classification violates the Fifth Amendment. Although women are now permitted to serve in combat—undercutting the basis for the Court's decision in *Rostker*—there may exist another important government objective substantially related to the sex-based classification in the MSSA. Stated differently, there may be an alternative basis for finding the sex-based classification in the MSSA remains constitutional.

Congress may ultimately accept or reject the National Commission's recommendation to amend the MSSA. In making that decision, Congress will consider extensive evidence regarding the impact of including women in a future draft. If Congress elects not to amend the MSSA to include women, the government will have the burden in judicial challenges to the statute of showing that the existing sex-based classification satisfies constitutional review.¹⁹² Under the usual standard of review in sex-based classification cases, the constitutionality of the MSSA, with its requirement that only men register for the draft, turns on whether this sex-based

188. INSPIRED TO SERVE, *supra* note 3.

189. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568 (S.D. Tex. 2019).

190. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020).

191. Complaint Class Action for Injunctive Declaratory Relief, *supra* note 141.

192. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that “the burden of justification [for sex-based classifications] is demanding and it rests entirely on the State”).

classification is substantially related to an important government objective. However, based on the majority's deference to congressional decision-making in matters of military affairs, as discussed in *Rostker*, the Court may allow for something less than the normal "substantial relation" required between the government's objectives and the sex-discriminatory means of achieving those objectives. The following discussion identifies the government's objectives relating to the MSSA and assesses whether male-only registration is substantially related to the accomplishment of those objectives.

A. *Identifying Important Governmental Objectives*

The Court in *Rostker* gave very little attention to the first component of *Craig's* intermediate scrutiny standard. It simply identified the "important governmental interest" served by the MSSA as "raising and supporting armies."¹⁹³ This governmental interest derives from Article I, Section 8 of the Constitution, which states that "The Congress shall have Power . . . To raise and support Armies."¹⁹⁴

Another, slightly more specific, purpose for the MSSA is set out in the statute's "Congressional declaration of policy," which provides in part: "The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation."¹⁹⁵ In addition, though not expressly stated in the Constitution or the statute's declaration of policy, administrative efficiency—meaning the ability to raise and support an effective fighting force in a timely and cost-effective manner—constitutes another potential interest that Congress may consider in determining whether to amend the MSSA. As previously explained, under the *Craig* intermediate scrutiny standard, a reviewing court will have to determine whether the MSSA's sex-based classification is "substantially related" to these governmental objectives.

B. *Substantial Relation Analysis*

The "substantial relation" requirement of intermediate scrutiny does not require a perfect fit between ends and means. In *Rostker*, for example, the Court upheld the sex-based classification

193. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("No one could deny that under the test of *Craig v. Boren*, . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'"). Justice Marshall in his dissent agreed with the majority regarding the importance of this objective. *See id.* at 88 (Marshall, J., dissenting).

194. U.S. CONST. art. I, § 8.

195. 50 U.S.C. § 3801(b) (2018).

because even “assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans.”¹⁹⁶ As Justice Scalia explained in a subsequent case, a sex-based classification need not be accurate “in every case” as long as “in the aggregate” it advances the underlying objective.¹⁹⁷

1. Raising and Supporting Armies

With respect to the goal of raising and supporting armies, the sex-based classification in the MSSA hinders this objective. As noted by the National Commission, the “population growth rate in the United States is at its lowest point in more than 80 years, and 7 of 10 young Americans—male and female—are currently ineligible to serve because they fail to meet physical, moral, educational, and health standards, including mental health criteria.”¹⁹⁸ The National Commission further stated that “[b]ecause the existing registrant pool may prove inadequate to meet the personnel needs of [the Department of Defense] if a draft is required, it is critical to create a broader pool that includes women.”¹⁹⁹ A 2017 report by the Office of the Under Secretary of Defense for Personnel and Readiness also supports the expansion of the draft pool to include women for similar reasons:

It would appear imprudent to exclude approximately 50% of the population—the female half—from availability for the draft in the case of a national emergency. Future wars may have requirements for skills in non-combat fields in which the percentage of individuals qualified would not be as variable by gender. A broader, deeper registrant pool would enhance the ability of the [Selective Service System] to provide manpower to the [Department of Defense] in accordance with its force needs.²⁰⁰

In 1981, when Congress declined to extend registration to women, the Senate Armed Services Committee report stated that “[a]ll the military services testified at length about their mobilization plans, and the place of women in those plans. Both the civilian and military leadership agreed that there was no military need to

196. *Rostker*, 453 U.S. at 81.

197. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579 (1990) (*overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

198. INSPIRED TO SERVE, *supra* note 3.

199. *Id.*

200. OFFICE OF THE UNDER SEC’Y OF DEF., REPORT ON THE PURPOSE AND UTILITY OF A REGISTRATION SYSTEM FOR MILITARY SELECTIVE SERVICE 17 (Mar. 17, 2017), <https://hasbrouck.org/draft/DOD-report-17MAR2017.pdf> [<https://perma.cc/BU9N-7D2X>] [hereinafter REPORT ON THE SELECTIVE SERVICE].

draft women.”²⁰¹ In contrast, modern military leaders—including the Commandant of the Marine Corps and the Army Chief of Staff—have expressed support for extending registration to women.²⁰² A study by the General Accounting Office indicates that mandating women to register for the draft would increase the draft pool from 13 million men to 27.4 million men and women.²⁰³ Given demographic trends, including women in the draft pool does not hamper the objective of raising and supporting Armies and may well be the most effective way to achieve that objective.

2. Achieving Adequate Armed Strength

In addition to providing a sufficiently large pool of eligible conscripts, the draft is also intended to achieve “adequate armed strength” to “insure the security of this Nation.”²⁰⁴ In other words, the draft must provide an adequately effective fighting force. Opponents to the extension of registration to women claim that including women in a mass mobilization of combat troops will diminish the fighting effectiveness of the military. They point to the physiological differences between men and women as the primary basis for this position.

Numerous studies have examined the physiological differences between men and women. In 2016, RAND Corporation prepared a meta-analysis of these studies to examine how best to integrate women into the military’s special operations forces.²⁰⁵ RAND summarized its meta-analysis as follows: “Overall, studies have shown that men, on average, score better on tests of muscular strength and cardiovascular (i.e., aerobic) endurance, compared with women. However, men and women do not differ on tests of movement quality, such as flexibility and balance.”²⁰⁶ The physiological differences between men and women were greatest in the tests of upper-body and total-body strength.²⁰⁷ Further, men and

201. S. REP. NO. 96-826, at 158 (1980).

202. Michael S. Schmidt, *2 Generals Say Women Should Register for Draft*, N.Y. TIMES (Feb. 2, 2016), <https://www.nytimes.com/2016/02/03/us/politics/2-generals-say-women-should-register-for-draft.html> [<https://perma.cc/9W7A-RKVY>].

203. U.S. GEN. ACCT. OFF., GENDER ISSUES: CHANGES WOULD BE NEEDED TO EXPAND SELECTIVE SERVICE REGISTRATION TO WOMEN 4 (1998), <https://www.gao.gov/assets/230/225927.pdf> [<https://perma.cc/6LSE-JUV2>].

204. 50 U.S.C. § 3801(b) (2018).

205. RAND CORP., CONSIDERATIONS FOR INTEGRATING WOMEN INTO CLOSED OCCUPATIONS IN U.S. SPECIAL OPERATIONS FORCES (2016), https://www.rand.org/pubs/research_reports/RR1058.html [<https://perma.cc/MB6E-JWE9>].

206. *Id.* at 41.

207. *Id.*

women differ only slightly with respect to core strength, where the studies found “no meaningful differences.”²⁰⁸

The physiological differences mean that, on average, men can lift more weight than women and women are more susceptible to fatigue when carrying heavy loads.²⁰⁹ RAND was careful to note in its analysis, however, that these averages do not determine individual performance:

Although physical ability differences are expected between men and women, *on average*, it is important to examine the potential range of these differences and to recognize that there are women who will achieve exceptionally high scores. In other words, average gender differences can be misleading when decisions are being made about individuals.²¹⁰

Whether these physical differences translate into differences in fighting performance was the subject of a 2014–2015 Marine Corps study.²¹¹ Over that one-year period, the Marine Corps trained female Marines in military occupational specialties that had previously been closed due to combat restrictions and integrated the female Marines into larger units.²¹² The Marine Corps then measured the performance of the integrated units, as well as all-male units, on various combat-related exercises and tasks.²¹³ Based on this study, the Marine Corps reached the following conclusions:

The female Marines integrated into the closed [military occupational specialty] units demonstrated that they are capable of performing the physically demanding tasks, but not necessarily at the same level as their male counterparts in terms of performance, fatigue, workload, or cohesion.

Integrated units, compared with all-male units, showed degradations in the time to complete tasks, move under load, and achieve timely effects on target. The size of the differences observed between units and tasks varied widely. The more telling aspects of the comparisons is the cumulative impacts. The pace, timing, and accuracy of any singular task is not necessarily important, but taken together, and in the context of actual combat operations, the cumulative differences can

208. *Id.*

209. *Id.* at 40–41.

210. *Id.* at 42 (emphasis added).

211. MARINE CORPS OPERATIONAL TEST & EVALUATION ACTIVITY, GROUND COMBAT ELEMENT INTEGRATED TASK FORCE: EXPERIMENTAL ASSESSMENT REPORT (2015), <https://dod.defense.gov/Portals/1/Documents/wisr-studies/USMC%20-%20Line%20Of%20Effort%203%20GCEITF%20Experimental%20Assessment%20Report2.pdf> [<https://perma.cc/C24Z-BJAQ>].

212. *Id.* at ES-1.

213. *Id.*

lead to substantial effects on the unit, and the unit's ability to accomplish the mission.²¹⁴

The Marine Corps did identify certain types of tasks, however, that integrated units performed as well as or better than all-male units. In particular, the Marine Corps reported:

Further integration of females into the combat arms brings with it many of the general benefits of diversity that we experience across the spectrum of the workforce, both within the military as well as the private sector. This was perhaps best illustrated in a decision-making study that we ran in which all-male and integrated groups attempted to solve challenging field problems. Each of the problems involved varying levels of both physical and cognitive difficulty. For those more cognitively challenging problems, the female integrated teams (with one female, and three to four males), performed as well or better than the all-male teams.²¹⁵

The Marine Corps found that when comparing the performance of all-male and sex-integrated units, the greatest disparities in performance related to "the most physically demanding tasks, such as casualty evacuations, long hikes under load, and negotiating obstacles."²¹⁶ As such, the study indicates the extreme importance of integrating women into appropriate combat positions. Of course, the majority of military personnel, even during times of war, do not serve in positions requiring the most extreme physiological demands. According to the National Commission, "over half of all enlisted personnel in the military in World War II worked in just three occupations: mechanics, administrative and clerical workers, and providers of services to the force."²¹⁷ In addition, given the changing nature of warfare, even fewer individuals may serve in positions requiring the highest level of physical strength in future conflicts. As stated by one military expert, "future warfare calls for data scientists, network engineers, cloud security specialists, satellite communications engineers[,] . . . and system development engineers."²¹⁸ Thus, not including women in the draft pool may result in missing talented individuals who strengthen the fighting effectiveness of the military by using their abilities in the new

214. *Id.* at 75.

215. MARINE CORPS COMBAT DEV. COMMAND, ANALYSIS OF THE INTEGRATION OF FEMALE MARINES INTO GROUND COMBAT ARMS AND UNITS iv (2015), <http://cmrlink.org/data/sites/85/CMRDocuments/285174854-Marine-Corps-analysis-of-female-integration.pdf> [<https://perma.cc/4XF9-3XTL>].

216. *Id.* at v.

217. INSPIRED TO SERVE, *supra* note 3.

218. *Id.* (quoting U.S. Naval War College Professor and Hoover Institution Fellow Jacquelyn Schneider).

positions required by modern warfare. As stated by the National Commission, “[e]xpanding draft eligibility to women will enable the military to access the most qualified individuals, regardless of sex. . . . It will strengthen U.S. national security by ensuring that the Nation has access to the full range of Americans’ skills and capabilities.”²¹⁹ Thus, including women in any future draft will serve the goal of achieving “adequate armed strength”²²⁰ better than continuing their exclusion.

3. Administrative Efficiency

In a time of national emergency, the Government must be able to call upon the Selective Service System to deliver an adequate number of inductees to address the existing emergency in a timely and cost-effective manner. Administrative concerns factored into the decision by Congress to reject President Carter’s 1980 proposal to extend the MSSA to include women. The Senate Report, which was later adopted by Congress, noted that while only “[six] percent of the enlisted skills in the Army are closed to women as a result of the exclusion of women from combat. . . . fully 42 percent of all billets filled by enlisted personnel in the army are in specialties, skills[,] or units not available to women.”²²¹ Thus, a significant number of the positions that would need to be filled in a draft—“infantry specialists, armor specialists, combat engineers, and positions in field artillery and air defense”—were ones that women could not hold in light of the combat restrictions that applied at the time.

The Senate Report also stated that “an induction system that provided half men and half women to the training commands in the event of mobilization would be administratively unworkable and militarily disastrous.”²²² The Senate Report reached this conclusion based on its assumption that if women were included in the draft pool, they would necessarily have to be drafted in “roughly equal numbers” as men.²²³ In that situation, the Senate Report speculated that:

[W]e might well be faced with a situation in which the combat replacements needed in the first 60 days—say 100,000 men—would have to be accompanied by 100,000 women. Faced with this hypothetical, the military witnesses stated that such a situation would be intolerable. It would create monumental strains on the training system, would clog the

219. *Id.*

220. 50 U.S.C. § 3801(b) (2018).

221. S. REP. NO. 96-826, at 157–58 (1980).

222. *Id.* at 158.

223. *Id.*

personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need.²²⁴

Today, these administrative concerns have been mitigated by the change in combat policy. With women now eligible for combat, the Selective Service would no longer face the problem that women called in a draft would automatically be ineligible for almost half the positions that the draft seeks to fill. Moreover, a majority of the positions that would need to be filled by a draft, including a significant number of combat positions, do not require the degree of load-bearing that the Marine study identified as a potential concern in establishing sex-integrated units.²²⁵

In addition, the hypothetical draft discussed by the Senate Report, where half the draftees are men and the other half women, is not necessarily required from a legal perspective. In his dissent in *Rostker*, Justice Marshall specifically addressed this issue, stating:

[T]he Senate Report's speculation that a statute authorizing differential induction of male and female draftees would be vulnerable to constitutional challenge is unfounded. The unchallenged restrictions on the assignment of women to combat, the need to preserve military flexibility, and the other factors discussed in the Senate Report provide more than ample grounds for concluding that the discriminatory means employed by such a statute would be substantially related to the achievement of important governmental objectives. Since Congress could have amended [the MSSA] to authorize differential induction of men and women based on the military's personnel requirements, the Senate Report's discussion about "added burdens" that would result from drafting equal numbers of male and female draftees provides no basis for concluding that the total exclusion of women from registration and draft plans is substantially related to the achievement of important governmental objectives.²²⁶

Of course, Justice Marshall's analysis does not take into account that the "restrictions on the assignment of women to combat"²²⁷ no longer exist, but the conclusion of his analysis may well still hold. If the Government can show that flexibility and other factors, including military exigency, require something other than

224. *Id.* at 159.

225. In 1981, the time of the *Rostker* decision, the Government argued that "in the event of mobilization, approximately two-thirds of the demand on the induction system would be for *combat skills*." *Rostker v. Goldberg*, 453 U.S. 57, 97 (1981) (Marshall, J., dissenting).

226. *Id.* at 111.

227. *Id.*

equal numbers of male and female draftees, then a sex-disparate draft would survive constitutional review. On the other hand, if women can adequately serve in at least half the positions that need to be filled through a draft, then as a matter of equality,²²⁸ a lottery-based draft independent of sex would be appropriate.

In any event, the main administrative problem identified in the Senate Report—the unnecessary draft of women for positions that they were ineligible to fill—no longer applies. Women are now eligible to serve in all the positions to be filled by a draft. If there is a physiological basis for drafting only men for some subcategory of these positions, the burden is on the Government to demonstrate that a sex-based classification in the draft itself, rather than in registration for the draft, would serve an important governmental interest. Moreover, the Court has expressed strong skepticism when the Government seeks to justify sex-based classifications based on administrative convenience, stating that “any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands ‘dissimilar treatment for men and women who are . . . similarly situated,’ and therefore involves the ‘very kind of arbitrary legislative choice forbidden by the [Constitution].’”²²⁹

In summary, the MSSA seeks to accomplish three important objectives: (1) raise and support armies; (2) achieve adequate armed strength to protect the nation; and (3) mobilize a fighting force in a timely and cost-effective manner. As to raising and supporting armies, the evidence indicates that excluding women from the draft pool hinders the accomplishment of this goal because of the low percentage of draft-aged individuals who are eligible for service. For the MSSA’s second objective, the Marine Corps study does indicate that placing women in the most physically rigorous combat positions may adversely affect performance with respect to some ground combat tasks. Nevertheless, the changing nature of warfare and the growing importance of technology, rather than brute strength on the battlefield, diminishes the physiological issues and, therefore, favors the inclusion of women in the draft. Finally, with women now eligible to serve in combat and a significant percentage of combat and non-combat positions appropriate for most women, the efficiency concerns identified by Congress in the Senate Report no longer apply. Consequently, even with a potentially more deferential form of intermediate scrutiny, the Government will have

228. *See infra* Part III.

229. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Reed v. Reed*, 404 U.S. 71, 76, 77 (1971)).

difficulty carrying its burden of showing that the sex discrimination in the MSSA comports with constitutional requirements.

In addition to the constitutional failings of the sex-based classification in the MSSA, considerations of equality strongly support amending the statute to extend the registration requirement to women. That issue is discussed in Part III, below.

III. CONSIDERATIONS OF EQUALITY

As stated previously, it is the Government's burden to demonstrate that the sex-based classification in the MSSA is substantially related to the accomplishment of important government objectives. Limiting draft registration to men does not unequivocally advance any of the statutory objectives discussed above: raising and supporting armies, achieving adequate armed strength, or administrative efficiency. An additional objective of the MSSA, equality, warrants separate discussion, as the sex-based classification in the current version of the MSSA not only fails to advance that objective, but actively undermines it.

In addition to achieving "adequate armed strength," the declaration of policy in the MSSA also states:

[I]n a free society the obligations and privileges of serving in the armed forces and the reserve components thereof *should be shared generally, in accordance with a system of selection which is fair and just*, and which is consistent with the maintenance of an effective national economy.²³⁰

Thus, Congress identified burden-sharing in accordance with principles of fairness and justice as another essential goal of the selective service process. It is difficult to imagine the achievement of this goal under a system applied unequally based on inherent group characteristics. In essence, then, a draft system characterized by equality constitutes one of the goals of the MSSA.

The United States has not used the draft since June 1973, when it shifted to an all-volunteer military.²³¹ Part of the reason for transitioning from conscription to an all-volunteer military was because of the perception that the draft had been implemented unfairly during the Vietnam War, with the burden of mandatory service borne disproportionately by the poor, those with fewer educational opportunities, and minorities.²³²

230. 50 U.S.C. § 3801 (b)–(c) (2018) (emphasis added).

231. BERNARD ROSTKER, I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 2 (2006), <https://www.rand.org/pubs/monographs/MG265.html> [<https://perma.cc/8NL3-T5FT>].

232. *Id.* ("By the late 1960s, the American system of conscription had lost

After the Vietnam War, two members of the Presidential Clemency Board, Lawrence Baskir and William Strauss, undertook a study of the generation that was of draft age during the War.²³³ Their work constitutes the “most definitive empirical study of inequities during the Vietnam period.”²³⁴ Baskir and Strauss revealed that the wealthy and college-educated were largely able to avoid service in Vietnam. For example, a draft-age man characterized as “low income” had a 19 percent chance of serving in Vietnam.²³⁵ In contrast, potential “high income” draftees had only a 9 percent chance.²³⁶ High school dropouts and those whose highest academic achievement was graduating from high school had an 18 percent and 21 percent chance of serving in Vietnam, respectively, whereas college graduates had only a 12 percent chance of serving.²³⁷ Thus, those with privilege, both as to income and education, had a much lower probability of being drafted and serving in Vietnam.

As for race, the draft fell disproportionately on Black Americans. While Black Americans comprised 11 percent of the U.S. population, over the first three years of the war they made up “16.3 percent of all draftees and 23 percent of all combat troops.”²³⁸ In fact, through 1965, Black Americans constituted 25 percent of the U.S. combat deaths in Vietnam.²³⁹ The dysfunction of the draft and the public’s perception of that dysfunction caused President Nixon, in 1969, to create the so-called “Gates Commission”—a national commission of “eminent citizens and experts” charged with exploring the possibility of moving to an all-volunteer force.²⁴⁰ In its 1970 report, the Gates Commission concluded that “the nation’s interests will be better served by an all-volunteer force, supported by an effective stand-by draft, [rather] than by a mixed force of volunteers

legitimacy and support among the vast majority of the American people. It was viewed as unfair, the universality of the World War II draft having been replaced by a system encapsulated in the title of a landmark blue ribbon commission report, *Who Serves When Not All Serve*”).

233. LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION (1978).

234. ROSTKER, *supra* note 231, at 44.

235. *Id.*

236. *Id.*

237. *Id.*

238. Gerald F. Goodwin, *Black and White in Vietnam*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/opinion/racism-vietnam-war.html> [<https://perma.cc/D9DV-ZMES>].

239. *Id.*

240. *Statement by the President Announcing the Creation of the Commission*, in THE REPORT OF THE PRESIDENT’S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE vii (1970), <https://www.rand.org/content/dam/rand/pubs/monographs/MG265/images/webS0243.pdf> [<https://perma.cc/7FT5-H7K5>].

and conscripts.”²⁴¹ The racial, educational, and income disparities involved in the draft process motivated the Gates Commission to reach this conclusion.

The Vietnam War draft taught the Government that a successful draft must not only be fair in how it is executed, but it also must be perceived as fair by the general public. Part of fairness means that the draft spreads the burden of conscription among all eligible members of society regardless of class, education, or race. Given the evolution of gender roles in our country, the sharing of this obligation to serve the nation should also be made without regard to sex. As stated in a recent report by the Office of the Under Secretary of Defense for Personnel and Readiness, “if a draft becomes necessary, the public must see that it is fair and equitable. For that to happen, *the maximum number of eligible persons must be registered.*”²⁴² Amending the MSSA to include women would further the purpose of the statute by ensuring that the obligation of serving is shared broadly and, consequently, that the draft system is more likely to be perceived as fair and just.

Treating women the same as men, by requiring that they register for the draft, will also advance the cause of sex equality. Congressional considerations in excluding women from the draft have been beset by sexism since the initial enactment of the MSSA in 1948. The district court in *Rostker* characterized congressional attitudes as permeated by “an aura of male chauvinism,” when Congress initially enacted the MSSA.²⁴³ The district court quoted a comment made during a U.S. House of Representatives debate by Representative James Van Zandt of Pennsylvania to illustrate this point. After noting that women had begun serving as nurses in the Navy, Mr. Van Zandt stated:

Let me point out the position of the enlisted man. There is not a member of the House Committee on Armed Services who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a [female] officer. Put yourself in the position of an enlisted man and I am sure you will agree with them.²⁴⁴

241. *Letter from Thomas S. Gates, in THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE*, iii (1970), <https://www.rand.org/content/dam/rand/pubs/monographs/MG265/images/webS0243.pdf> [<https://perma.cc/7FT5-H7K5>].

242. *REPORT ON THE SELECTIVE SERVICE*, *supra* note 200, at 17 (emphasis added).

243. *Goldberg v. Rostker*, 509 F. Supp. 586, 597 n.15 (E.D. Pa. 1980).

244. *Id.* (quoting 94 CONG. REC. H6970 (June 2, 1948) (statement of Rep. Van Zandt)).

This is just one example of the sexism that existed at the time of the enactment of the MSSA. The legislative history of the statute has been described as “replete with . . . [these] kind[s] of sexual stereotypes.”²⁴⁵

The 1980 Senate Report, which explained the reasons for Congress not amending the MSSA at that time, also includes numerous statements that are difficult to reconcile with our current conception of sex equality. For example, the Senate Report states:

[T]he 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 principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.²⁴⁶

The conclusory statement that it is “fundamental” women “should not intentionally and routinely engage in combat” obviously conflicts with the current status of women in the military and the reality that thousands of women have served the United States with distinction in some of the world’s most dangerous combat areas, such as Iraq and Afghanistan.²⁴⁷ Moreover, the “wide support” for precluding women from draft registration and potential combat mentioned in the Senate Report has dissipated according to public opinion polls. More respondents supported than opposed female draft registration in each of five public opinion polls taken between 2013 and 2017, though the polling showed the public closely split on the issue.²⁴⁸ Of course, equal treatment should not depend on

245. *Id.*

246. S. REP. NO. 96-826, at 157 (1980).

247. The successful service of women in Iraq and Afghanistan was summarized by Lieutenant General Mark Hertling, who testified to the National Commission, “[h]aving served with women in combat, and having seen their courage and skills, I can personally say I have ZERO concerns about women on the front lines of combat units.” *INSPIRED TO SERVE*, *supra* note 3.

248. *See id.* (Figure 13: Public Opinion on Including Women in a Draft or Selective Service Registration). Notably, in polls where more detailed information is available, there appears to be a split between women and men over the treatment of women in the Selective Service System. When asked “if the military draft were reinstated, would you favor or oppose drafting women as well as men,” 45 percent of women favored drafting women and 48 percent opposed. To this same question, 59 percent of men favored drafting women and 36 percent of men opposed. *Americans Back Women in Combat 3–1, but Less for Draft, Quinnipiac University National Poll Finds; Support for Universal Gun Background Checks Is 92%*, QUINNIPIAC UNIV. POLLING INST. (Feb. 7, 2013), <https://poll.qu.edu/national/release-detail?ReleaseID=1847> [<https://perma.cc/N7AG-REBB>]. A similar question in a CNN/ORC International Poll elicited 48 percent of women support the inclusion of women in a hypothetical draft and 51 percent opposing it. In this poll, 60 percent of men supporting including

public opinion,²⁴⁹ but to the extent that concerns over potential adverse public reactions to female conscription motivated Congress to retain male-only registration in 1980, those concerns have been mitigated by a move away from the “widespread support” for not requiring women to register touted by the Senate Report.

In further justifying the decision not to require women to register for the draft, the 1980 Senate Report stated:

[D]rafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of natural emergency cannot be taken lightly, nor its broader implications ignored. The [Senate Armed Services] Committee is strongly of the view that such a result, which would occur if women were registered and inducted under the [Carter] Administration plan, is unwise and unacceptable to a large majority of our people.²⁵⁰

These statements may have aligned with public sentiment in 1980, but more than forty years later they echo the type of sexist reasoning that the Court has time and again found to violate constitutional standards. As explained by Justice Ginsburg when

women in the draft and 40 percent opposed it. CNN ORC INT'L, POLL: MARCH 4, 2016, 16, <https://i2.cdn.turner.com/cnn/2016/images/03/04/rel4d-.threats.draft.guantanamo.pdf> [<https://perma.cc/FUF6-HYMW>]. When asked in an Economist/YouGov Poll whether women should be required to register for the draft, 40 percent of women responded positively and 43 percent negatively. Sixty-one percent of men said that women should be required to register and 27 percent said they should not. THE ECONOMIST/YOUGOV POLL: LIST OF TABLES: MAY 23–26 2016 131, https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/jas6h9ux2j/econTabReport.pdf [<https://perma.cc/7CNC-7XDN>]. Finally, in a Rasmussen poll “61% of male voters believe women should be required to register for the draft, [but] only 38% of female voters agree” and “[m]ost women (52%) oppose such a requirement.” *Most Women Oppose Having to Register for the Draft*, RASMUSSEN REPS. (Feb. 10, 2016) https://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/most_women_oppose_having_to_register_for_the_draft [<https://perma.cc/F7PM-9M9T>].

249. Thomas Jefferson (unintentionally) illustrated this fact when discussing the role of women in public affairs: “Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation [sic] of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men.” *United States v. Virginia*, 518 U.S. 515, 531 n.5 (1996) (quoting *Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816)*, in 10 WRITINGS OF THOMAS JEFFERSON 45–46 n.1 (Paul L. Ford ed., 1899)).

250. S. REP. NO. 96-826, at 159 (1980).

the Court struck down Virginia's attempt to prevent women from attending the Virginia Military Institute, sex-based classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."²⁵¹ Assuming that women should remain in the home while their husbands fight the nation's wars epitomizes the perpetuation of female inferiority that the Court in *United States v. Virginia* found to violate women's constitutional rights.

Moreover, the Senate Report does not expressly specify what the "broader implications" are that cannot be ignored if women were subject to the draft. Interpreted generously, the Senate Report may have been referring to the implications of changing the traditional family structure if women are called to serve their country. Less generously, the Senate Report may have been referring to the "broader implications" of an increase in female empowerment and resulting perceived loss of personal and societal power by males if traditional in-home and out-of-the-home work roles are reversed. In either case, the Court in *United States v. Virginia* emphasized that the Government may not "exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"²⁵² Nevertheless, Congress's unspecified concern over the "broader implications" of women participating in the draft appears motivated by a desire to retain the traditional roles of men and women.

The resistance to registering women for the draft has also been based on a desire to protect women from physical harm.²⁵³ That motivation, even if well-intended, undermines women's equality in our society. Imposing the registration requirement on women may be viewed as an added obligation or burden that women do not currently have to bear.²⁵⁴ But that obligation brings men and

251. *United States v. Virginia*, 518 U.S. 515, 534 (1996).

252. *Id.* at 517 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

253. Lucy V. Katz, *Free a Man to Fight: The Exclusion of Women from Combat Positions in the Armed Forces*, 10 MINN. J. LAW & INEQ. 1, 19 (1991) (stating that the "socio-political issues [for excluding women from combat] relate to cultural and social norms that demand protection of women from the horrors and rigors of war").

254. Prior to her appointment to the Court, Justice Ginsburg served as lead counsel in several cases involving women's rights that were litigated before the U.S. Supreme Court. One of those cases, *Kahn v. Shevin*, 416 U.S. 351 (1974), involved a challenge to a Florida statute that gave widows, but not widowers, a \$500 annual property tax exemption. *Id.* at 352. Justice Ginsburg represented a widower challenging the constitutionality of the statute, even though the statute on its face benefited women. *Id.* at 351–52. In litigating the matter, Justice

women one step closer to equal treatment. Without it, the Government is implicitly signaling that women cannot shoulder the same responsibilities as men. This is particularly harmful in that the sex-based classification in question involves one of our country's most solemn duties: defending our nation in a time of crisis.

The "archaic and overbroad" generalization that women are less capable than men and need the protection of men has a long history in American society and has even been prevalent in the Supreme Court's jurisprudence. As explained by Justice Brennan in *Frontiero v. Richardson*, a case that struck down sex-based classifications in the context of military housing:

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. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

"Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator."²⁵⁵

Ginsburg argued that the statute violated the U.S. Constitution's Equal Protection requirement because it was based on an invidious stereotype:

Historically, women have been treated as subordinate and inferior to men. Although discrimination against women persists and equal opportunity has by no means been achieved, women simultaneously have been placed on a pedestal and given special benefits. Both discrimination against[,] and special benefits for, women stem from stereotypical notions about their proper role in society.

Brief for Appellants, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78), 1973 WL 172384, at *4.

255. *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

Thankfully, the law has progressed since Justice Bradley's statement about the "destiny and mission of woman." Women are no longer relegated to the "noble and benign office of wife and mother." They are lawyers, doctors, politicians, and now they also serve as Army Rangers and Green Berets. The military leadership, the members of the National Commission, and at least one federal district court have all recognized that the future success of the U.S. Armed Forces requires the full participation of all eligible members of our society. The MSSA's sex-based classification is an antiquated vestige of a time when overbroad generalizations about women's abilities and roles limited the achievement of their full potential. The sex discrimination in the MSSA relegates women to a form of second-class citizenship, where their contributions to and participation in our national defense are diminished. Greater equality may only be achieved through equal treatment, including amending the MSSA to allow women to shoulder one of the most important responsibilities of citizenship.

CONCLUSION

Thirty years ago, in the wake of the first Gulf War, Professor Lucy Katz argued for changing the combat exclusion rules then preventing women from full participation in military affairs.²⁵⁶ In making her argument, Katz stated that "full citizenship is not wholly possible without full participation in the community's defense."²⁵⁷ Katz further argued that "the combat exclusion denigrates the equalitarian ideals that underlie much of the best in the American political value system."²⁵⁸ The federal government eventually recognized the detrimental effects of the combat exclusion both on military effectiveness and on societal progress, and rescinded the combat exclusion rule in 2013.²⁵⁹ The same opportunity to improve both the effectiveness of the military and the equality in our society exists by eliminating the sex-based discrimination of the MSSA.

Much hard work in advancing sex equality in the military has already been done. Following the rescission of combat limitations in 2013, each of the military branches has worked diligently to afford women opportunities for service and advancement. Of course, equality in theory and equality in practice are very different matters, and sex-based discrimination and violence continue to

256. Katz, *supra* note 253.

257. *Id.* at 50.

258. *Id.* at 51.

259. See Panetta, *supra* note 4.

persist in today's military.²⁶⁰ Even so, one more step in the long process of granting women full rights and obligations in the military will be to amend the MSSA to eliminate the discriminatory and counter-productive sex-based classification that requires only men to register for the draft. Writing in the Yale Law Journal in support of the Equal Rights Amendment in 1971, three women in that year's graduating class, along with one of their professors, stated that "[a]s long as anyone has to perform military functions, all members of the community should be susceptible to the call. When women take part in the military system, they more truly become full participants in the rights and obligations of citizenship."²⁶¹ That statement, now fifty years old, still rings true. It is well past time to eliminate the archaic sex-based discrimination of the MSSA.

260. See Patricia Kime, *Despite Efforts, Sexual Assaults Up Nearly 40% in US Military*, MILITARY.COM (May 2, 2019), <http://www.military.com/daily-news/2019/05/02/despite-efforts-sexual-assaults-nearly-40-us-military.html> [<http://perma.cc/2HTS-DFKA>] (stating that sexual assaults in the U.S. military rose by 38 percent from 2016 to 2018).

261. Barbara A. Brown, Thomas I Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 979 (1971).