CASE COMMENTS

MALES-ONLY DRAFT REGISTRATION DOES NOT VIOLATE EQUAL PROTECTION COMPONENT OF FIFTH AMENDMENT

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

In *Rostker v. Goldberg*[1] the United States Supreme Court, by giving deference to the military powers of Congress,[2] relaxed the intermediate standard of review[3] for gender-based classifications in holding that males-only draft registration[4] does not violate the equal protection component[5] of the fifth amendment due process clause.[6]

The *Rostker* plaintiffs,[7] young males subject to draft registration,

1. 101 S. Ct. 2646 (1981). The issue presented in this case was extremely controversial and drew much public attention. For the treatment by the press of this case, see, e.g., L.A. Daily J., Mar. 25, 1981, at 3, col. 1; *id.*, Mar. 30, 1981, at 1, col. 2; *id.*, July 31, 1980, at 1, col. 6; *id.*, July 23, 1980, at 4, col. 5; *id.*, Apr. 9, 1980, at 1, col. 7; Nat'l L.J., Apr. 6, 1981, at 15, col. 1; N.J.L.J., Aug. 7, 1980, at 8, col. 1; *id.*, Jan. 15, 1981, at 2, col. 3; *id.*, Aug. 14, 1980, at 6, col. 1. *See also* Brief of Appellees In Opposition To Motion To Intervene of Stacey Acker, et al., app. A, Rostker v. Goldberg, 101 S. Ct. 2646 (1981); Reply of Stacey Acker, et al., Movant For Intervention, To Brief of Appellees In Opposition To Motion To Intervene, app. A, Rostker v. Goldberg, 101 S. Ct. 2646 (1981); Young, *Divided Court Upholds Male-Only Draft*, 67 A.B.A.J. 1028 (1981).

2. The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. I, § 8, cls. 12-14.

3. The Supreme Court applies three levels of scrutiny, or tests, to review equal protection challenges: (1) the rational basis test (minimal scrutiny), *see* notes 24-28 *infra* and accompanying text; (2) the substantial relation test announced in Craig v. Boren, 429 U.S. 190 (1976) (intermediate scrutiny), *see* notes 39-46 *infra* and accompanying text; and (3) strict scrutiny, *see* note 24 *infra*. The test that is normally applied to review gender-based classifications challenged on equal protection grounds is the *Craig* standard of intermediate review. To pass this test the Court must find that the challenged classification is substantially related to the achievement of an important governmental interest.

4. *See* note 8 *infra*.

5. In Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975), the Court stated: "Although it contains no Equal Protection clause as does the Fourteenth Amendment, the Fifth Amendment Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.' Bolling v. Sharpe, 347 U.S. 497, 499 (1954)." *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541 (1977).

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

7. The original plaintiffs, three males under 18 years of age subject to registration and a fourth male who had registered with the Selective Service System, brought the action both individually and as representatives of a class. On June 25, 1975, Robert L. Goldberg was permitted to intervene as a party plaintiff; on July 22, 1975, the three plaintiffs under 18 years of age were dismissed as parties to the action. *See* Goldberg v. Tarr, 510 F. Supp. 292, 292 n.1 (E.D. Pa.

challenged the Military Selective Service Act[8] on several grounds,[9]

1980). Before the district court heard the case, Owen F. Jones, a 19-year-old male subject to registration with the Selective Service System, was also allowed to intervene as a party-plaintiff. *See* Goldberg v. Rostker, 509 F. Supp. 586, 587 (E.D. Pa. 1980). On July 1, 1980, the district court certified a class under Fed. R. Civ. P. 23(b)(2) comprising "all male persons who are registered or subject to registration under 50 U.S.C. app. § 453 or are liable for training and service . . . under 50 U.S.C. app. §§ 454, 456(h) and 467(c)." 509 F. Supp. at 589. In addition, the district court further refined the plaintiff class by holding that only "those members of the class born in 1960 and 1961 who were required . . . to present themselves for registration," *id.* at 586, and "those . . . who registered before April 1, 1975," *id.* at 590, had standing to sue.

8. 50 U.S.C. app. §§ 451-473 (1976) (repealed in part—§§ 452, 457). The specific section challenged on sex discrimination grounds was 50 U.S.C. app. § 453 (1976), which provides in pertinent part as follows:

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Under authority of this section, President Ford terminated registration by issuing Pres. Proc. No. 4360, 40 Fed. Reg. 14,567 (1975), *reprinted in* 50 U.S.C. app. § 453, at 15 (1976). In response to the Soviet invasion of Afghanistan, *see* 16 WEEKLY COMP. OF PRES. DOC. 198 (Jan. 23, 1980), President Carter, on Feb. 11, 1980, recommended to Congress that funds be appropriated to reinstitute registration and that the Military Selective Service Act be amended to authorize the registration of women. H.R. DOC. NO. 96-267, 96th Cong., 2d Sess. (1980); HOUSE COMM. ON ARMED SERVICES, 96TH CONG. 2D SESS., PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM (Comm. Print 1980). Subsequently both houses of Congress conducted hearings on whether women should be included in registration plans and whether funds should be allocated. *See, e.g., Dept. of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. (1980); *Dept. of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on H.R. 6495 Before the House Comm. on Armed Services*, 96th Cong., 2d Sess. (1980); *Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (1980). The Senate Armed Services Committee issued a report rejecting all proposals to register women and stated twelve specific findings to justify this rejection. S. REP. NO. 96-826, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643. The House passed H.R.J. Res. 521, 96th Cong., 2d Sess., 94 Stat. 552 (1980), which appropriated funds for registration, on April 22, 1980. 126 CONG. REC. H2752 (1980). The Senate passed H.R.J. Res. 521 on June 12, 1980. 126 CONG. REC. S6773 (1980). The amount appropriated was less than the amount President Carter requested due to Congress' refusal to register women. *See* S. REP. NO. 96-789, 96th Cong., 2d Sess. (1980). The House-Senate Conference on H.R.J. Res. 521 adopted the findings of the Senate Armed Services Committee regarding reasons not to include women in registration plans. S. CON. REP. NO. 95-895, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2612. Both houses of Congress adopted these findings when they passed S. CON. REP. NO. 96-895, 126 CONG. REC. H7800, S11646 (1980). The full Congress passed H.R.J. Res. 521 on June 27, 1980, *see* 126 CONG. REC. 2922 (1980), and President Carter signed it on June 28, 1980. The Selective Service System immediately promulgated new regulations setting forth procedures for an all-male registration. 45 Fed. Reg. 40,577 (1980). On July 2, 1980, President Carter issued

including sex discrimination.[10] The district court dismissed the entire case for lack of justiciability,[11] but the court of appeals reversed the dismissal of the sex discrimination claims.[12] On remand a three-judge district court[13] denied defendants' pre-trial motions to dismiss for lack of standing[14] and for summary judgment.[15] After hearing the case,[16] the same court declared the males-only provisions of the Military Selective Service Act unconstitutional on the basis of sex discrimination and issued a permanent injunction three days before registration was to

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Proc. No. 4771, 45 Fed. Reg. 45,247 (1980), ordering the registration of males ages 18 through 26 to begin on July 21, 1980.

In addition, in 1979 Congressional committees and subcommittees had considered whether to register women and had rejected the proposal. *See, e.g., Hearings on S. 109 Before the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. (1979); *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226 before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. (1979); S. REP. No. 96-226, 96th Cong., 1st Sess. (1979).

9. The original plaintiffs, *see* note 7 *supra*, filed their claim on June 16, 1971, seeking declaratory and injunctive relief. They alleged, in addition to the sex discrimination claim, that the Military Selective Service Act "amounted to a taking of property without due process, imposed involuntary servitude, violated rights of free expression and assembly, [and] was unlawfully implemented to advance an unconstitutional war." Rostker v. Goldberg, 101 S. Ct. 2646, 2650 n.2 (1981).

10. The district court summarized plaintiffs' specific contention as follows: "[M]ales only are subject to registration for the draft, and therefore there is an increased probability of the male plaintiffs actually being inducted because the pool of draft eligibles is decreased by the exclusion of females." Goldberg v. Tarr, 510 F. Supp. 292, 295 (E.D. Pa. 1980).

11. Rowland v. Tarr, 341 F. Supp. 339 (E.D. Pa. 1972), *rev'd*, 480 F.2d 545 (3d Cir. 1973). The court's reasoning is not entirely clear because it discusses the political questions doctrine, the military powers of Congress, and judicial deference, but never makes any explicit connection between these subjects and the result in the case. Nevertheless, the *Rowland* court's statement that "dismissal for nonjudiciability is necessary," *id.* at 341, indicates that the court viewed a challenge to draft registration as nonjusticiable.

12. Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973). The court noted that "[f]rom the district court's opinion we are unable to determine on what basis it rejected this particular count." *Id.* at 547.

13. "The Act authorizing three-judge courts to hear claims such as this was repealed in 1976, Pub. L. 94-381, §§ 1 and 2, 90 Stat. 1119 (Aug. 12, 1976), but remains applicable to suits filed before repeal, *id.*, § 7, 90 Stat. 1120." Rostker v. Goldberg, 101 S. Ct. 2646, 2650 n.2 (1981).

14. Rowland v. Tarr, 378 F. Supp. 766 (E.D. Pa. 1974). Following this refusal to dismiss, no further action was taken on the case for five years. In 1979 the case was still on the district court docket and, after the court proposed to dismiss the case for inaction, further discovery occurred, thus reviving the dispute.

15. Goldberg v. Tarr, 510 F. Supp. 292 (E.D. Pa. 1980). The ground for denial was the inadequacy of the record before the court to make findings of fact. *See id.* at 296-97.

16. The court heard the case on the basis of a "Joint Documentary and Stipulated Record." Goldberg v. Rostker, 509 F. Supp. 586, 588 (E.D. Pa.), *stayed*, 448 U.S. 1306 (1980) (Brennan, Circuit Justice), *rev'd*, 101 S. Ct. 2646 (1981).

begin.[17]

Upon an appeal by the government, Justice Brennan, sitting as Circuit Justice, stayed the injunction order one day after it was issued so that registration could begin as scheduled.[18] The United States Supreme Court thereafter noted probable jurisdiction[19] and *held*: Registration of males but not females under the Military Selective Service Act does not violate the fifth amendment because women are excluded from combat service by statute[20] or military policy[21] and therefore are not similarly situated for purposes of registration for the draft.[22]

The equal protection component of the fifth amendment due process clause protects persons from unlawful federal discrimination on the basis of gender.[23] The proper test[24] for determining when a gender classi-

17. *Id.* at 605. Registration was to begin on July 21, 1980. Proc. No. 4771, 45 Fed. Reg. 45,247 (1980), *reprinted in* 50 U.S.C. app. § 453, at 16 (1981). *See* note 8 *supra*.

18. Rostker v. Goldberg, 448 U.S. 1306 (Brennan, Circuit Justice), *stay'g* 509 F. Supp. 586 (E.D. Pa. 1980). Among his reasons for issuing the stay, Justice Brennan stated that "it does seem to me that the prospects of reversal can be characterized as 'fair.'" *Id.* at 1309.

19. Rostker v. Goldberg, 449 U.S. 1009 (1980) (mem.).

20. 10 U.S.C. § 6015 (Supp. II 1978) provides in pertinent part: "[W]omen may not be assigned to duty on vessels or in aircraft that are engaged in combat missions . . . ." 10 U.S.C. § 8549 (1976) provides in pertinent part: "Female members of the Air Forces may not be assigned to duty in aircraft engaged in combat missions."

21. 101 S. Ct. at 2657.

22. *Id.* at 2659.

23. Not all statutes that classify on the basis of gender are unlawful. *See* Kahn v. Shevin, 416 U.S. 351 (1974). The Court in *Kahn* stated: "Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services, 50 U.S.C. app. § 454." *Id.* at 356 n.10. *See also* Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 167-68 (1975).

24. With the exception of gender-based classifications, the Supreme Court has developed two levels of scrutiny, or tests, for assessing equal protection claims. The lower tier of scrutiny is the rational basis test, which the Court has traditionally applied to challenges to economic and social legislation. *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Railway Express Agency v. New York, 336 U.S. 106 (1949). For a definition of the rational basis test, see text accompanying note 27 *infra*.

The upper tier of scrutiny is the strict scrutiny test, under which a statute will not be upheld unless it is necessary to the achievement of a compelling governmental interest. This strict level of scrutiny is normally reserved for challenges to statutes that classify on the basis of a suspect classification (race and nationality) or that touch upon fundamental rights (voting and elections, access to courts, and interstate travel). *See, e.g.,* Boddie v. Connecticut, 401 U.S. 371 (1971) (access to civil courts); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Loving v. Virginia, 388 U.S. 1 (1967) (race); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (access to criminal appellate courts); Korematsu v. United Sates, 323 U.S. 214 (1944) (nationality). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL

fication is unlawful has not always been clear in recent decades.[25]

Prior to the 1970s the Supreme Court applied the rational basis test to gender classifications challenged on equal protection grounds.[26] Under this test a statute is presumed valid and upheld if the court finds a rational relationship between the particular classification and a legitimate governmental interest.[27] Applying this test meant, as a practical matter, that most equal protection challenges to gender-based classifications failed[28] because the scrutiny of the statute was minimal.

LAW 670-971 (10th ed. 1980); Baker, *Neutrality, Process, and Rationality: Flawed Interpretation of Equal Protection*, 58 TEX. L. REV. 1029 (1980); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Shaman, *supra* note 23; Tussman & ten-Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

25. *See* Michael M. v. California, 450 U.S. 464, 468 (1981) ("[a]s is evident from our opinions, the Court had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications"); Rostker v. Goldberg, 448 U.S. 1306, 1309 (1980) (Brennan, Circuit Justice) ("[i]n the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate"); Cassen, *Equal Protection—Equal Status: A Summary of Sex Discrimination Cases Since Frontiero*, 11 LINCOLN L. REV. 167, 168 (1980) ("[t]his switching of standards and rationales for treatment of women as citizens under the law has created confusion and uncertainty"). *See generally* Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Ginsburg, *Gender and the Constitution*, 44 U. CINN. L. REV. 1 (1975); Goldstein, *The Constitutional Status of Women: The Burger Court and the Sexual Revolution in American Law*, 3 L. & POL'Y Q. 5 (1981); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV. 617 (1974); Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal For Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35 (1980); Steele, *Males Only Draft Registration: An Equal Protection Analysis*, 11 CUM. L. REV. 295 (1980); 1976 WIS. L. REV. 330.

26. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (limiting jury service to women volunteers upheld) (effectively overruled by Taylor v. Louisiana, 419 U.S. 522 (1975)); Goesaert v. Cleary, 335 U.S. 464 (1948) (prohibition against women obtaining bartender's licenses upheld); Muller v. Oregon, 208 U.S. 412 (1908) (maximum hours limitation for female laundry and factor workers upheld). *See also* Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 281, 283-91 (1971); Erickson, *Women and the Supreme Court: Anatomy Is Destiny*, 41 BROOKLYN L. REV. 209, 214-21 (1974); Ginsburg, *Sex Equality and the Constitution*, *supra* note 25, at 454-57; Ginsburg, *Gender and the Constitution*, *supra* note 25, at 16; Goldstein, *supra* note 25, at 6-7; Note, *supra* note 24, at 1077-87; Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1502-16 (1971); 1981 UTAH L. REV. 431, 434-35.

27. *See generally* Barrett, *The Rational Basis Standard For Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 851-56 (1980); Eastwood, *supra* note 26, at 283-91; Shaman, *supra* note 23, at 159-71; Wilkinson, *supra* note 24, at 951; Note, *supra* note 24, at 1077-87; Note, *supra* note 26, at 1502-16.

28. *See* Erickson, *supra* note 26, at 214-21; Ginsburg, *Sex Equality and the Constitution*, *supra*

In *Reed v. Reed*,[29] however, a unanimous Court struck down an Idaho statute that gave preference to males over females in the appointment of estate administrators.[30] Even though the *Reed* Court employed deferential, rational basis language,[31] it apparently applied a higher level of scrutiny.[32] A clear departure from the rational basis standard occurred in *Frontiero v. Richardson*,[33] in which the Court struck down a dependents' benefits law for military service members.[34] In a plurality opinion, Justice Brennan declared gender a suspect classification,[35] subject to the strict scrutiny test.[36] Although four justices dissented from that classification, they did concur in the result.[37] Hence, the correct equal protection analysis to apply in sex discrimination cases was unclear.[38]

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note 25, at 457; Gunther, *supra* note 24, at 19; Shaman, *supra* note 23, at 174; 1976 WIS. L. REV. 330, 334.

29. 404 U.S. 71 (1971).

30. The Court found the classification to be "arbitrary line drawing." *Id.* at 76.

31. "The question presented by this case, then, is whether a difference in the sex of competing applications for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation [of the statute.]" *Id.*

32. The Court stated: "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 persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." *Id.* (emphasis added). *See also* Erickson, *supra* note 26, at 221-24; Goldstein, *supra* note 25, at 7-10; Johnston, *supra* note 25, at 621-26; Note, *Developing An Equal Protection Standard for Gender Discrimination Cases—Where's the Rub?*, 11 RUT.-CAM. L.J. 293, 295-96 (1980); 45 TENN. L. REV. 514, 517-18 (1978); 19 WASHBURN L.J. 365, 367-68 (1980); 17 WASHBURN L.J. 182, 184 (1977).

33. 411 U.S. 677 (1973).

34. The law allowed a male serviceman to claim his wife without any showing of dependency, whereas a female servicewoman was required to prove that her husband was dependent upon her for one-half of his support before she could claim him. *Id.* at 678-79.

35. *Id.* at 688.

36. *See* note 24 *supra*.

37. Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973).

38. *Compare* Kahn v. Shevin, 416 U.S. 351 (1974) *with* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). In *Kahn* the Court upheld a Florida law granting property tax exemptions to widows, but not to widowers. The Court found the classification acceptable due to its purpose of remedying past and present sex discrimination in the job market. The Court purported to apply the *Reed* standard, quoting its "fair and substantial relation" language. Kahn v. Shevin, 416 U.S. at 355. In *Weinberger*, however, the Court struck down a Social Security wage-earner death benefits program in which a deceased husband's benefits went to his wife and children, while a deceased wife's benefits went only to her children. The Court scrutinized the program's "actual" and "articulated" purposes closely, and, upon finding no actual benign purpose, declared the classification impermissible. Weinberger v. Wiesenfeld, 420 U.S. at 648-53.

Compare also Stanton v. Stanton, 421 U.S. 7 (1975) *with* Schlesinger v. Ballard, 419 U.S. 498 (1975). In *Stanton* the Court invalidated a Utah statute that set the age of majority for females at

In *Craig v. Boren*[39] the Court finally appeared to settle the issue[40] of the applicable level of scrutiny for gender-based equal protection challenges. The Court, although stating that *Reed*[41] represented the proper standard, actually articulated an intermediate level of scrutiny by requiring gender classifications to serve and be substantially related to the achievement of important government objectives.[42] Employing this means/end analysis, the Court struck down the Oklahoma statute that prohibited the sale of 3.2% beer to females under eighteen and males under twenty-one. Despite the statute's articulated safety purpose and statistical justifications,[43] the Court held that the statute impermissibly discriminated against males aged eighteen to twenty-one.[44]

The Court has subsequently cited and applied *Craig* in a variety of equal protection challenges to gender-based classifications as representing the proper standard for review.[45] Recent decisions indicate that the

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18 years and for males at 21 years. In *Schlesinger* the Court, distinguishing *Reed* and *Frontiero* as having involved sex discrimination for administrative convenience, upheld a naval promotion system that gave preference to women. Males failing to be promoted for a second time within nine years were discharged, whereas females were not discharged until passed up for promotion twice within 13 years. Utilizing a "similarly situated" analysis, the Court found the distinction justified because of the combat restrictions placed upon women, but not men. Schlesinger v. Ballard, 419 U.S. at 508.

See generally Baker, *supra* note 24, at 1084-89; Cassen, *supra* note 25, at 171-76; Erickson, *Equality Between the Sexes in the 1980s*, 28 CLEV. ST. L. REV. 591, 596 (1979); Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test In "Reverse" Sex Discrimination Cases*, 42 BROOKLYN L. REV. 1, 4-38 (1975); Erickson, *supra* note 26, at 224-30; Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157, 159; Ginsburg, *Sex Equality and the Constitution*, *supra* note 25, at 464-68; Ginsburg, *Gender and the Constitution*, *supra* note 25, at 21-23; Goldstein, *supra* note 25, at 10-12; Johnston, *supra* note 25, at 635-42, 661-73; Nowak, *supra* note 24, 1075-79; Roberts, *supra* note 25, at 47-49; Wilkinson, *supra* note 24, at 982-89; Note, *supra* note 32, at 296-98; 45 TENN. L. REV. 514, 518-23 (1978); 19 WASHBURN L.J. 365, 368 (1980); 17 WASHBURN L.J. 182, 184-88 (1978); 1976 WIS. L. REV. 330, 335-41.

39. 429 U.S. 190 (1976).

40. Justice Powell, admitting that the issue was not settled by prior cases, stated: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications." *Id.* at 210 (Powell, J., concurring).

41. The standard actually articulated in Reed v. Reed, 404 U.S. 71 (1971), resembled the rational basis test. *See* note 31 *supra*. *But see* note 32 *supra*. *See generally* notes 29-32 *supra* and accompanying text.

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

43. *Id.* at 199-204.

44. *Id.* at 204, 210.

45. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977). The *Webster* Court applied *Craig* to sustain a Social Security statute that allowed females to receive higher old-age insurance benefits than males. 430 U.S. at 318. The Court found an

Court is committed to the *Craig* standard and will invoke it to review equal protection claims grounded upon sex discrimination.[46]

The sex classification line of equal protection cases, however, is not the only relevant strand of precedent involved in *Rostker v. Goldberg*.[47] Because passage of the Military Selective Service Act was an exercise of the military powers of Congress and the decision to refrain from including females in registration programs was a result of extensive legislative consideration,[48] the challenge to the Act's constitutionality necessarily invokes another line of Supreme Court decisions.[49]

The Supreme Court often expresses a deference to congressional decisions,[50] especially when Congress acts pursuant to its powers over

important governmental interest in remedying the economic effects of prior sex discrimination and a direct relationship between the means and the end. *Id.* In *Goldfarb* the Court applied *Craig* to invalidate a Social Security statute that provided a widow with death benefits automatically, but required a widower to prove that he received one-half of his support from his wife's earnings. The Court found that the statute did not substantially further any important governmental objectives, but rather was the "accidental by-product of a traditional way of thinking about females." 430 U.S. at 223. The Court found that this distinction discriminated against the female wage-earner by giving her spouse less protection than the male wage-earner's spouse. *Id.* at 208-09. *See generally* Baker, *supra* note 24, at 1084-94; Cassen, *supra* note 25, at 174-76, 184-92; Erickson, *Equality Between The Sexes in the 1980s*, *supra* note 38, at 591-95; Ginsburg, *Sex Equality and the Constitution*, *supra* note 25, at 468-75; Goldstein, *supra* note 25, at 14-18; Roberts, *supra* note 25, at 49-51; Steele, *supra* note 25, at 299-301; Note, *supra* note 32, at 298-300; 45 TENN. L. REV. 514, 523-25 (1978); 1981 UTAH L.REV. 431, 436-38; 17 WASHBURN L.J. 182, 188 (1977).

46. *See, e.g.,* Michael M. v. California, 450 U.S. 464 (1981); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979). *See generally* Cassen, *supra* note 25, at 184-91; Ginsburg, *Sex Equality and the Constitution*, *supra* note 25, at 468-71; Roberts, *supra* note 25, at 49-52; 1981 UTAH L. REV. 431, 445.

47. 101 S. Ct. 2646 (1981).

48. *See* note 8 *supra*.

49. *See* Roberts, *supra* note 25, at 81-82. Dean Roberts points out the uniqueness of the problem involved in the constitutionality of males-only draft registration and the need to look beyond a straight-forward *Craig* analysis as follows:

> It is not enough to apply the *Craig v. Boren* standard to male-only registration without recognizing the substantially different problems it presents . . . . It is . . . vastly different from the contexts of the other major gender-based discrimination cases . . . . Here, we are concerned with Congress' constitutional duty to raise and support armies, whereas in none of the major equal protection cases has an affirmative power of Congress been directly implicated.

Id. at 82.

50. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448, 473 (1980) (Court must give recognition to acts of Congress, yet must also enforce the equal protection clause); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("we must afford great weight to the decisions of Congress").

military and international affairs.[51] One example of this deference is the Court's treatment of first amendment rights in the military context.[52] Such deference represents a respect for the separation of powers doctrine[53] and a recognition of the judiciary's lack of competence to

51. *See, e.g.,* Fiallo v. Bell, 430 U.S. 787 (1977); Middendorf v. Henry, 425 U.S. 25 (1976); Greer v. Spock, 424 U.S. 828 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); United States v. O'Brien, 391 U.S. 367 (1968); Orloff v. Willoughby, 345 U.S. 83 (1953); Lichter v. United States, 334 U.S. 742 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayaski v. United States, 320 U.S. 81 (1943); United States v. MacIntosh, 283 U.S. 605 (1931). *But see* United States v. Robel, 389 U.S. 258, 263 (1967) ("the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit"); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[e]ven the war power does not remove constitutional limitations safeguarding essential liberties"); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("[t]he war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations"). *See generally* Roberts, *supra* note 25, at 74-93.

52. *See, e.g.,* Parker v. Levy, 417 U.S. 733 (1974). In *Parker* the Supreme Court upheld the conviction of an Army captain for violating Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 933-934 (1975). The activities constituting the violations were "public utterances wherein he promoted insubordination." Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 7 (1980). The Court rejected the captain's claim of infringement on his right of free speech, held that Articles 133 and 134 did not violate the first amendment, and stated: "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections." Parker v. Levy, 417 U.S. at 758. *See also* Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (upheld requirement of prior command approval to circulate petitions on overseas Navy and Marine bases); Brown v. Glines, 444 U.S. 348 (1980) (upheld requirement of prior command approval to circulate petitions on Army base); Greer v. Spock, 424 U.S. 828 (1976) (upheld restrictions on political speeches on military base); Gillette v. United States, 401 U.S. 437 (1971) (upheld denial of conscientious objector status to those who object only to particular wars rather than all wars); United States v. MacIntosh, 283 U.S. 605 (1931) (upheld requirement of Naturalization Act that prospective citizens must promise to bear arms, despite conscientious objector status). For further discussion of this matter, see Levine, *supra*, at 6-11; Roberts, *supra* note 25, at 83-87. In discussing Gillette v. United States, 401 U.S. 437 (1971), Dean Roberts notes that "[t]he Court justified the distinction, which to many may seem irrational, on the grounds that Congress has special powers in the area of raising military forces and a compelling interest in maintaining an efficient and workable draft system." Roberts, *supra* note 25, at 86.

The Court has expressed similar deference to military decisions in the context of other civil liberties. *See, e.g.,* Middendorf v. Henry, 425 U.S. 25 (1976) (military personnel are not entitled to the fifth amendment right to counsel in summary court-martial proceedings); Burns v. Wilson, 346 U.S. 137 (1953) (denial of habeas corpus); Orloff v. Willoughby, 345 U.S. 83 (1953) (same).

53. *See, e.g.,* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("*[o]rderly government* requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters") (emphasis added). In Gilligan v. Morgan, 413 U.S. 1 (1973), the Court, referring to the constitutional authority of Congress over military judgments and the militia, explained that "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives

make judgments involving the military.[54]

Courts defer to the constitutional powers of Congress in the context of equal protection and draft legislation challenges. In *Schlesinger v. Ballard*,[55] for example, the Court upheld preferential promotion standards for women in the Navy.[56] A key element of the Court's reasoning was the acknowledgement that the main purpose of the military is to defend the nation in wars and that Congress and the President are to determine "how best our Armed Forces shall attend to that purpose."[57] Deference was also a major theme in *Fiallo v. Bell*,[58] in which the Court rejected an equal protection challenge to provisions of the Immigration and Nationality Act of 1952.[59] Even though the petitioners challenged the Act on sex discrimination grounds, the Court deferred to Congress' powers over aliens.[60]

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and officials which underlies our entire constitutional system." *Id.* at 10. *See generally* Roberts, *supra* note 25, at 93. *See also* Owens v. Brown, 455 F. Supp. 291, 300 (D.D.C. 1978).

54. *See, e.g.,* Parker v. Levy, 417 U.S. 733, 751 (1974); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Pauling v. McNamara, 331 F.2d 796, 799 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 933 (1964).

55. 419 U.S. 498 (1975).

56. For a discussion of the details of the preferential promotion program, see note 38 *supra*.

57. Schlesinger v. Ballard, 419 U.S. 498, 510 (1975). The significance of this case was pointed out by Dean Roberts:

> It is particularly relevant because the promotion problems at issue in *Ballard* were a direct result of the restrictions against women in combat, and that policy also stands at the root of Congress' decision to exclude women from registration and induction. Second, even though the line of "new equal protection cases" seemed well established by then (albeit without a clear rationale), the majority in *Ballard* did not demand very much in the way of factual support for its finding of a sufficient governmental interest.

Roberts, *supra* note 25, at 88.

See also Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978). In *Owens* a district court invalidated, on fifth amendment equal protection grounds, a ban on the assignment of female personnel to duty on Navy rights other than hospital ships and transports. Before reaching the merits, the district court rejected the charge that so much deference is owed to Congress in the area of military affairs that such an issue is a nonjusticiable political question. Although rejecting that claim, the district court did acknowledge that a large degree of deference is due Congress in judging the legality of exercises of its military powers. *Id.* at 299-300. Because the portions of the statute struck down in *Owens* were subsequently amended, the Supreme Court never reviewed the result. *See* 10 U.S.C. § 6015 (Supp. II 1978).

58. 430 U.S. 787 (1977).

59. The challenged provisions were §§ 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952. 8 U.S.C. §§ 1101(b)(1)(D)-(2)(1976). The provisions gave preferences, for admission purposes, to the alien children or parents of a United States citizen or permanent resident. Under the challenged sections, an illegitimate child whose father was a citizen or permanent resident was not accorded any preference, whereas an illegitimate child whose mother was a citizen or permanent resident was accorded a preference.

60. The *Fiallo* Court began its analysis by stating that "it is important to underscore the

Although parties have challenged draft legislation throughout the history of the United States, courts have uniformly upheld such legislation.[61] In two recent challenges to draft-related legislation, a major concern of the Court was Congress' military powers.

In *United States v. O'Brien*[62] the Supreme Court upheld both the constitutionality of a statute prohibiting the burning of a draft card[63] and the defendant's conviction for violating that statute. The Court found that the incidental limitation on the defendant's first amendment freedom of speech was justified, in part,[64] because the statute was enacted pursuant to the congressional power under the Constitution to raise and support armies and to make all laws necessary and proper to that end.[65] The Court described this power as "broad and sweeping."[66]

In *Gillette v. United States*[67] the Court sustained the denial of conscientious objector status to those who oppose particular wars despite the

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limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that over no conceivable subject is legislative power of Congress more complete than it is over the admission of aliens. Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); *accord*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)." 430 U.S. at 792. This language is particularly significant in light of the fact that *Fiallo* is a post-*Craig* decision. *See* Roberts, *supra* note 25, at 87-89.

61. The following cases, upholding the draft since 1900, were compiled in Rowland v. Tarr, 341 F. Supp. 339, 342-43 (E.D. Pa. 1972), *rev'd*, 480 F.2d 545 (3d Cir. 1973): United States v. O'Brien, 391 U.S. 367 (1968); United States v. Nugent, 346 U.S. 1 (1953); Lichter v. United States, 334 U.S. 742 (1948); *Ex parte* Quirin, 317 U.S. 1 (1942); United States v. Bethlehem Steel Corp., 315 U.S. 289 (1941); United States v. Boardman, 419 F.2d 110 (1st Cir.), *cert. denied*, 397 U.S. 991 (1969); United States v. Butler, 389 F.2d 172 (6th Cir. 1968); United States v. Hogans, 369 F.2d 359 (2d Cir. 1966); Etcheverry v. United States, 320 F.2d 873 (9th Cir. 1963); George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); Richter v. United States, 181 F.2d 591 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950); United States v. Henderson, 180 F.2d 711 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950); Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. Crocker, 308 F. Supp. 998 (D. Minn.), *aff'd*, 435 F.2d 601 (8th Cir. 1970); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968).

62. 391 U.S. 367 (1968).

63. 50 U.S.C. § 462(b)(3) (1976).

64. The Court found that the restriction on free speech was also justified by the fact that the statute furthered "an important or substantial governmental interest unrelated to the suppression of free expression" and "the incidental restriction on alleged first amendment freedom is not greater than is essential to that interest." 391 U.S. at 377.

65. *Id.*

66. *Id.* The Court further stated that: "We think it also apparent that the Nation has a *vital interest* in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." *Id.* at 381 (emphasis added). *See also* Roberts, *supra* note 25, at 86.

67. 401 U.S. 437 (1971).

grant of this status to those who oppose all wars. The Court held that the distinction was not a violation of the first amendment's free exercise clause[68] and that the burden on the plaintiff was justified by substantial governmental interests.[69] In addition, with the exception of the district court decision in *Goldberg v. Rostker*,[70] every lower federal court has rejected equal protection challenges to males-only draft registration.[71] The major theme in each of these decisions was deference to Congress' exercise of its military powers.[72]

In *Rostker v. Goldberg*,[73] the Supreme Court upheld males-only draft registration by attempting to reconcile the sex discrimination line of

68. The free exercise clause of the first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. For a discussion of the Supreme Court's treatment of other first amendment rights in the military context, see note 61 *supra*.

69. 401 U.S. at 462. *See also* Roberts, *supra* note 25, at 87. Dean Roberts suggests that the significance of *Gillette* is that it indicates "an attitude by a majority of the present Court that even the most fundamental rights must be viewed within the context of Congress' judgment about military necessity." *Id.*

70. 509 F. Supp. 586 (E.D. Pa.), *stay'd,* 448 U.S. 1306 (1980) (Brennan, Circuit Justice), *rev'd,* 101 S. Ct. 2646 (1981).

71. *See, e.g.,* United States v. Reiser, 532 F.2d 673 (9th Cir.), *cert. denied,* 429 U.S. 838 (1976); United States v. Baechler, 509 F.2d 13 (4th Cir. 1974), *cert. denied,* 421 U.S. 993 (1975); United States v. Camara, 451 F.2d 1122 (1st Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); United States v. Fallon, 407 F.2d 621 (7th Cir.), *cert. denied,* 395 U.S. 908 (1969); Kovach v. Middendorf, 424 F. Supp. 72 (D. Del. 1976); United States v. Offord, 373 F. Supp. 1117 (E.D. Wis. 1974); United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973); United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. Clinton, 310 F. Supp. 333 (E.D. La. 1970); Suskin v. Nixon, 304 F. Supp. 71 (N.D. Ill. 1969). *See also* Steele, *supra* note 25, at 297 n.12; Note, *Women And The Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406, 407 n.16 (1980).

The only other exception to this line of cases was the district court decision in United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd,* 532 F.2d 673 (9th Cir.), *cert. denied,* 429 U.S. 838 (1976), which applied strict scrutiny and declared the all-male draft unconstitutional. *Id.* at 1063-69. The Ninth Circuit, however, reversed the decision by applying a rational basis test. 532 F.2d 673 (9th Cir.), *cert. denied,* 429 U.S. 838 (1976).

72. *See, e.g.,* United States v. Baechler, 509 F.2d 13, 14-15 (4th Cir. 1974) ("we cannot say Congress had no rational basis for distinction based on sex"), *cert. denied,* 421 U.S. 993 (1975); United States v. Offord, 373 F. Supp. 1117, 1118 (E.D. Wis. 1974) ("the governmental interest is so extremely urgent that courts must show greatest deference to congressional judgment"); United States v. Clinton, 310 F. Supp. 333, 335 (E.D. La. 1970) ("Congress has full discretion to structure the national system of obligatory service as it sees fit, limited by the Fifth Amendment's guarantee of due process and, of course, by the Constitution's specific personal protections"; "the question of whom to call up is essentially a political one").

73. 101 S. Ct. 2646 (1981). This was a 6-3 decision: Justice White, *id.* at 2661 (White, J., dissenting), and Justice Marshall, *id.* at 2662 (Marshall, J., dissenting), wrote dissenting opinions; Justice Brennan joined in both of these.

cases[74] with the military deference line of cases.[75]

Writing for the majority, Justice Rehnquist began his analysis by recognizing the deference due congressional decisions regarding national defense and military affairs.[76] He argued that such deference was particularly appropriate in this case because Congress had considered the Act's constitutionality[77] and "explicitly" relied upon its constitutional military powers[78] in rejecting proposals to register women.[79]

Justice Rehnquist then surveyed the Court's prior decisions involving civil liberties and the military[80] and those involving sex discrimination and the military.[81] He concluded that although Congress is not free from the restraints of the due process clause, the military context may require a different application of the normal tests and

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74. *See* notes 23-46 *supra* and accompanying text.

75. *See* notes 48-72 *supra* and accompanying text.

76. 101 S. Ct. at 2651. Justice Rehnquist noted that "[w]henever called upon to judge the constitutionality of an Act of Congress . . . the Court accords 'great weight to the decisions of Congress.' CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)." *Id.* He also acknowledged the uniqueness of the issue before the Court: "This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.*

77. *Id.* Justice Rehnquist cited several examples in which Congress considered the issue of constitutionality. *Id.* at 2651, 2653 n.6, 2655-56. Among these examples is Senate Report No. 96-826, in which the Senate Armed Services Committee expressed the following view:

> The arguments for treating men and women equally . . . simply cannot overcome the judgment of our military leaders and of the Congress itself that a male-only system best serves our national security. The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing with the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference.

S. REP. NO. 96-826, 96th Cong., 2d Sess. 159-60, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2649-50, *quoted at* 101 S. Ct. at 2653 n.6.

78. 101 S. Ct. at 2651. Justice Rehnquist argued that prior decisions of the Court emphasized the "broad and sweeping" nature of these powers as well as the lack of competence on the part of the Court to make complex judgments in this field. *Id.* at 2651-52.

79. For a discussion of the procedural background and deliberations of Congress that led up to this rejection, see note 8 *supra*.

80. 101 S. Ct. at 2652. Justice Rehnquist discussed Brown v. Glines, 444 U.S. 348 (1980); Middendorf v. Henry, 425 U.S. 25 (1976); Greer v. Spock, 424 U.S. 828 (1976); and Parker v. Levy, 417 U.S. 733 (1974) and furthermore cited Burns v. Wilson, 346 U.S. 137 (1953) and United States v. MacIntosh, 283 U.S. 605 (1931). *See generally* note 52 *supra*.

81. 101 S. Ct. at 2652. Justice Rehnquist focused his discussion on Schlesinger v. Ballard, 419 U.S. 498 (1975) and Frontiero v. Richardson, 411 U.S. 677 (1973). *See generally* notes 33-38 & 55-57 *supra* and accompanying text.

limitations.[82]

Justice Rehnquist also recognized the Court's frequent use of the *Craig* test in challenges to gender-based classifications, but argued that "[a]ny further refinement in the applicable tests" would be of little value.[83] Thus, he did not explicitly state the level of scrutiny he was applying—only that deference due congressional choices was at its "apogee" in this case.[84]

The majority opinion next examined Congress' deliberations[85] that led to the rejection of Military Selective Service Act amendments that would have included women in the draft registration system.[86] Justice Rehnquist argued that these congressional deliberations distinguished this case from other gender-based discrimination cases because they demonstrated that Congress "did not act 'unthinkingly.' "[87] He also determined from the findings of Congress that its purpose in reinstating registration was to "prepare for a draft of *combat troops*."[88] Because women, unlike men, cannot legally participate in combat,[89] Justice Rehnquist concluded that men and women are "not similarly situated for a draft or draft registration."[90] Therefore, the exemption of women

82. 101 S. Ct. at 2653. Justice Rehnquist added the following: "In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a *reasonable* evaluation by the Legislative Branch." *Id.* (emphasis added).

83. *Id.* at 2654. He argued that "simply labelling" the particular controversy and picking the test that corresponds to that label "may all too readily become facile abstractions used to justify a result." *Id.*

84. *Id.* Justice Rehnquist cited Schlesinger v. Ballard, 419 U.S. 498, 510 (1975), as exemplifying the manner in which courts should reconcile this deference with the usual standard of analyzing gender-based classifications. He argued that *Schlesinger* did not apply a different test, but merely granted the "deference due congressional choices" in the exercise of its military powers. 101 S. Ct. at 2655. *See generally* note 38 *supra* and accompanying text.

85. *See generally* note 8 *supra*.

86. 101 S. Ct. at 2655-56. To make this point, Justice Rehnquist provided extensive documentation of these deliberations and hearings. *Id.*

The majority also held that these materials, rather than the legislative history pertaining to the original 1948 enactment of the Military Selective Service Act, were relevant to an evaluation of Congress' reasons for limiting draft registration to males only. *Id.* at 2656. The dissenters did not take issue with this holding.

87. *Id.* at 2655 (quoting Brief For Appellees at 35, Rostker v. Goldberg, 101 S. Ct. 2646 (1980)).

88. *Id.* at 2657 (emphasis added). The majority found this determination supported by testimony at congressional hearings, and therefore concluded that "the courts are not free to make their own judgment on the question." *Id.*

89. *See* notes 20-21 *supra* and accompanying text.

90. 101 S. Ct. at 2658.

from registration was not only "sufficiently but closely related to Congress' purpose in authorizing registration."[91]

Although the district court relied heavily on evidence from congressional hearings showing that approximately 80,000 of the initial 650,000 personnel needed in any anticipated draft could be filled by women,[92] Justice Rehnquist found the exemption of women from draft registration justified by several congressional findings: the additional burdens of registering or drafting women,[93] the estimate that the need for women in time of mobilization would be met by volunteers,[94] and the need for military flexibility.[95] Therefore, Justice Rehnquist concluded, the district court erred in independently evaluating this evidence rather than deferentially examining Congress' evaluation of it.[96]

Justice White, dissenting,[97] did not acknowledge or discuss the deference due congressional choices in military affairs. He focused instead on the three justifications the majority found for excluding women from the draft and registration and, upon examination of the record, found all three to be deficient.[98]

Justice Marshall, also dissenting,[99] acknowledged that deference is due Congress' exercise of its military powers,[100] but argued that to up-

91. *Id.*

92. *See* Goldberg v. Rostker, 509 F. Supp. 586, 599-605 (E.D. Pa.), *stayed,* 448 U.S. 1306 (1980) (Brennan, Circuit Justice), *rev'd,* 101 S. Ct. 2646 (1981).

93. 101 S. Ct. at 2660. *See* S. REP. No. 96-826, 96th Cong., 2d Sess. 158-59, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2648-49.

94. 101 S. Ct. at 2660 (citing S. REP. No. 96-826, 96th Cong., 2d Sess. 160, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2648).

95. 101 S. Ct. at 2660. "Military flexibility" refers to the need to have a certain percentage of noncombat support positions filled by combat-qualified personnel. This allows replacements to be called into combat quickly, and also provides positions for combat troops upon return from being deployed in their combat capacity. *See* S. REP. No. 96-826, 96th Cong., 2d Sess. 158, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2648.

96. 101 S. Ct. at 2660.

97. *Id.* at 2661 (White, J., dissenting).

98. *Id.* at 2661-62 (White, J., dissenting). Justice White found the estimated number of women volunteers in time of mobilization unpersuasive in light of evidence that the executive branch and the military held a contrary view. *Id.* at 2661 (White, J., dissenting). He also argued that the administrative burdens involved in registering all women, but only drafting a small number as needed, was not a sufficient justification for this gender-based discrimination as a matter of law. *Id.* at 2662 (White, J., dissenting). As for the military flexibility argument, Justice White's examination of the record led him to conclude that the drafting of 80,000 females would not hamper military flexibility. *Id.* at 2662 (White, J., dissenting).

99. *Id.* at 2662 (Marshall, J., dissenting).

100. *Id.* at 2663-64 (Marshall, J., dissenting).

hold males-only draft registration the legislation must still satisfy the *Craig* test.[101] Justice Marshall easily concluded that Congress' interest in raising and supporting armies was sufficiently important to satisfy one-half of the *Craig* analysis.[102] He then turned to examining the relationship between the means and the end, and he ultimately concluded that the necessary substantial relationship did not exist.[103]

Justice Marshall reached this conclusion by closely examining the congressional reports and hearings on the issue of whether to register women and by attacking the majority's justifications. One of the primary errors in the majority's reasoning, according to Justice Marshall, was its assumption of a draft in which "every draftee must be available for assignment to combat."[104] Attacking both this hypothetical draft[105] and the majority's conclusion that men and women are not similarly situated for purposes of a draft, Justice Marshall pointed to the testimony in congressional hearings that 80,000 females could be utilized in the event of mobilization.[106] As to these 80,000 positions, he argued, men and women are similarly situated.[107] Justice Marshall also argued that the record contained no evidence indicating either that the presence of females in these 80,000 positions would hinder military flexibility[108] or that female volunteers would necessarily fill these 80,000

101. *Id.* at 2664 (Marshall, J., dissenting). Justice Marshall saw the failure of the majority to apply the *Craig* test as a "fundamental flaw" in its reasoning. *Id.* at 2666 (Marshall, J., dissenting).

102. *Id.* at 2663 (Marshall, J., dissenting).

103. *Id.* at 2675 (Marshall, J., dissenting). As he saw it, the majority focused on the wrong question in this respect, *i.e.*, "[w]hether a *gender-neutral* classification would substantially advance important governmental interests." *Id.* at 2666 (Marshall, J., dissenting).

104. *Id.* at 2668 (Marshall, J., dissenting). He thought the majority erred in considering registration as inseparable from conscription of combat troops. The majority viewed registration as a preparation for a draft. Justice Marshall, however, looked to congressional hearings for support of his argument that the purpose of registration is to provide " 'an inventory of what the available strength is within the military qualified pool in this country.' " *Id.* at 2667 (Marshall, J., dissenting) (quoting *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 198 and S. 226 before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm.*, 96th Cong., 1st Sess. 10 (1980) (statement of General Rogers)).

105. 101 S. Ct. at 2667 (Marshall, J., dissenting).

106. *Id.* at 2670 (Marshall, J., dissenting).

107. *Id.* (Marshall, J., dissenting).

108. *Id.* at 2673 (Marshall, J., dissenting). He argued that the military flexibility argument is based on the unnecessary assumption that an equal number of men and women would have to be drafted. Justice Marshall reasoned that because nothing prevented Congress from drafting only a limited number of women, military flexibility would not be weakened by registering all women and drafting a limited number of them, as needed. *Id.* at 2673-74 (Marshall, J., dissenting).

positions.[109]

The Supreme Court's decision in *Rostker* lends itself to three related levels of analysis: first, the standard of the majority; second, the propriety of this standard; and third, the adequacy of the Court's analysis of the means/end relationship. Although the majority opinion is not free from serious defects, the Court reached the correct result.

The most serious deficiency of Justice Rehnquist's opinion is his failure to articulate adequately the standard that he applied.[110] Obviously he did not apply the strict *Craig* standard.[111] The Court's insistence on an important governmental interest indicates that *Craig* was not forgotten, but the emphasis on deference due congressional choices concerning military affairs affects the means/end component of the *Craig* test.[112] The Court's scrutiny of the relationship between the exclusion of females from registration and the ends that Congress sought to achieve is not as searching or as thorough as a strict *Craig* analysis mandates.[113] In addition, the Court apparently accepted Congress'

109. *Id.* at 2672 (Marshall, J., dissenting). In addition, Justice Marshall stated that the argument that Congress was justified in excluding women from draft registration on the ground of administrative burden must fail, because it is also based on the unnecessary assumption that women must be drafted in large numbers, if at all. *Id.* at 2674-75 (Marshall, J., dissenting).

110. The Court extensively discussed deference and the *Craig* standard, but failed to articulate the effect that one has upon the other. Justice Rehnquist's statement that "[a]nnounced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny,' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result," *id.* at 2654, is an unsatisfactory reason for his failure to explain how deference to Congress and the *Craig* standard are affected by each other. He certainly is correct that the statement of a particular standard often becomes a "facile abstraction," but the Court's complete failure to articulate a standard actually damages "certainty in the law," and weakens the strength of the Court's justification of its result.

111. Justice Marshall recognized this and saw it as a major flaw of the majority's reasoning. *See* note 101 *supra*. Justice Rehnquist also admitted, although not explicitly, that he was not applying the *Craig* analysis when he stated that the error of the district court was its failure to give deference to Congress' evaluation of the evidence. 101 S. Ct. at 2660. Because the district court purported to, and did, apply the *Craig* standard, and because the majority did not take issue with the correctness of the district court's application of the *Craig* standard, it follows that the error of the district court was in its choice to adhere to the *Craig* standard. Hence, the majority must not have applied the *Craig* standard.

112. Dean Roberts argued that deference should have this effect upon the *Craig* standard when he states that "the deference Congress may be due should come into play not in deciding whether to apply the old rational relationship or the new important governmental interest test, but rather in determining the substantiality of the relationship between means and ends." Roberts, *supra* note 25, at 83.

113. The dissenting opinion of Justice Marshall, 101 S. Ct. at 2662 (Marshall, J., dissenting), and the district court opinion, Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa.), *stayed,* 448 U.S.

findings without extensively evaluating the factual basis of those findings.[114] The majority's approach, therefore, is actually a relaxed *Craig* analysis, and the Court views the deference owed Congress' military powers as a justification for this decreased scrutiny.

The Court's relaxation of the established intermediate level of review is proper[115] in *Rostker* because it is consistent with, and gives adequate

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1306 (1980) (Brennan, Circuit Justice), *rev'd,* 101 S. Ct. 2646 (1981), exemplify an orthodox *Craig* analysis.

114. Under an orthodox *Craig* analysis the Court would have examined all the evidence before Congress to determine the administrative burden of registering women, the estimates of female volunteers, and whether military flexibility would be hindered by inducting a limited number of women. Instead the Court uncritically accepted the findings of Congress contained in S. REP. No. 96-826, 96th Cong., 2d Sess. 160-61, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2650-51. In Craig v. Boren, 429 U.S. 190 (1976), the Court did not accept Oklahoma's asserted justifications of the relationship between traffic safety and allowance of males 18 to 21 to drink 3.2% beer. The Court instead extensively evaluated the statistical evidence and found the relationship wanting. *See* notes 39-44 *supra* and accompanying text. *But see* Michael M. v. California, 450 U.S. 464 (1981), in which the Court purported to apply the *Craig* standard to a statutory rape law, but actually seemed to require little justification from the state for its articulated purposes of preventing teenage pregnancies. *Id.* at 469-76.

115. Between the time of the district court's disposition and the decision by the Supreme Court, several scholarly commentaries appeared discussing how the Court would, and should, dispose of the case. *See* Steele, *supra* note 25; Committee on Federal Legislation, *If the Draft Is Resumed: Issues For A New Selective Service Law*, 36 REC. ASS'N B. N.Y.C. 98, 105-10 (1981); Roberts, *supra* note 25, at 81-92; Note, *supra* note 71, at 418-24. Both the Steele article, *supra* note 25, and the report of the Committee on Federal Legislation of the New York City Bar Association, *supra*, assumed that the *Craig* analysis would apply and that males-only draft registration would not pass muster under that standard. Neither of these articles recognized either the need for deference to Congress in this field or the application of a relaxed *Craig* standard.

The Note, *supra* note 71, did recognize that deference to Congress would be an issue when the Supreme Court reviewed the district court's decision. "The Supreme Court has . . . set aside an area of military competence in which the judiciary will not apply the level of constitutional scrutiny applicable to similar governmental actions in other contexts." *Id.* at 421. "[T]he program might survive if the traditional judicial deference afforded Congress and the President in national defense matters mandates a lower standard of review." *Id.* at 418. However, the author argued that an unrelaxed *Craig* analysis should apply because the Court gave deference "to executive and legislative decisions only when the requested relief would require a court to intervene so intrusively as to threaten the ability of the other branches to maintain an effective national defense." *Id.* at 423. The author argued, largely on the basis of Schlesinger v. Ballard, 419 U.S. 498 (1975); Gilligan v. Morgan, 413 U.S. 1 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973); and Orloff v. Willoughby, 345 U.S. 83 (1953) that intervention was improper only when it required the Court to "regulate the day-to-day operations of the military." Note, *supra* note 71, at 423. Because invalidation of males-only draft registration would not require such regulation by the Court, the author argued that deference and a relaxation of the *Craig* standard would not be appropriate. *Id.* Although the author's interpretation of the cases is plausible, it is overly narrow and fails to realize the Court's underlying concerns with national security and separation of powers. *See* notes 53-54 *supra* and accompanying text. In addition, the author's conclusion that "scrutinizing the exclusion of broad groups from the pool of potential draftees under ordinary standards of judicial

weight to, precedent granting deference to Congress' exercise of its explicit military powers.[116] The dissenting opinions in *Rostker* are flawed by their nonexistent[117] or casual treatment[118] of those precedents[119] recognizing the Constitution's allocation of power over the nation's defense.[120] That allocation of power represents the framers' judgment that power over military affairs properly belongs in the hands of the popularly elected branch of government.[121]

In addition, the disagreement between the majority and the dissent over the meaning of the record and Congress' findings illustrates the very necessity to invoke deference in *Rostker*. Justice White aptly pointed out that "the record . . . means different things to different people."[122] If several Justices of the Supreme Court cannot agree on

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review would not hamper the executive or the legislature in making military decisions," Note, *supra* note 71, at 423, is unpersuasive because Congress' decision to refrain from registering women was based upon its explicit military powers. A judicial invalidation of that decision would certainly "hamper" Congress' ability to make military judgments. *See* note 77 *supra*.

For arguments that the district court decision was incorrect and that a deferential version of the *Craig* standard should apply, see Roberts, *supra* note 25, at 81-92.

116. *See generally* notes 48-72 *supra* and accompanying text. Dean Roberts refers to these decisions as a "significant and complex line of cases which stand for the proposition that conflicts between individual rights and national security measures must be resolved with great deference to congressional judgments." Roberts, *supra* note 25, at 83-84.

If the Court relaxes its application of the tests used to review infringements on first amendment rights—rights that are explicitly protected by the Constitution—in the military context, then it is all the more proper to relax the tests used to review infringements on the federal guarantee of equal protection on the basis of sex—a guarantee that the Court has read into general clauses of the Constitution—in the same context. Strict application of the announced tests in the context of Congress' power over military affairs would merely become, in Justice Rehnquist's words, "facile abstractions used to justify a result." 101 S. Ct. at 2654. One commentator wrote, "the court's decision is an affirmation of the traditional congressional primacy under the war powers clause." Young, *supra* note 1.

117. 101 S. Ct. at 2661 (White, J., dissenting).

118. *Id.* at 2662 (Marshall, J., dissenting).

119. This criticism applies to the district court opinion, Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa.), *stayed,* 448 U.S. 1306 (1980) (Brennan, Circuit Justice), *rev'd,* 101 S. Ct. 2646 (1981), as well.

120. "Here, we are concerned with Congress' constitutional duty to raise and support armies, whereas in none of the major equal protection cases has an affirmative power of Congress been directly implicated." Roberts, *supra* note 25, at 82.

121. *See generally* Barrett, *supra* note 27, at 878. The commentator states:

> The virtue of our legislative system is that it provides a setting in which all of the varied interests can bring their points of view to bear and engage in a process of bargaining and haggling within which multiple goals can be served and compromises attained which are tolerable to the public at large.

Id. See also note 53 *supra* and accompanying text.

122. 101 S. Ct. at 2661 (White, J., dissenting).

the import of testimony by military experts before Congress,[123] then judgments regarding the best way to provide for the national defense should rest with the elected branch of government.[124] The dissenters did not portray this wisdom. The dissenters and the district court[125] embarked upon an independent evaluation[126] of all the evidence[127] before Congress and subjectively reached their conclusions about how the national defense should be structured in time of emergency.[128]

Although the Court's choice of a deferential *Craig* analysis is justified by precedent and separation of powers concerns, the justification of Congress' choice to exclude women from registration plans leaves much to be desired as a factual matter.[129] Female registration is unnecessary if only combat-qualified personnel will be drafted.[130] However,

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123. Most of the testimony the dissent relied upon is that of administration or Department of Defense officials. *See id.* at 2668-76 (Marshall, J., dissenting). Dean Roberts argues that "[r]eliance on the opinions of administration spokesmen in preference to the judgment of Congress . . . ignores political realities. The year before, all these same spokesmen had opposed registration." Roberts, *supra* note 25, at 83.

124. Dean Roberts makes the following argument for defense: "It is indeed the wise course to analyze the complicated issues of the need for combat replacements and the conflicting claims for operational flexibility with the knowledge that Congress' constitutional responsibility and its superior experience give it something of an edge." Roberts, *supra* note 25, at 83. *See also* Young, *supra* note 1, at 1028: "The best that can be said for the decision is that it involves political issues of the greatest importance, and the Court was wise in leaving their resolution to Congress."

125. Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa.), *stayed*, 448 U.S. 1306 (1980) (Brennan, Circuit Justice), *rev'd*, 101 S. Ct. 2646 (1981).

126. 101 S. Ct. at 2660.

127. Justice Marshall stated that "this Court may appropriately look to the [Senate] Report in evaluating the justification for the discrimination." *Id.* at 2665 (Marshall, J., dissenting). The majority would not argue with his assertion, but Justice Marshall inappropriately went far beyond the Senate Report and evaluated the hearings and testimony upon which the Senate Report was based. He admitted this when he said, "I prefer to examine the findings in the Senate Report and the testimony presented to Congress." *Id.* at 2668 (Marshall, J., dissenting).

128. Dean Robert's criticism of the district court opinion applies to both dissenting opinions: "[I]t is difficult to read the *Goldberg* opinion and not conclude that the judges there . . . substituted their judgment for that of Congress on these issues." Roberts, *supra* note 25, at 83.

129. For a discussion of the congressional justification, see notes 93-95 *supra* and accompanying text.

130. Both dissenting opinions admitted as much. 101 S. Ct. at 2661 (White, J., dissenting); *id.* at 2667 (Marshall, J., dissenting). *See* Young, *supra* note 1, at 1028 ("both the majority and the dissenters . . . seem to assume that the present prohibitions against the use of women in combat are constitutional"). For an argument that such prohibitions are not constitutional, see Goodman, *Women, War and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S L. REP. 243, 264-69 (1980).

If the Court in *Rostker* had applied an orthodox *Craig* analysis and found males-only draft registration unconstitutional, a challenge to the prohibitions against the participation of females in combat would have been a certainty. Ironically, if the male plaintiffs had succeeded in *Rostker*,

it is the evidence indicating that 80,000 men will probably be drafted for positions which women could legally fill[131] that troubled the dissent and weakened the majority's "similarly situated" analysis.[132] The dissenters convincingly rebutted the majority's three congressional justifications[133] for not registering women to fill these 80,000 positions.[134] In these rebuttals, however, the dissenters went far beyond the findings contained in the Senate report, ceased to function as judges, and began to function as legislators.[135] The majority, on the other hand, accepted the reasonableness of the three justifications with only minimal scrutiny of their factual foundations. This approach is consistent with the deferential type of *Craig* standard the majority applied. The Court did not need to examine the hearings and testimony before Congress to determine whether Congress' findings were correct because the majority gave Congress the benefit of the doubt.

Proper disposition of the issue in *Rostker* required neither a mechanical or subjective application of the *Craig* standard nor independent scrutiny of expert testimony before Congress. Choosing which segment of the citizenry will be subject to compulsory military service was, and is, a sensitive political issue with potentially serious social and international ramifications.[136] Because Congress relied upon its explicit con-

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they would actually have been in a worse position due to such combat restrictions because, if women were registered to fill noncombat positions in the event of a draft, then men would be drafted only for combat positions, and the probability of a male draftee being sent into combat would be increased. It is possible that this foresight and a desire to avoid passing on the constitutionality of these combat restrictions were an unarticulated factor in the majority's reasoning.

131. *See* note 92 *supra* and accompanying text.

132. *See* note 90 *supra* and accompanying text.

133. *See* notes 93-95 *supra* and accompanying text.

134. *See* 101 S. Ct. at 2668-75 (Marshall, J., dissenting). Justice Marshall cited evidence that the figure of 80,000 women draftees would not hinder military flexibility and argued that no evidence existed demonstrating that the needed volunteers would materialize during mobilization.

135. *See* note 92 *supra*.

136. Dean Roberts is in accord when he argues:

> An obvious reason why more deference should be given Congress' weighing of the arguments and Congress' view of the facts concerning mobilization is that we are here dealing with an issue—who shall be compelled to serve and perhaps die in defense of the country—which is not only a fundamental political question, but also a matter given over by the Constitution to the affirmative power of Congress.

Roberts, *supra* note 25, at 82.

It is interesting that the Court did not consider the social ramifications of registering women for the draft as a possible justification for Congress' decision to register only men. One author reasons that "in spite of all the emotional reactions reported by the press, almost no one seems seriously to have addressed the tremendous implications, both social and military, that a draft of women would raise." Young, *supra* note 1, at 1028. The fact that the Court did not consider the

stitutional powers[137] in deciding that only males should register for the draft, proper disposition of the claim that this congressional decision violated the fifth amendment required a degree of deference consistent with the integrity of Congress' authority over military affairs and national defense. By properly deferring to Congress, the Supreme Court reached the correct result in terms of constitutional law.

It is unlikely, however, that *Rostker* marks a retreat by the Court from middle-tier scrutiny of gender-based classifications. Rather, the unique constitutional problems inherent in a challenge to males-only draft registration[138] suggest that the Court will not apply *Rostker*'s relaxed *Craig* analysis in future nonmilitary sex discrimination cases.[139]

S.E.H.

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societal impact of registering and drafting women as a possible reason for Congress' decision cannot be explained by the Court's ignorance of the issue. On the contrary, the issue was forcefully brought to the Court's attention by brief. *See* Brief in Support of the Motion to Intervene of Stacey Acker, et al., Rostker v. Goldberg, 101 S. Ct. 2646 (1981); Amicus Curiae Brief of Stacey Acker, et al., Rostker v. Goldberg, 101 S. Ct. 2646 (1981). For example, in the Motion to Intervene of Stacey Acker, et al., the movants argued:

> Indeed, it was Congress' belief that, in the words of Senator Heflin, "the opposition of registering women is so widespread and pervasive that if young women were required to register, it might jeopardize the whole registration program." 126 *Cong. Rec.*, S. 1242 (Feb. 7, 1980). Such assessments of the broad social impact of a decision to draft women are within the unique province of Congress to make and are not for the courts to ignore, especially where, as here, questions of our national defense and Congress' power under Article I, § 8 are concerned.

Motion to Intervene, at 16. The argument that societal impact was a sufficient justification for refusing to register women was summarized in the Amicus Curiae Brief of Stacey Acker, et al., as follows:

> The impact on society of reversing the long-accepted decision that women should not be *obligated* to serve in the armed forces is directly related to this country's national resolve necessary to a successful defense posture. It is not only legitimate but compelling for Congress to be concerned that such resolve not be weakened by forcing the public to accept a draft registration and induction system that would be unpalatable to the citizenry. Testimony was provided to the Congress to justify such a conclusion, and Congress found, on the basis of this testimony and its own common-sense judgments, that discontinuing the exclusion of women from registration and induction might endanger the entire draft system.

Id. at 8.

See also S. REP. No. 96-826, 96th Cong., 2d Sess. 159, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2649.

137. *See* note 2 *supra*.

138. *See* note 49 *supra*.

139. *See* Young, *supra* note 1. *See also Supreme Court Review and Constitutional Law Symposium,* 50 U.S.L.W. 2187, 2187-88 (1981).