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# Constitutional Law - Gender-Based Discrimination - Separation of Powers - The Total Exclusion of Women from the Military Selective Service Act Does Not Violate Due Process

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# Recent Developments

## CONSTITUTIONAL LAW—GENDER-BASED DISCRIMINATION—SEPARATION OF POWERS—THE TOTAL EXCLUSION OF WOMEN FROM THE MILITARY SELECTIVE SERVICE ACT DOES NOT VIOLATE DUE PROCESS

*Rostker v. Goldberg* (U.S. 1981)

In response to the Soviet invasion of Afghanistan, President Carter, in early 1980, pursuant to his authority under the Military Selective Service Act (MSSA)[1] to require the registration of "every male citizen,"[2] ordered that the induction registration process be reactivated.[3] The President further recommended that Congress amend the MSSA to call for the registration of females as well as males.[4] In response, Congress allocated the funds to reactivate the registration process for males, but declined to amend the MSSA to permit the registration of females.[5] Consequently, President Carter issued a proclamation[6] ordering the registration of specific groups of young men.[7]

1. 50 U.S.C. app. §§ 451-462 (1981).

2. 50 U.S.C. app. § 453 (1981). The purpose of a registration is to facilitate any eventual conscription that may take place. 101 S. Ct. 2646 (1981).

3. 101 S. Ct. at 2649. The President did not seek conscription. *Id.* at n.1. Registration was seen, however, as a "necessary step to preserving or enhancing our national security interests." *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services,* 96th Cong., 2d Sess. 1805 (1980) [hereinafter cited as *Hearings on S. 2294*].

4. 101 S. Ct. at 2649.

5. *Id.* See S. REP. No. 789, 96th Cong., 2d Sess. 1 at n.1, 2 (1980), 126 CONG. REC. S6546 (June 10, 1980) (remarks of Senator Nunn). Congress considered and rejected a proposal to provide for the registration of women as well as men under the MSSA in S. REP. No. 826, 96th Cong., 2d Sess. (1980). The report was prepared by the Senate Armed Services Committee on the Fiscal Year 1981 Defense Authorization Bill. *Id.* at 160-61. The findings were subsequently endorsed by the House and Senate conferees on the Bill. S. CONF. REP. No. 826, 96th Cong., 2d Sess., 100 (1980). Both the Senate and the House adopted the Report's findings by passing the Conference Report. 126 CONG. REC. H7800, S11646 (daily ed. Aug. 26, 1980).

6. 101 S. Ct. at 2649. A proclamation is a formal declaration causing some governmental matters to be published, that is issued by the proper authority, usually a high government executive. BLACK'S LAW DICTIONARY 1086 (5th ed. 1979).

7. 101 S. Ct. at 2649. 50 U.S.C. app. § 453 (1981) provides for the registration of "every male citizen . . . and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six." *Id.*

A class action [8] suit was reactivated [9] before a three-judge panel [10] in the Eastern District of Pennsylvania, alleging that the MSSA impermissibly discriminated between males and females.[11] The district court held that the MSSA was unconstitutional,[12] finding that it violated the due process clause of the fifth amendment,[13] and enjoined the enforcement of registration under the MSSA.[14]

8. 101 S. Ct. at 2650. The class eventually consisted of "all male persons who are registered under 50 U.S.C. app. § 453 or are liable for training and service in the armed forces of the United States under 50 U.S.C. app. §§ 454, 456(h), and 467(c); and who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System." Goldberg v. Rostker, 509 F. Supp. 586, 605 (E.D. Pa. 1980).

9. 101 S. Ct. at 2650. The suit was originally instituted in 1971 when several men subject to registration under the MSSA filed suit in the Eastern District of Pennsylvania seeking the empaneling of a three-judge district court to challenge the constitutionality of the MSSA. The plaintiffs sought a declaratory judgment of unconstitutionality, and injunctive relief against enforcement of the MSSA. *Id.* Relief was denied and all of these claims were dismissed. Rowland v. Tarr, 341 F. Supp. 339 (E.D. Pa. 1972). The Court of Appeals for the Third Circuit affirmed the dismissal of all claims except the one claiming gender discrimination. 480 F.2d 545 (3d Cir. 1973). On remand, the district court found that the plaintiffs had standing to assert the claim, and that the claim was substantial enough to convene a three-judge panel. 101 S. Ct. at 2650, n.2. In July, 1974, the panel refused to dismiss the case as moot. 378 F. Supp. 766 (E.D. Pa. 1974). The case then lay dormant for five years until the present class was certified.

10. 101 S. Ct. at 2650. The panel was convened pursuant to 28 U.S.C. § 2282 (1970), which was subsequently repealed. Pub. L. No. 94-381, §§ 1-2, 90 Stat. 1119 (1976). However, the statute remained applicable to suits filed before it was repealed. *Id.* § 7, 90 Stat. 1120 (1976).

11. Goldberg v. Rostker, 509 F. Supp. 586, 589 (E.D. Pa. 1972).

12. *Id.* at 605. The district court additionally found that the plaintiffs had standing and that the case was ripe for adjudication. *Id.* at 591, 592. These issues were not contested on appeal. The Court emphasized that it only decided the constitutionality of the registration, not of a subsequent conscription. *Id.*

13. *Id.* Although the fifth amendment does not contain an express guarantee of equal protection, it has been held that "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975), *quoting* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

14. Goldberg v. Rostker, 509 F. Supp. 586, 605 (E.D. Pa. 1972). The court applied the "important government interest test" articulated in Craig v. Boren, 429 U.S. 190 (1976), and determined that the legislative objectives were insufficient to justify the total exclusion of women from the registration process. *Id.* at 597. For a discussion of *Craig v. Boren, see* notes 36-43 and accompanying text *infra*. The legislative objectives, as set forth by the district court rested upon the fact that women are excluded from combat positions. The court stated:

> [i]n a time of mobilization the primary need of the military services will be in combat related positions and in support position personnel who can readily be deployed into combat; therefore, in order to maximize the flexibility of personnel management, women should be excluded from the (MSSA).

509 F. Supp. at 600 (footnote omitted).

Justice Brennan, acting as Circuit Justice for the Third Circuit, stayed the lower court's order enjoining registration.[15] On appeal the Supreme Court reversed the order of the district court, *holding* that Congress had acted within the scope of its constitutional authority to raise and regulate the military, and that the MSSA did not violate the due process clause of the fifth amendment. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

Both the fourteenth and fifth amendments[16] to the Constitution guarantee the equal protection of the laws. The former expressly provides that "[n]o State . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws."[17] The latter, while not expressly mentioning equal protection,[18] has been held to provide this right.[19]

Alleged violations of equal protection have generally been examined by the courts under either a "rational relationship" or "strict scrutiny" standard.[20] Under the rational relationship standard, the statute in question is presumed constitutional, and need only be reasonably related to a legitimate legislative purpose.[21] Under strict scrutiny, the statute will be upheld if it is necessary to further a compelling governmental interest.[22] Strict scrutiny is applied only when a statute contains

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15. 101 S. Ct. at 2651. Registration was commenced two days later.

16. For the text of the fourteenth and fifth amendments, *see* text accompanying note 17, and note 18 *infra*.

17. U.S. CONST., amend. XIV.

18. The fifth amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V.

19. *See* note 13 *supra*.

20. *See* notes 29-34 and accompanying text *infra*.

21. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961), where the Court held:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

*Id.* at 425-26 (citations omitted). *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Railway Express Agency v. New York, 336 U.S. 106 (1949). *See generally* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 698-702 (1977); Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 16 (1975). Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 SYRACUSE L. REV. 639, 644-45 (1979).

22. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (racial classifications constitutionally suspect); Korematsu v. United States, 323 U.S. 214, 216 (1944) (racial classifications subject to most rigid scrutiny).

a classification based upon a "suspect criterion," [23] or when it implicates a fundamental right.[24]

Statutes involving gender discrimination were traditionally evaluated under the rational relationship standard,[25] and courts generally accepted the legislative classifications.[26] It was not until *Reed v. Reed* in 1971 that gender-based classifications were subjected to heightened scrutiny.[27] In striking down a state statute which preferred males over equally qualified females for the administration of decedent's estates, the *Reed* Court ruled that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." [28]

The highest degree of scrutiny in gender-based discrimination cases was applied by a Supreme Court plurality in *Frontiero v. Richardson*.[29] In *Frontiero,* the Court invalidated a statute which defined spouses of male members of the Air Force as dependents for purposes of increased quarters allowances and other benefits.[30] However, spouses of female

23. The following cases have held various classifications to be suspect: In re Griffiths, 413 U.S. 717 (1973) (alienage); New Jersey Welfare Rights Org'n v. Cahill, 411 U.S. 619 (1973) (illegitimacy); Graham v. Richardson, 403 U.S. 365 (1971) (national origin); Loving v. Virginia, 388 U.S. 1 (1967) (race). *See also* Bice, *supra* note 21, at 693-95.

24. The following cases have held various rights to be fundamental: Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (right to vote); Sherbert v. Verner, 374 U.S. 398 (1963) (right to the free exercise of religion); Bates v. City of Little Rock, 361 U.S. 516 (1960) (right of association); Griffin v. Illinois, 351 U.S. 12 (1956) (right to a criminal appeal). *See also* Bice, *supra* note 21, at 695-98.

25. *See* Muller v. Oregon, 208 U.S. 412 (1908).

26. *Id. See* Goesaert v. Cleary, 335 U.S. 464 (1948). *Goesaert* was typical of the traditional deference. The *Goesaert* Court upheld a statute prohibiting women from being bartenders unless they were the wife or daughter of the owner, reasoning that if the state legislature had *any* justification in mind when enacting the statute the gender classification should be upheld. *Id.* at 466. The Court stated:

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.

*Id.*

27. 404 U.S. 71 (1971).

28. *Id.* at 76. The standard of review was not as deferential toward legislative judgments, in that the Court required that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all similarly circumstanced shall be treated alike." *Id., quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

29. 411 U.S. 677 (1973).

30. 37 U.S.C. §§ 401, 403 (1968).

members of the Air Force were not defined as dependents unless they were in fact dependent for over one half of their support.[31] The plurality in *Frontiero*[32] found gender to be a suspect classification,[33] and therefore applied the strict scrutiny standard.[34]

In later cases the Court retreated from such a strict level of scrutiny in gender discrimination suits.[35] In *Craig v. Boren*,[36] a mid-tier level of scrutiny was articulated by the Court which required that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[37] *Craig* held that a statute which allowed females between the ages of eighteen and twenty to consume 3.2% beer invidiously discriminated against males of the same age group who were prohibited from drinking 3.2% beer.[38] Subsequent cases have generally applied the *Craig* standard of review in gender classification cases.[39]

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31. 10 U.S.C. §§ 1072, 1076 (1975).

32. The plurality opinion was written by Justice Brennan, and was joined by Justices Marshall, Douglas, and White. Justice Stewart concurred separately. Justice Powell wrote a concurring opinion in which Chief Justice Burger and Justice Blackmun joined. Justice Rehnquist dissented.

33. 411 U.S. at 688. Justice Brennan concluded that sex was "suspect" because "sex . . . is an immutable characteristic determined solely by the accident of birth. . . . [T]he sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* at 686.

34. *Id.* at 688. "[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.*

Strict judicial scrutiny in gender-based discrimination cases could once again become applicable if the proposed Equal Rights Amendment is passed. The proposed amendment reads as follows: "Equality of rights under law shall not be denied or abridged by the United States or by any state on account of sex." *Proposed Amendment to the United States Constitution*, S.J. RES. 8, 9; H.R.J. RES. 208, 92d Cong., 1st Sess. (1971).

The proposed amendment has been passed by both Houses of Congress. *See* S. REP. No. 689, 92d Cong., 2d Sess., 2 (1972); H.R. REP. No. 359, 92d Cong., 1st Sess. (1971). At present, the proposed amendment must be ratified by three more states before June 30, 1982, to become part of the United States Constitution. *See* The Philadelphia Inquirer, August 30, 1981, at 27-A, col. 6.

35. *See* notes 36-43 and accompanying text *infra*.

36. 420 U.S. 190 (1976).

37. *Id.* at 197. Justice Brennan, who advocated the application of strict scrutiny in *Frontiero*, wrote the majority opinion in *Craig*. Because the Court saw *Reed* as controlling, it adopted a less stringent level of review. *Id.* at 199.

38. *Id.* at 204.

39. At present, the *Craig* standard is the one commonly applied in gender-based discrimination suits.

In several post *Craig* cases where the mid-tier level of review was used, the legislative classifications have been upheld. *See, e.g.*, Parham v. Hughes, 441 U.S. 347 (1979) (prohibition against institution of wrongful death actions by fathers but not mothers of illegitimate children upheld); Personnel Ad-

Under the application of the mid-tier level of scrutiny, it has been held that "administrative convenience" [40] is no justification for a gender-based classification, and is not a "mere shibboleth, the mere recitation of which dictates constitutionality." [41] The rationale for this rejection is that such a classification of necessity constitutes "dissimilar treatment for men and women who are . . . similarly situated," [42] and thus is the sort of arbitrary legislative classification forbidden by the Constitution.[43]

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ministrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (lifetime preference for veterans as opposed to non-veterans upheld because gender-neutral).

In other cases, however, the Court has struck down several legislative classifications as violative of the *Craig* standard. *See, e.g.,* Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) (classification requiring widowers but not widows to prove dependency in order to collect workmen's compensation death benefits not sufficiently related to state interest); Caban v. Mohammed, 441 U.S. 380 (1979) (statute allowing mother, but not father, of illegitimate child to block adoption by withholding consent struck down); Orr v. Orr, 440 U.S. 268 (1979) (statute requiring husband only to pay alimony not substantially related to state purpose).

The rational relationship test has been applied in recent gender classification cases only where the Court recognized the classification as necessary to ameliorate the effects of past discrimination. *See* Schlesinger v. Ballard, 419 U.S. 498 (1975) (rational basis test used to uphold differing tenure requirements for male and female officers); Kahn v. Shevin, 416 U.S. 351 (1974) (rational basis test used to uphold property tax exemption favorable to widows, but not widowers). *See also* Hull, *supra* note 21, at 657-63; Bice, *supra* note 21, at 702-07.

40. For an example of an administrative convenience rationale, *see* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980). In *Wengler,* a workmen's compensation dependency statute requiring widowers, but not widows, to prove dependency was struck down as an arbitrary classification based merely on gender, and not sufficiently related to the government's purpose of providing for needy spouses. *Id.* at 152. The justification for the distinction between widows and widowers was that individual inquiries as to dependency would be "prohibitively costly." *Id.* The Court reasoned that "the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience." *Id.*

41. Frontiero v. Richardson, 411 U.S. at 690. Although *Frontiero* applied strict scrutiny, a similar rejection of administrative convenience has occurred under the mid-tier and rationality levels of scrutiny. *See, e.g.,* Craig v. Boren, 429 U.S. at 198.

42. 411 U.S. at 690, *quoting* Reed v. Reed, 404 U.S. at 77.

43. 411 U.S. at 690. Similarly, courts will reject, as justification for a gender-based classification, "archaic and overbroad generalizations relating to the differences in behavior and capabilities between the sexes." Schlesinger v. Ballard, 419 U.S. at 508. If the differences in treatment stem from notions of the roles played by men and women, they represent "outmoded way(s) of thinking about members of the opposite sex." Owens v. Brown, 455 F. Supp. 291, 303 (D.D.C. 1978). *See also* Stanton v. Stanton, 421 U.S. 7 (1975) (statute based on notion that females are emancipated earlier than males unconstitutional); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (presumption that working women dependent on their spouses for support struck down as improper generalization).

When the "substantial relationship standard" is applied in the military context,[44] an additional consideration arises concerning the deference that is owed by the courts to the political branches in the exercise of their constitutional authority over the military.[45] Such deference is a function of the doctrine of separation of powers,[46] or of "the relationship between the judiciary and the coordinate branches of the Federal Government." [47]

The area of military affairs, in particular, is largely unfamiliar to the courts, and consequently, courts grant to congressional judgments in this area an "especially high degree of respect." [48] This is due in part to the express constitutional commitment of military affairs to the political branches,[49] and in part because of the "essential differences between the military and civilian communities that counsel strongly in favor of executive autonomy in military matters, subject to legislative guidance." [50] Courts often are compelled to abstain due to a lack of competence where review would entail "complex, subtle and professional decisions [which are] subject *always* to civilian control of the Legislative and Executive Branches." [51]

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44. *See* notes 45-65 and accompanying text *infra*.

45. *See* U.S. CONST., art. I, § 8, cls. 12-16. The Constitution gives Congress the power to "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," "provide for calling forth the Militia," "provide for organizing, arming and disciplining the Militia . . . ." *Id.*, cls. 12, 13, 14, 15, 16. Clause 18 of article I provides Congress with the authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *Id.*, cl. 18.

46. *See* Johnson, *The Role of the Judiciary With Respect to the Other Branches of Government*, 11 GA. L. REV. 455 (1977). "[T]he doctrine of separation of powers, reflects the deeply held belief of our founding fathers that the powers of government should be separate and distinct, with the executive, the legislative, and the judicial departments being independent and coordinate branches of government." *Id.* at 463. *See also* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Johnson & McAfee, *A Dialogue on the Political Question Doctrine*, 1978 UTAH L. REV. 523 (1978); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

47. Baker v. Carr, 369 U.S. 186, 210 (1961).

48. Owens v. Brown, 455 F. Supp. 291, 300 (D.D.C. 1978). Courts likewise refrain from examining legislative motive. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968); Arizona v. California, 283 U.S. 423, 455 (1931).

49. *See* note 45 *supra*. "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." United States v. O'Brien, 391 U.S. at 377. *See also* Lichter v. United States, 334 U.S. 742 (1948).

50. Owens v. Brown, 455 F. Supp. 291, 300 (D.D.C. 1978).

51. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis supplied by the Court). The petitioner in *Gilligan* sought "continuing surveillance by a federal court over the training, weaponry and orders of the [National] Guard," a function which does not come under the aegis of judicial authority. *Id.* at 6. *See also* Scharpf, *supra* note 46, at 560: "[T]he Court does not hold that legal rules do not apply; it holds that competence to apply them should rest with the political departments." *Id.*

Balanced against this traditional deference to the executive and the legislature is the principle that it is the "province and duty of the judicial department to say what the law is." [52] While courts respect the judgments of the coordinate branches, they do not abdicate their constitutional responsibility to decide cases and controversies.[53] Rather, the function of the court in such situations is to ensure that the challenged congressional action "conformed to the constitutional limitations under which Congress was permitted to exercise its basic powers." [54] Even in the military context, Congress and the armed forces are still subject to the Bill of Rights and its constitutional ramifications.[55] An example of the exercise of this power of review by a court is *Owens v. Brown*.[56]

The *Owens* Court struck down a portion of a statute which prohibited women from sea duty except on certain ships.[57] Although emphasizing the high degree of deference owed to the political branches in a military context,[58] the Court did not decline to review the case because the constitutional right of equal protection was implicated.[59] The Court applied the *Craig* mid-tier level of scrutiny,[60] on the ground that the statute "allow[ed] of but one distinction, that of male and female." [61]

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52. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

53. *See* U.S. CONST., art. III, § 2.

54. Lichter v. United States, 334 U.S. 742, 765 (1948). *Lichter* involved a challenge to the constitutionality of the Renegotiation Act, which authorized recovery of excess profits made during World War II. *Id.* at 746. The Court noted that the congressional power to pass the Act was "inescapably express, not merely implied." *Id.* at 756. However, the Supreme Court did not abstain from reviewing the case, because it was not reviewing the *power* of the government to so legislate. *Id.* at 765. Rather, it was fulfilling its role as the "ultimate arbiter of the Constitution." Powell v. McCormack, 395 U.S. 486, 549 (1967).

55. Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976).

56. 455 F. Supp. 291 (D.D.C. 1978).

57. *Id.* *See* 10 U.S.C. § 6015 (1959). Section 6015 provides in pertinent part, that females are prohibited from being "assigned to duty on vessels or in aircraft that are engaged in combat missions . . . (or) assigned to duty on vessels of the Navy other than hospital ships (or) transports." *Id.*

58. 455 F. Supp. at 299-300.

59. *Id.* at 302. The Court recognized that "while the obvious differences between the military and civilian communities provide the backdrop against which to test the lawfulness of military decisions, they do not of necessity furnish a basis for foregoing review." *Id.* at 301.

The Court struck down the nondiscretionary provisions of the statute because the absolute prohibition of women on sea vessels was not substantially related to the government's purpose of increasing the combat effectiveness of Navy ships. *Id.* at 305.

60. 429 U.S. at 190. For a discussion of the mid-tier level of review in equal protection cases, *see* notes 36-43 and accompanying text *supra*.

61. 455 F. Supp. at 294.

In *Schlesinger v. Ballard*[62] the Court faced the issue of whether differing terms of tenure for male and female naval officers constituted an unconstitutional gender-based classification in violation of the due process clause.[63] The Court accepted the legislative classification, not because such a decision was beyond the scope of judicial authority, but because no due process violation had occurred.[64]

Thus, while deference to political military judgments is a factor to be weighed in a gender-based discrimination claim, the court is not precluded from determining whether the powers of the political branches "have been exercised in conformity to the Constitution, and if they have not, to treat their acts as null and void."[65]

Against this background, the *Goldberg* Court[66] commenced its analysis by emphasizing the deference to be accorded by courts to congressional actions because "Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States."[67] The Court noted that such deference was appropriate in this instance where Congress specifically considered the constitutionality of exempting women from registration, and particularly where the issue involved congressional authority over military matters.[68] The Court also noted that, in the area of military affairs, courts are

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62. 419 U.S. at 498.

63. *Id.* Petitioner, a male naval officer, had failed on two occasions to be promoted during his nine years of active service, and thus was subject to mandatory discharge. *Id. See* 10 U.S.C. § 6382(a) (1956). However, his female counterparts were afforded thirteen years of active service before being subject to a mandatory discharge for not receiving a promotion. 419 U.S. at 498. *See* 10 U.S.C. § 6401 (1959).

64. 419 U.S. at 509. The Court recognized the authority of Congress over the military pursuant to Article I, § 8, cls. 12-14 of the Constitution. 419 U.S. at 510. However, the majority additionally stressed that, to the extent that women are prohibited from serving in combat, males and females are *not* similarly situated for purposes of the challenged statutes. *Id.* at 508. Consequently, the gender-based classification was not unconstitutional. *Id.* at 510.

65. Powell v. McCormack, 395 U.S. 486, 506 (1967), *quoting* Kilbourn v. Thompson, 103 U.S. 168, 199 (1881).

66. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Stevens joined. Justices White and Marshall each filed dissenting opinions, which were joined by Justice Brennan.

67. 101 S. Ct. at 2651.

68. *Id.* In its report on the issue of registering women, Congress also emphasized the deference owing to the judgments of Congressional and military leaders in dealing with military affairs. *See* S. REP. No. 826, *supra* note 5, at 160.

incompetent to make substantive adjudications,[69] and consequently, a deferential stance is essential to an adequate adjudication.[70]

The majority cautioned, however, that despite such broad authority, Congress' activities must nonetheless conform to the mandates of the Constitution, and specifically, the limitations of the due process clause.[71] The Court emphasized that, while "not abdicat[ing] . . . ultimate responsibility to decide the constitutional question," it would refrain from substituting its judgment for that of Congress.[72]

The majority disagreed with the district court's determination that the issue in *Goldberg* did not involve military affairs and that a deferential stance need not, therefore, be taken.[73] The Court asserted instead that "[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one." [74]

Even though a certain degree of deference was recognized, the Court also referred to the gender-based "heightened scrutiny" test of *Craig v.*

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69. 101 S. Ct. at 2652. The *Goldberg* Court quoted its prior opinion in *Gilligan*, stating:

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

Gilligan v. Morgan, 413 U.S. at 10 (emphasis in original). The Court relied upon additional authority in support of the same principle. 101 S. Ct. at 2652, *citing* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Simmons v. United States, 406 F.2d 456, 459 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969).

70. 101 S. Ct. at 2652. The majority relied upon several other cases in support of its deferential attitude. *Id., citing* Brown v. Glines, 444 U.S. 348 (1980) (prior restraint on right to petition military personnel upheld); Middendorf v. Henry, 425 U.S. 25 (1976) (deference given to Congress in not providing right to counsel in summary court martial proceeding); Greer v. Spock, 424 U.S. 28 (1976) (first amendment restrictions on military base upheld); Parker v. Levy, 417 U.S. 733 (1974) (Congress allowed more freedom in making legislation when it relates to military society); United States v. MacIntosh, 283 U.S. 605 (1931) (congressional withholding of citizenship upheld).

71. 101 S. Ct. at 2653.

72. *Id.* In admitting that traditional due process limitations may be somewhat more relaxed in a military context, the majority balanced its role as ultimate arbiter of the Constitution against the necessity of deferring to the political branches in military matters: "simply labeling the legislative decision 'military' on the one hand or 'gender-based' on the other does not automatically guide a court to the correct constitutional result." *Id.* at 2654.

73. *Id.* at 2653. For a discussion of the district court's rationale, *see* notes 12-14 and accompanying text *supra*. The majority also rejected the argument of respondent that the issue of registration only indirectly affected the national defense and involved civilian, not military, affairs. 101 S. Ct. at 2653.

74. *Id.* The court relied upon S. REP. No. 826 for its determination that Congress specifically linked its discussion of registration to the induction process. *Id., citing* S. REP. No. 826. *See* S. REP. No. 826, *supra* note 5 at 156, 160.

*Boren*.[75] The Court added, however, that too great a reliance on degrees of deference or levels of scrutiny could lead to "facile abstractions used to justify a result." [76] Instead, the Court noted that when Congress is faced with a choice between two alternatives, and its choice is being challenged on equal protection grounds, "the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws." [77]

The majority affirmed the congressional decision-making process in this case by undertaking an exhaustive analysis of the legislative history involved.[78] The Court asserted that "the decision to exempt women from registration was not the 'accidental byproduct of a traditional way of thinking about women.' " [79]

The majority emphasized that registration is but the first step in the continuous process of induction,[80] and added that its purpose "was to prepare for a draft of *combat troops*." [81] In light of this purpose it would be inappropriate for women to be registered, because, as the majority noted, women have consistently been restricted from combat eligibility.[82] The Court thus reasoned that men and women were not

75. 101 S. Ct. at 2654, *citing* Craig v. Boren, 429 U.S. at 190. For a discussion of the *Craig* mid-tier level of scrutiny, *see* notes 36-43 and accompanying text *supra*.

76. 101 S. Ct. at 2654. The majority steered a middle ground between "[s]imply labelling the legislative decision 'military' on the one hand or 'gender-based' on the other," and acknowledged that the government's purpose in raising and supporting armies was an important enough interest to fulfill the first requirement of the two pronged mid-tier test. *Id.*

77. *Id.*

78. *Id.* at 2655-60. The Court noted that the 1980 legislative history, as opposed to the legislative history at the time of the enactment of the MSSA in 1948 was the most relevant. *Id.* at 4803. "Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption." *Id.*

79. *Id., quoting* Califano v. Webster, 430 U.S. 313, 320 (1977).

80. 101 S. Ct. at 2656, *citing* Falbo v. United States, 320 U.S. 549, 553 (1944); United States v. Nugent, 346 U.S. 1, 9 (1953).

81. 101 S. Ct. at 2657 (emphasis supplied by the Court). The Court noted that this ruling was supported by the legislative history in S. REP. No. 826, *supra* note 5, at 160 ("if mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements"); and in *Hearings on S. 2294, supra* note 3, at 1688 (Senator Jepson) ("The shortage would be in the combat arms. That is why you have drafts"). 101 S. Ct. at 2657.

The Court further attributed Congress with explaining that the registration procedure would ensure an early delivery of inductees in the event of a national emergency. *Id., citing* S. REP. No. 826, *supra* note 5, at 154-55.

82. 101 S. Ct. at 2657-58. The majority noted that the use of women in combat positions in the Navy and Air Force is restricted by virtue of 10 U.S.C. §§ 6015 and 8549 (1959). 101 S. Ct. at 2657. For the pertinent provisions of § 6015, *see* note 57 *supra*.

similarly situated, and to exempt women from registration is not violative of the due process clause.[83]

The majority considered the argument that a small number of women could be drafted,[84] but concluded that the time and expense entailed would outweigh the benefits.[85] Also, the Court found that any need for women in noncombat positions could be adequately served by volunteers.[86] The Court accepted Congress' determination that the presence of women in noncombat positions would severely impede military flexibility because rotation between combat and noncombat positions would be limited, thus restricting the available manpower.[87]

Justice White, in his dissenting opinion,[88] disagreed with the interpretation of the record by the majority, and would have been satisfied in vacating the lower court judgment and remanding for further hearings on the issue of the feasibility of including women within the scope of registration.[89] He disagreed with the majority's position that the volunteer force alone would be sufficient to fill the noncombat positions in the event of mobilization, and asserted that the record supported a contrary finding.[90]

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83. 101 S. Ct. at 2658. The Court concluded that such an exemption is "not only sufficiently but closely related to Congress' purpose in authorizing registration." *Id.*

The Court addressed the issue of equality between the sexes, and, while recognizing that it is a legitimate viewpoint, found that the military necessity of instituting a pool of strong combat troops predominated. *Id.* at 2659.

84. *Id.* The Court noted the testimony of military experts that if a draft arose, of a possible 650,000 registrants, the military could absorb up to 80,000 women inductees. *Id.* at 4804-05, *citing Hearings on S. 2294, supra* note 3, at 1161, 1828. These 80,000 women would be placed in noncombat positions. 101 S. Ct. at 2659.

85. *Id.* at 2660. The Court relied upon S. REP. No. 826, *supra* note 5, at 159 (administrative problems to be dealt with). 101 S. Ct. at 2660. The Report also referred to the widespread societal impact that would result, with sweeping implications that are "unwise and unacceptable to a large majority of our people." *Id.*

86. *Id.* The Court adopted the Senate Committee findings that, because of the combat restrictions on women, the need for men would predominate, and volunteers would fill whatever positions were available to women. *Id., citing* S. REP. No. 826, *supra* note 5, at 160.

87. 101 S. Ct. at 2660. "In peace and war, significant rotation of personnel is necessary. . . . Large numbers of combat positions must be available to which combat troops can return for duty before being redeployed." *Id. citing* S. REP. No. 826, *supra* note 5, at 158.

88. 101 S. Ct. at 2661 (White, J., dissenting). Justice White's dissenting opinion was joined in by Justice Brennan.

89. *Id.*

90. *Id.* Justice White also rejected the administrative convenience rationale adopted by the majority, in that it was an insufficient justification for gender-based discrimination. *Id.* at 2662 (White, J., dissenting).

Justice Marshall's dissenting opinion relied upon the record in asserting that the majority's reasoning was flawed in several respects.[91] First, Justice Marshall saw the majority as assuming the existence of a draft wherein every position had to be filled with combat personnel, when, in reality, "no such guarantee is possible." [92] Secondly, Justice Marshall contends that there was no evidence in the record to support the majority's contention that *every* draftee must be combat trained.[93]

Finally, Justice Marshall asserted that, since certain positions could be filled by either men or women, they are thus similarly situated to that extent.[94] Neither the interest of the government in raising and supporting armies, nor the absence of a "military need" to draft women "provide[s] the constitutionally required justification for the total exclusion of women from registration and draft plans." [95]

In reviewing the *Goldberg* decision, it is submitted that the Court was correct in recognizing that the Constitution mandates a degree of deference to the legislative branch in military matters.[96] Although the Court is the "ultimate arbiter of the Constitution," [97] this power must be tempered by the respect and deference due the Congress in the proper exercise of its constitutionally delegated functions.[98]

However, a deferential attitude toward the Congress in military decisions should not necessitate an alteration of existing equal protection standards.[99] It is possible to apply a strict or mid-tier equal

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91. *Id.* (Marshall, J., dissenting). Justice Marshall's dissenting opinion was joined in by Justice Brennan.

Justice Marshall initially disagreed with the majority's formulation of the standard to apply in a gender-based discrimination case: "The relevant inquiry under the *Craig v. Boren* test is not whether a *gender-neutral* classification would substantially advance important governmental interests. Rather, the question is whether the gender-based classification is itself substantially related to the achievement of the asserted governmental interest." *Id.* at 2666 (Marshall, J., dissenting) (emphasis supplied by Justice Marshall).

92. *Id.* at 2667 (Marshall, J., dissenting).

93. *Id.* at 2668 (Marshall, J., dissenting). Justice Marshall relied on the record to support his theory that not every draftee needs to be combat-trained. *Id., citing* S. REP. No. 826, at 160 (primary manpower needed for combat). *See* note 5 and accompanying text *supra* for a discussion and the text of S. REP. No. 826.

94. 101 S. Ct. at 2670 (Marshall, J., dissenting).

95. *Id.* at 2672 (Marshall, J., dissenting). Justice Marshall asserted that the absence of a military need to draft women is irrelevant to a resolution of the equal protection issue at stake. *Id.* at 2671 (Marshall, J., dissenting).

96. *See* 101 S. Ct. at 2651-55. For a discussion of the requirement of deference to political decisions, *see* notes 45-51 and accompanying text *supra.*

97. Powell v. McCormack, 395 U.S. 486, 549 (1967).

98. For a discussion of this deference, *see generally* Johnson, *supra* note 46; Henkin, *supra* note 46.

99. The majority avoided a commitment to any particular standard of review, and defined its task as deciding "whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an

protection test while simultaneously proceeding with a measure of respect due to a legislative judgment, in the analysis under that test. For example, in *Schlesinger v. Ballard,*[100] the Court applied traditional equal protection principles to a gender-based discrimination claim, while concurrently announcing a degree of deference to the legislative decision.[101] It is submitted that a more definitive stance by the *Goldberg* majority as to the precise standard of review applied would have helped to clarify prior uneven interpretations in gender discrimination cases while leaving Congress latitude in its decisions regarding the military.[102]

It is also submitted that the Court need not have deferred to the legislative judgment as absolutely as it did, but rather could have modified the district court order [103] to conform to the legislative history as a whole, as well as to the current status of women in the military.[104]

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explicit guarantee of individual rights which limits the authority so conferred." 101 S. Ct. at 2654. It is suggested that in not applying any established standard, the Court may have ignored clearly defined tests.

The Court did acknowledge that the government's interest in raising and supporting armies met the second prong of the *Craig v. Boren* standard, namely, an important governmental interest. *Id.* However, it never applied the remainder of the test, *i.e.,* whether the classification is "substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. at 197. For a discussion of the equal protection standards of review, *see* notes 20-43 and accompanying text *supra.*

100. 419 U.S. at 498.

101. *Id.* at 510. The majority relied upon *Schlesinger* several times to support a theory of deference to legislative judgments in military matters. 101 S. Ct. at 2651, 2654, 2655. However, the rationale of the two opinions varies. The *Schlesinger* Court upheld the congressional decision because no due process violation had been established. 419 U.S. at 410. Similarly, the present majority noted that the total exclusion of women from registration did not violate the due process clause. 101 S. Ct. at 2658. However, a stronger emphasis was placed upon the deference owed the legislature in *Rostker* because of the military context in which it arose: "[W]e cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal." *Id.* at 2655. For a discussion of *Schlessinger,* see notes 62-64 and accompanying text *supra.*

102. For a discussion of the uneven results of the application of the mid-tier level of review, *see* note 39 *supra. See also* Hull, *supra* note 21, at 671. "Whether or not a given classification furthers an 'important governmental interest,' or is substantially related to this interest, are subjective determinations, and a conservative majority is as likely to conclude one way as a liberal majority is to conclude the other." *Id.*

103. *See* Goldberg v. Rostker, 509 F. Supp. at 605. For a discussion of the district court's rationale, *see* notes 12-14 and accompanying text *supra.*

104. The Court reasoned that "the primary manpower need would be for combat replacements." 101 S. Ct. at 2657. Because women are prohibited from serving in combat by virtue of 10 U.S.C. § 6015, the Court concluded that women were not needed for induction, and therefore should not be required to register. 101 S. Ct. at 2658. The record establishes, however, that women in the military perform vital functions in highly technical areas that are not combat-related, and thus need not be rotated into combat deploy-

This could have been done without overturning the long-standing prohibition of women serving in combat,[105] while holding the MSSA unconstitutional insofar as it conflicted with the evidence in the record regarding the extensive use of women in the military.[106] It is further suggested that the majority relied upon certain assumptions tending to justify its conclusions, that are not supported in the legislative history.[107]

Furthermore, it is submitted that the Court erred in using the "administrative convenience" [108] rationale as a justification for upholding the gender-based classification; regardless of the standard of review applied, such a rationalization has been held to be nothing more than "a mere shibboleth" to disguise an invidious discriminatory purpose.[109] The Court reinforced its position with supporting documentation from the record.[110] However, in such an instance, it is suggested that the proper role of the Court would have been to reverse the legislature on that issue, because administrative convenience is an unacceptable justification for a gender-based classification.[111]

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ment. *See, e.g.,* S. REP. No. 826, *supra* note 5, at 157, wherein the Senate found that "[w]omen now volunteer for military service and are assigned to most military specialties. These volunteers now make an important contribution to our Armed Forces." *Id. See also Hearings on S. 2294, supra* note 3, at 171, 182.

105 10 U.S.C. § 6015 (1959). For the pertinent provisions of § 6015, *see* note 57 *supra.*

106. For a discussion of the importance of women in the military, *see* note 104 *supra.*

107. *See, e.g.,* 101 S. Ct. at 2656-57, wherein the Court assumed that registration would of necessity lead to immediate induction. Congress, however, has stated that registration is to prepare for full manpower mobilization *in the event that* a national emergency arises. *See* S. REP. No. 826, *supra* note 5, at 154-55. The current status of the law is limited to registration only. *Id.* Furthermore, induction itself was not challenged by respondents. 101 S. Ct. at 2650, n.2. Nor did the President in his recommendation seek conscription. *Id.* at 2649, n.1. Additionally, it was noted that new legislation would have to be passed before any induction could take place. S. REP. No. 826, *supra* note 5, at 155.

Moreover, even if a draft were to be instituted, the majority appears to assume that everyone inducted must be combat trained. *See* 101 S. Ct. at 2656-57. However, Congress has merely stated that, were induction to occur, the *primary* manpower needs would be for combat-trained personnel. S. REP. No. 826, *supra* note 5, at 160 (emphasis added).

108. For a discussion of "administrative convenience," *see* notes 40-43 and accompanying text *supra.*

109. Frontiero v. Richardson, 411 U.S. at 677. For a discussion of *Frontiero, see* notes 29-34 and accompanying text *supra.*

110. 101 S. Ct. at 2660. *See also* S. REP. No. 826, *supra* note 5, at 158-59.

111. Frontiero v. Richardson, 411 U.S. at 690; Schlesinger v. Ballard, 419 U.S. at 498. *Schlesinger* affirmed the rejection of the administrative convenience rationale, but because the Court had found that no due process violation had occurred, the administrative convenience rationale was inapplicable. *Id.* at 510. For a discussion of *Schlesinger, see* notes 62-64 and accompanying text *supra.*

It is additionally proposed that the Court erred in stating in absolute terms that "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." [112] In light of the fact that men and women who perform the same noncombat positions equally as well are obviously similarly situated for purposes of a draft or registration for a draft, such a statement evinces an "archaic and overbroad generalization," which is no justification for a gender-based classification.[113]

The *Goldberg* decision will operate to further muddy the already uncertain scope of the mid-tier level of scrutiny in gender discrimination cases,[114] thus postponing an elucidation of that standard of review until later Supreme Court review. The vitality of the holding, however, hinges to a substantial extent upon the future of the proposed Equal Rights Amendment.[115] If passed, the amendment would require a re-evaluation of the decision of the Court, with the recognition that equality of the sexes may be constitutionally mandated.[116] However, at present *Goldberg* stands more as an example of judicial reluctance to examine a military decision and a reaffirmance of the separation of powers principle [117] than it does as an elucidation of gender discrimination principles.

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112. 101 S. Ct. at 2658.

113. Schlesinger v. Ballard, 419 U.S. at 508. For a discussion of "archaic and overbroad generalizations," *see* Weinberger v. Wiesenfeld, 420 U.S. at 643; Craig v. Boren, 429 U.S. at 198-99.

114. For a discussion of the mid-tier level of review, *see* notes 36-43 and accompanying text *supra*.

115. For a discussion of the proposed Equal Rights Amendment, *see* note 34 *supra*.

116. *See* notes 29-34 and accompanying text *supra*.

117. For a discussion of the separation of powers principle, *see* notes 44-51 and accompanying text *supra*.