BAD LAW AND BAD POLICY: WHY THE MILITARY SELECTIVE SERVICE ACT IS UNCONSTITUTIONAL IN LIGHT OF THE POLICY DECISION TO ALLOW WOMEN TO SERVE IN COMBAT ROLES IN THE MILITARY

By Zachary S. Whiting[*]

I. INTRODUCTION

This Note analyzes the legal and policy considerations of the Military Selective Service Act ("MSSA"), military conscription, and the role of men and women in combat. The author begins this Note by providing a historical context, reviewing the various legislative iterations of the Selective Service System and selective implementations of the registration and conscription requirements. The author then reviews the case law interpreting the Selective Service System, with a heavy review of the seminal case *Rostker v. Goldberg*,[1] in which the Supreme Court of the United States upheld the constitutionality of the MSSA against a Fifth Amendment due process challenge.

The author proceeds to make several legal and policy arguments and presents possible solutions. First, the author considers the constitutionality of the MSSA in light of the Defense Department's decision to end restrictions on women in combat roles and open up combat positions to women in all branches of the military. The author argues that in light of recent developments, *Rostker v. Goldberg* is no longer the controlling precedent and the MSSA is unconstitutional. Second, the author considers possible solutions to remedy these constitutional concerns. While requiring women to register with the Selective Service System may alleviate some of the constitutional infirmities of the MSSA, the author argues that this is bad policy. Ultimately, the author concludes that Congress should repeal the MSSA and eliminate the registration and conscription requirements altogether and rely on an all-volunteer force.

---

[*] Zachary graduated from the Regent University School of Law in 2014. He graduated *summa cum laude* and Phi Beta Kappa from Stetson University in 2010 with a B.A. in Political Science. Zachary thanks Matthew Poorman for his editorial guidance, and Professor David Wagner for his service as faculty advisor during the writing of this Note.

[1] 453 U.S. 57, 78–79 (1981).

II. HISTORICAL BACKGROUND

A. Various Legislative Iterations of the Selective Service System

1. Selective Service Act of 1917

The origins of the modern registration and draft regime began with the Selective Service Act of 1917 ("the 1917 Act"), enacted on May 18, 1917.[2] Even before the United States entered World War I, Congress and the President sought to increase the size of the regular army and reserve component through the National Defense Act of 1916.[3] Frustrated that volunteer enrollment was not meeting the benchmarks set by the National Defense Act, Congress passed and President Woodrow Wilson signed the Selective Service Act of 1917.[4]

The Selective Service Act of 1917, passed a month after Congress declared war against Germany, was designed to increase the number of troops available to fight in World War I.[5] The phrase "Selective Service" "refers to the need to be selective when conscripting from the local community because of the economic hardship placed upon the Nation during a draft."[6] The goal of the 1917 Act was to increase the regular army to full force and increase the reserve component.[7] The means of achieving this goal was a regime of systematic registration for conscription rather than voluntary enlistment.[8] The 1917 Act contained a registration provision that "made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft."[9]

The 1917 Act created conscription categories into which registrants were placed, created local boards that facilitated the registration and classification process, and allowed for certain classes to be deferred or exempted from the registration and conscription requirements (e.g., ministers, divinity students, married persons with dependents, or

---

[2] *See* Selective Draft Act, ch. 15, 40 Stat. 76 (1917) (codified as amended at 50 U.S.C. § 451 *et seq.* (2012)).

[3] National Defense Act of 1916, ch. 134, 39 Stat. 166 (1916) (codified as amended in scattered sections of 10 & 32 U.S.C.).

[4] *See* Selective Draft Law Cases, 245 U.S. 366, 375–76, 380–81 (1918); *see, e.g.*, Jeremey K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1102 (2014).

[5] *Selective Draft*, 245 U.S. at 375.

[6] SELECTIVE SERV. SYS., SELECTIVE SERVICE SYSTEM: AMERICA'S INSURANCE POLICY 10, *available at* http://www.sss.gov/PDFs/Educational%20Materials/Primer.pdf.

[7] *See Selective Draft*, 245 U.S. at 375–76.

[8] *See id.*

[9] *Id.* at 376.

conscientious objectors).[10] There were three registration cycles during World War I:

> The first, on June 5, 1917, was for all men between the ages of 21 and 31. The second, on June 5, 1918, registered those who attained age 21 after June 5, 1917. (A supplemental registration was held on August 24, 1918, for those becoming 21 years old after June 5, 1918. This was included in the second registration.) The third registration was held on September 12, 1918, for men age 18 through 45.[11]

The constitutionality of the 1917 Act was challenged in the courts and upheld by the Supreme Court of the United States in 1918 in the *Selective Draft Law Cases*.[12] Approximately twenty-four million men registered for the draft[13] and more than 1.66 million men were drafted under the 1917 Act.[14] The World War I Selective Service System, originally designed to be temporary, was liquidated and eventually phased out:

> After the signing of the armistice of November 11, 1918, the activities of the Selective Service System were rapidly curtailed. On March 31, 1919, all local, district, and medical advisory boards were closed, and on May 21, 1919, the last state headquarters closed operations. The Provost Marshal General was relieved from duty on July 15, 1919, thereby finally terminating the activities of the Selective Service System of World War I.[15]

2. Selective Training and Service Act of 1940

Another looming world war led to the adoption of the first peacetime registration and conscription regime in American history.[16] The Selective Training and Service Act of 1940 ("the 1940 Act") was enacted on September 16, 1940.[17] Similar to the 1917 Act, the 1940 Act initially "authorized the President to 'create and establish a Selective Service System . . . and [to] establish within the Selective Service System civilian

---

[10] *See id*; *see also* Anne Yoder, *Military Classifications for Draftees*, SWARTHMORE C. PEACE COLLECTION, http://www.swarthmore.edu/library/peace/conscientiousobjection/MilitaryClassifications.htm (last visited Dec. 15, 2013).

[11] *World War I Selective Service System Draft Registration Cards*, *M1509*, NAT'L ARCHIVES, http://www.archives.gov/research/military/ww1/draft-registration/index.html (last visited Feb. 22, 2015).

[12] *Selective Draft*, 245 U.S. at 381.

[13] NATIONAL ARCHIVES, *supra* note 11, at 1.

[14] SELECTIVE SERV. SYS., *supra* note 6, at 11.

[15] NATIONAL ARCHIVES, *supra* note 11, at 2.

[16] *See Selective Service Records*, NAT'L ARCHIVES, http://www.archives.gov/st-louis/archival-programs/other-records/selective-service.html (last visited Dec. 15, 2013).

[17] Selective Training and Service (Burke-Wadsworth) Act of 1940, ch. 720, 54 Stat. 885 (repealed 1973).

local boards . . . .'"[18] The World War II regime employed a lottery system to draft soldiers.[19] When the United States entered into World War II, the 1940 Act was amended to require men between the ages of eighteen and sixty-five to register, and made men between the ages of eighteen and forty-five eligible for conscription.[20] By the end of World War II, more than ten million men had been drafted under the 1940 Act.[21]

The 1940 Act also contained a number of deferments and exemptions from the registration and conscription requirement for those in certain occupations, married with dependents, ministers and divinity students, and conscientious objectors.[22] The constitutionality of the 1940 Act was challenged in the courts on a number of grounds—namely, lack of Congressional authority, the nondelegation doctrine, and religious freedoms—but the lower federal courts consistently upheld the 1940 Act.[23]

Like the 1917 Act, the 1940 Act was intended to be temporary; the Act was allowed to expire, and the System was liquidated:[24]

> The Selective Service System created by the 1940 Act was terminated by the Act of March 31, 1947, which established an Office of Selective Service records "to liquidate the Selective Service System, which liquidation shall be completed as rapidly as possible after March 31, 1947, but in any event not later than March 31, 1948 . . . ."[25]

3. The Current System: The Military Selective Service Act

The beginning of the Cold War and concerns about the rise and spread of communism led to a renewed call for a registration and conscription regime.[26] The result was the creation of the current Selective

---

[18] United States v. Groupp, 459 F.2d 178, 180 (1st Cir. 1972).

[19] *See Take a Closer Look at the Draft*, NAT'L WWII MUSEUM, http://www.nationalww2museum.org/learn/education/for-students/ww2-history/take-a-closer-look/draft-registration-documents.html (last visited Dec. 15, 2013).

[20] *See* Selective Training and Service Act §§ 2–3; *cf.* Yoder, *supra* note 10 (noting the age range became eighteen to sixty-five during World War II, whereas the Selective Training and Service Act originally set the range as twenty-one to thirty-six).

[21] SELECTIVE SERV. SYS., *supra* note 6, at 11.

[22] *See* Yoder, *supra* note 10.

[23] *See, e.g.*, United States v. Lambert, 123 F.2d 395, 396 (3d Cir. 1941); United States v. Herling, 120 F.2d 236, 236 (2d Cir. 1941); United States v. Newman, 44 F. Supp. 817, 822 (E.D. Ill. 1942); United States v. Garst, 39 F. Supp. 367, 367 (E.D. Pa. 1941); Stone v. Christensen, 36 F. Supp. 739, 743 (D. Or. 1940); United States v. Cornell, 36 F. Supp. 81, 83 (D. Idaho 1940) (all rejecting challenges that Congress lacked authority to require registration and conscription during peacetime). *See also* Seele v. United States, 133 F.2d 1015, 1019-20 (8th Cir. 1943) (rejecting challenge based on nondelegation doctrine); Rase v. United States, 129 F.2d 204, 210 (6th Cir. 1942) (rejecting challenge based on religious freedom).

[24] SELECTIVE SERV, SYS., *supra* note 6, at 10.

[25] United States v. Groupp, 459 F.2d 178, 180 (1972).

[26] *See* SELECTIVE SERV. SYS., *supra* note 6, at 10.

Service regime, which has gone through several name changes and substantive amendments since it was adopted in 1948 as the Selective Service Act of 1948.[27] The 1940 Act had expired and the previous regime had been liquidated by the time the 1948 Act was enacted.[28] The court in *Groupp* noted, "although patterned after the organization created in 1940, the Selective Service System established in 1948 was a new and separate system. It has remain[ed] in existence, albeit with amendments, extensions, and changes of name, since 1948."[29]

The MSSA[30] created a new regime built on the foundations of the previous Selective Service regimes since 1917.[31] The Act authorizes the President

> [t]o create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title . . . .[32]

The MSSA and subsequent presidential proclamations require men between the ages of eighteen and twenty-six to register.[33] At present, men have a sixty-day window starting thirty days before their eighteenth birthday to register with the Selective Service.[34] Men between the ages of eighteen and twenty-six are eligible to be drafted for military service.[35] The MSSA "order[s] that men be selected for the draft on a fair and equitable basis consistent with the maintenance of an effective national economy."[36] Furthermore, the Act originally provided for a variety of deferments and exemptions from the registration and conscription

---

[27] Military Selective Service Act, 50 U.S.C. app. §§ 451–471(a) (1948); *Groupp*, 459 F.2d at 180 n.6 ("In 1951, the name was changed to the 'Universal Military Training and Service Act.' Pub.L. 82-51, § 1, 65 Stat. 75, June 19, 1951. The name was changed in 1967 to the 'Military Selective Service Act of 1967.' Pub.L. 90-40, § 1, 81 Stat. 100, June 30, 1967. In 1971, the name became the 'Military Selective Service Act.' Pub.L. 92-129, § 101(a), 85 Stat. 348, September 28, 1971.").

[28] *Id.* at 180.

[29] *Id.*

[30] Unless otherwise noted, references to the 1948 Act and current Selective Service regime will be called "Military Selective Service Act" or "MSSA."

[31] *See* SELECTIVE SERV. SYS., *supra* note 6, at 9–10; *see also Groupp*, 459 F.2d at 180.

[32] Military Selective Service Act, 50 U.S.C. app. § 460(b)(3) (1948).

[33] *Id.* § 453(a).

[34] *See* Proclamation No. 4771, 3 C.F.R. 83 (1981), *reprinted as amended in* 50 U.S.C. app. § 453 (2012).

[35] Military Selective Service Act § 454(a).

[36] SELECTIVE SERV. SYS., *supra* note 6, at 10.

requirement,[37] but the Act has since been amended to reduce the number of deferment and exemption categories.[38]

The 1948 Act was amended in 1951 as the Universal Military Training and Service Act to make "the Selective Service System a permanent Federal agency."[39] The rise of tensions on the Korean peninsula led to the first round of draftees under the current Selective Service regime.[40] From 1950 to 1953, more than 1.68 million men were drafted, more than were drafted during World War I.[41] Because of Cold War tensions, "[t]he Selective Service System continued to provide men after the Korean war ended to keep military manpower levels at an acceptable level during the Cold War."[42]

Although U.S. involvement in Vietnam led to a new need for soldiers to serve, "[o]f the 8.8 million individuals who served in the Armed Services during the Vietnam era [1964 through 1972], less than 1.8 million entered through the draft."[43] The Vietnam War produced one of the most vocal anti-war protest movements, including flag burning and draft card burning.[44] Disillusionment with armed conflict generally, and the Vietnam War specifically, led to a number of reforms to the Selective Service System, particularly the deferment and lottery processes:

> A series of reforms during the latter part of the Vietnam conflict changed the way the draft operated, attempting to make it fair and equitable. These reforms also were an effort to reduce a man's uncertainty about his chances of being drafted. Three major reforms, all interrelated, were: (1) the abolition of some categories of deferments, including occupational, agricultural, fatherhood deferments and student deferments. This resulted in fewer reasons to excuse a man from service; (2) the use of a lottery based on birth dates to determine the order in which men would be called; and (3) reducing a man's period of prime vulnerability for the draft to the year in which he turns 20,

---

[37] Military Selective Service Act §§ 453 & 456(a). The Act provides for registration and conscription exemptions for those currently in the military, veterans, and certain government officials, among others. *Id.* The Act further provides for deferments for certain students, certain categories of employment, health and fitness, and conscientious objectors, among others. Yoder, *supra* note 10.

[38] SELECTIVE SERV. SYS., *supra* note 6, at 10.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 10–11.

[42] *Id.* at 10.

[43] *Id.*

[44] Jessie Kindig, *Draft Resistance in the Vietnam Era*, UNIV. OF WASH. (2008), http://depts.washington.edu/antiwar/vietnam_draft.shtml; Sarah Boxer, *Word for Word/The Flag Bulletin; Two Centuries of Burning Flags, a Few Years of Blowing Smoke*, N.Y. TIMES (Dec. 17, 1995), http://www.nytimes.com/1995/12/17/weekinreview/word-for-word-flag-bulletin-two-centuries-burning-flags-few-years-blowing-smoke.html.

with his risk of being drafted steadily decreasing after that year. Once 26, a man was too old for first-time consideration.[45]

B. Selective Implementation of Registration and Conscription

The MSSA was amended in 1973 to ensure that future conscription would be subject to congressional action.[46] Since the Vietnam War ended in 1973, no one has been drafted for military service.[47] Rather, "the U.S. has relied exclusively on volunteers for its military manpower."[48] Since then, "[t]he role of the Selective Service System . . . has been one of planning, training, and remaining prepared to provide backup to the All-Volunteer Armed Forces."[49] President Gerald Ford signed Proclamation 4360 on March 29, 1975, which eliminated the registration requirement for men between the ages of eighteen and twenty-six.[50] Furthermore, "in 1976 Selective Service state and local offices closed."[51]

However, "[b]y 1978, the Selective Service System had been reduced to the point where there was serious concern that it might not be able to fulfill its mission of providing manpower in an emergency."[52] Concerns about the Soviet invasion of Afghanistan led Congress to pass Joint Resolution 521[53] and President Carter to sign Proclamation 4771 on July 2, 1980, which reinstituted the registration requirement for men born on or after January 1, 1960.[54]

Under the terms of the MSSA and subsequent presidential proclamations, the registration requirement remains in effect today for those eighteen and older.[55] Today, Selective Service registration is required for benefits such as student financial aid, U.S. citizenship,

---

45 SELECTIVE SERV. SYS., *supra* note 6, at 10.

46 Rostker v. Goldberg, 453 U.S. 57, 60 n.1 (1981). ("Since the Act was amended to preclude conscription as of July 1, 1973 . . . any actual conscription would require further congressional action.").

47 SELECTIVE SERV. SYS., *supra* note 6, at 11.

48 *Id.*

49 *Id.*

50 Proclamation No. 4360, 3A C.F.R. 33 (1975), *reprinted in* 50 U.S.C. app. § 453 (2012).

51 SELECTIVE SERV. SYS., *supra* note 6, at 11.

52 *Id.*

53 Rostker v. Goldberg, 453 U.S. 57, 60 n.1 (1981). ("The President did not seek conscription. Since the Act was amended to preclude conscription as of July 1, 1973 . . . any actual conscription would require further congressional action.").

54 Proclamation No. 4771, 3 C.F.R. 82–83 (1981), *reprinted as amended in* 50 U.S.C. app. § 453 (2012).

55 Military Selective Service Act, 50 U.S.C. app § 453(a) (2012); Proclamation No. 4771, 3 C.F.R. 83 (1980), *amended by* Proclamation No. 7275, 3 C.F.R. 82 (2000), *reprinted in* 50 U.S.C. app. § 453 (2012).

federal job training, and federal employment.[56] However, since 1980, the government has pursued a policy of selectively prosecuting individuals who do not register for the Selective Service, a policy which has been upheld by the Supreme Court of the United States.[57]

III. CASE LAW INTERPRETING THE VARIOUS LEGISLATIVE ITERATIONS OF THE SELECTIVE SERVICE SYSTEM

This section reviews the key case law interpreting the various legislative iterations of the Selective Service System. The Supreme Court of the United States upheld the Selective Service Act of 1917 and the policy of conscription in the *Select Draft Law Cases*.[58] Furthermore, the lower federal courts upheld the Selective Training and Service Act of 1940 against a number of constitutional challenges.[59] Finally, the Supreme Court of the United States upheld the constitutionality of the MSSA against a Fifth Amendment due process challenge in the seminal case *Rostker v. Goldberg*.[60]

A. Selective Service Act of 1917

Pursuant to the 1917 Act, the Wilson Administration enforced the registration obligation and when individuals did not register they were prosecuted.[61] The defendants in the various cases defended that "the Constitution [did not confer] upon Congress the power to compel military service by a selective draft, and . . . if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and repugnant to the Constitution."[62] The district courts instructed that this defense was meritless, held that the statute was constitutional, and convicted the defendants.[63]

The Supreme Court of the United States affirmed the defendants' convictions.[64] The Court reasoned—in a textualist and originalist tone[65]—

---

[56] *See, e.g.*, *Benefits & Programs Linked to Registration*, SELECTIVE SERVICE SYS., http://www.sss.gov/fsbenefits.htm (last updated Dec. 21, 2010).

[57] *See* Wayte v. United States, 470 U.S. 598, 614 (1985); *see also,* Barry Lynn Creech, Note, *And Justice For All:* Wayte v. United States *and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385, 385–86 (1986).

[58] 245 U.S. 366, 375, 387–88 (1918).

[59] *See supra* note 23.

[60] 453 U.S. 57, 78–79 (1981).

[61] *See Selective Draft,* 245 U.S. at 376.

[62] *Id.*

[63] *Id.* at 377.

[64] *Id.* at 390.

[65] *See id.* at 387–88.

that Congress had the power to enact registration and conscription under the War Powers Clause, the Army Clause, the Navy Clause, the Militia Clause, and the Necessary and Proper Clause of Article I, section 8 of the Constitution.[66] The Court concluded its opinion by rejecting arguments that the statute improperly delegated federal powers to state officials,[67] improperly vested legislative and judicial power with the Executive Branch,[68] violated the Free Exercise Clause,[69] and violated the Thirteenth Amendment's Involuntary Servitude Clause.[70]

B. Selective Training and Service Act of 1940

During World War II, the constitutionality of the Selective Training and Service Act of 1940 was challenged on a number of grounds, including religious freedom and the nondelegation doctrine.[71] The chief challenge to the 1940 Act was that Congress lacked the authority to require registration and conscription of citizens during peacetime.[72] Though

---

[66] *See id.* at 377, 382; U.S. CONST. art. I, § 8, cls. 11–16, 18.

[67] *Id.* at 389 ("First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice.").

[68] *Id.* ("Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power." (citations omitted)).

[69] *Id.* at 389–90 ("And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.").

[70] *Id.* at 390 ("Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

[71] Annotation, *Selective Training and Service Acts*, 147 A.L.R. 1313 (1943).

[72] *See, e.g.*, United States v. Lambert, 123 F.2d 395, 396 (3d Cir. 1941) ("While [the petitioner] does not argue the broad proposition that the power of Congress to raise an army is limited to action following a formal declaration of war, he does urge that its power to compel a citizen to register, and if drawn, to engage in military service is so limited. No hint of such a limitation in the powers of Congress is found in the language of the Supreme Court in the decisions cited above. Nor does one find basis for such argument either expressly in the language of the Constitution or by reasonable construction of Article I, Section 8 which contains the grant of powers to the Congress."); United States v. Herling, 120 F.2d 236, 236 (2d Cir. 1941) ("The validity of the Selective Training and Service Act of 1940, and the regulations thereunder, is clear under the decisions sustaining similar legislation of 1917. To attempt a distinction because the present Act applies, though no formally declared war exists, is to import a difference which does not appear in the Constitution itself, Art. 1, Sec. 8, cl. 12, and which was definitely repudiated in the cited cases." (citations omitted)).

various constitutional challenges were raised, the lower federal courts consistently upheld the 1940 Act.[73]

C. Military Selective Service Act

In addition to the challenges lodged in the previous cases, the chief challenges to the MSSA were on due process and equal protection grounds. In *Smith v. United States*[74] and *United States v. Spencer*[75] the United States Court of Appeals for the Ninth Circuit rejected arguments that the MSSA deprived petitioners of due process rights and equal protection of the law by limiting military induction to men between the ages of eighteen-and-a-half and twenty-six years old.[76]

For purposes of this Note, it is important to give careful review to the seminal decision *Rostker v. Goldberg*.[77] In *Rostker*, the petitioners argued that the MSSA unconstitutionally discriminated against men by requiring men and not women to register with Selective Service and be subject to possible military conscription.[78] Ultimately, the Supreme Court of the United States upheld the constitutionality of the MSSA against a Fifth Amendment due process challenge.[79] Before reaching *Rostker*, however, it is important to discuss the historical background of the policy debate that occurred while *Rostker* was being argued in the federal courts.

1. Background: National Policy Debate About Requiring Women to Register

The 1973 amendments to the MSSA ensured that future conscription would require congressional action.[80] Furthermore, President Gerald Ford signed Proclamation 4360 on March 29, 1975, which eliminated the registration requirement for men between the ages of eighteen and twenty-six.[81] Concerns about the Soviet invasion of Afghanistan led President Carter to consider reinstituting the registration requirement.[82] President Carter argued that women should also be required to register and be subject to conscription, and there was a considerable national debate on the topic.[83] Congress disagreed with President Carter and

---

[73] *See supra* note 23.
[74] 424 F.2d 267 (9th Cir. 1970).
[75] 473 F.2d 1009 (9th Cir. 1973).
[76] *See id.* at 1010; *Smith*, 424 F.2d at 268–69.
[77] 435 U.S. 57 (1981).
[78] *Id.* at 61–62 n.2.
[79] *Id.* at 78–79.
[80] *See id.* at 60 n.1.
[81] Proclamation No. 4360, 3 C.F.R. 462 (1975).
[82] SELECTIVE SERV. SYS., *supra* note 6, at 11.
[83] *Rostker*, 453 U.S. at 60, 72.

refused to extend the registration requirement to women.[84] Ultimately, President Carter signed Joint Resolution 521, which appropriated enough money for male-only registration and reinstituted the registration requirement by Proclamation 4771.[85]

2. District Court Held MSSA Unconstitutional

In the midst of this national debate, the federal courts heard a constitutional challenge to the MSSA. In *Goldberg v. Rostker*,[86] the plaintiffs brought a class action suit in federal district court seeking to enjoin enforcement of the MSSA requirement that only males must register and be subject to conscription.[87] The district court certified the class "to include all male persons who are registered or subject to registration . . . or are liable for training and service in the armed forces of the United States."[88]

After considering jurisdictional, standing, and ripeness arguments related to the reinstatement of the registration requirement, the district court considered which standard of review applied to the gender discrimination claim.[89] While "[t]he defendants concede that selective service registration of males only constitutes discrimination based on gender and that 'defendants thus have the burden of justifying that classification,'" the parties disagreed about which standard of review should apply.[90] The district court noted that

> [t]he opinions of the Supreme Court have established three standards of review which may be applied in analyzing discriminatory classifications under the Equal Protection clause and the Fifth Amendment to the United States Constitution. Any statutory discrimination, at a minimum, must bear a reasonable relationship to a permissible governmental purpose (hereinafter the "reasonable relationship" test). Ordinarily, statutory classifications based on gender are unconstitutional unless they are substantially related to an important government interest (hereinafter the "important government interest" test). Racial or religious classifications or other "suspect" classifications will be unconstitutional unless they are necessary to accomplish a compelling state interest (hereinafter the "compelling government interest" test).[91]

---

84 *Id.* at 61.

85 *Id.*

86 509 F. Supp. 586, 588–89, 605 (E.D. Pa. 1980), *rev'd,* 453 U.S. 57, 83 (1981).

87 *Id.* at 588, 605.

88 *Id.* at 589.

89 *Id.* at 590–92.

90 *Id.* at 592.

91 *Id.* 592–93 (citations omitted).

The plaintiffs argued that the compelling government interest test should apply because "induction into military service and military service necessarily infringes upon fundamental rights."[92] Furthermore, "plaintiffs claim the draft creates an irrebuttable presumption that women are unqualified and that such a presumption should give rise to the highest level of scrutiny."[93] Alternatively, the plaintiffs argued that the important government interest standard should apply because the law is predicated on a gender-based discrimination.[94]

The defendants, on the other hand, argued that the compelling government interest test does not apply to gender discrimination cases.[95] Furthermore, the defendants argued that the important government interest test should not apply in this case, even though it traditionally applies to gender discrimination claims.[96] Rather, the defendants argued that "the judicial branch should extend great deference to Congress in military affairs" and recognize that the government's "exclusion of females from the registration process is constitutional if" the government can demonstrate it has a rational basis for doing so.[97]

The district court rejected both the defendants' argument that a rational basis test should apply and the plaintiffs' argument that a compelling government interest test should apply.[98] Rather, the district court determined that the intermediate important government interest test applied to this case.[99] The district court noted that "such [gender-based] classifications must bear a close and substantial relationship to important governmental objectives."[100] Accordingly, the district court characterized the equal protection issue in this case as whether "there is a substantial relationship between the exclusion of women and the raising of effective armed forces."[101]

Applying the important government interest test to the issue in the case, the district court held that "[i]t is defendants' burden to establish that the exclusion of females from registration for selective service promotes an important government objective and is substantially related to the achievement of that objective. Despite the extensive record compiled in this case defendants simply have not met this burden."[102] Because the

---

92 *Id.* at 593.
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.* at 594–95.
99 *Id.* at 593.
100 *Id.* (quoting Pers. Admin. of Mass. v. Feeny, 442 U.S. 256, 273 (1979)).
101 *Id.* at 596–97.
102 *Id.* at 597 (citation omitted).

government failed to meet its burden, the district court held the MSSA unconstitutional as a violation of the equal protection component of the Fifth Amendment's Due Process Clause and permanently enjoined the defendants from enforcing the registration of "any member of the plaintiff class."[103]

3. Supreme Court of the United States Upheld the Constitutionality of the MSSA

The government appealed and the Supreme Court heard the case in March 1981.[104] The issue before the Court was whether the MSSA "violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females."[105] The Court upheld the constitutionality of the MSSA on the grounds that Congress should be afforded great deference in military matters[106] and men and women are not "similarly situated" in terms of combat roles in the military.[107]

While the district court gave little deference to Congress, the Supreme Court gave great deference to the judgment of Congress.[108] The Court recognized there are limits on judicial deference to Congress, but ultimately decided Congress should be afforded great deference in this case.[109] Writing for the majority, then-Justice Rehnquist noted: "As the Court noted in considering a challenge to the selective service laws: 'The constitutional power of Congress to raise and support armies and to make

---

[103] *Id.* at 605.

[104] Rostker v. Goldberg, 453 U.S. 57 (1981). "The Director of Selective Service immediately filed a notice of appeal and the next day, Saturday, July 19, 1980, JUSTICE BRENNAN, acting in his capacity as Circuit Justice for the Third Circuit, stayed the District Court's order enjoining commencement of registration. Registration began the next Monday. On December 1, 1980, [the Supreme Court of the United States] noted probable jurisdiction." *Id*. at 64 (citation omitted).

[105] *Id.* at 59.

[106] *Id.* at 64–65.

[107] *Id.* at 78–79.

[108] *Id.* at 64–65 ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality. 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. In rejecting the registration of women, Congress explicitly relied upon its constitutional powers under Art. I, § 8, cls. 12–14." (citations omitted)).

[109] *Id.* at 67 ("Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice." (citations omitted)).

all laws necessary and proper to that end is broad and sweeping.'"[110] Furthermore, the majority noted: "Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."[111]

While noting concern that "degrees of 'deference'" and "levels of 'scrutiny'" should not be used to justify a particular result, the majority applied an intermediate or heightened scrutiny analysis to decide the issue presented in the case.[112] The important government interest test, an intermediate or heightened scrutiny test used to consider equal protections issues, requires that the gender-based classifications "bear a close and substantial relationship to important governmental objectives."[113]

The majority noted that "[n]o one could deny that under [this] test . . . [that] the Government's interest in raising and supporting armies is an 'important governmental interest.'"[114] Continuing its theme that the courts should give Congress great deference in this area, the majority reasoned that Congress heavily debated the means to achieve the important government interest.[115] Congress considered two approaches to achieve the important government interest: requiring only males to register or requiring both sexes to register.[116] As the majority noted: "Congress chose the former alternative. When that decision is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws."[117]

The majority noted that this case was different than most gender-based discrimination cases because "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'"[118] Rather, "[t]he question of registering women for the draft not only received considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee."[119]

---

[110] *Id.* at 65 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[111] *Id.*

[112] *See id.* at 69–70.

[113] Pers. Admin. of Mass. v. Feeny, 442 U.S. 256, 273 (1979).

[114] *Rostker*, 453 U.S. at 70.

[115] *See id.* at 71 ("In light of the floor debate and the Report of the Senate Armed Services Committee . . . it is apparent that Congress was fully aware . . . of the current thinking as to the place of women in the Armed Services.").

[116] *Id.* at 70.

[117] *Id.*

[118] *Id.* at 72.

[119] *Id.*

Ultimately, Congress decided not to require women to register and only appropriated enough funds for the registration of males.[120] Based on the extensive Congressional debate and legislative history of Joint Resolution 521, the majority noted that "[t]he foregoing clearly establishes that the decision to exempt women from registration was not the 'accidental by product of a traditional way of thinking about females.' . . . The issue was considered at great length, and Congress clearly expressed its purpose and intent."[121]

As the majority noted, "[t]he MSSA established a plan for maintaining 'adequate armed strength . . . to insure the security of [the] Nation.'"[122] Furthermore, "[r]egistration is the first step 'in a united and continuous process designed to raise an army speedily and efficiently.'"[123] Accordingly, "[t]he purpose of registration, therefore, was to prepare for a draft *of combat troops*."[124] The thrust of the majority's equal protection reasoning was 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."[125] As the majority noted:

> Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. Under 10 U.S.C. § 6015 (1976 ed., Supp. III), "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions," and under 10 U.S.C. § 8549 female members of the Air Force "may not be assigned to duty in aircraft engaged in combat missions." The Army and Marine Corps preclude the use of women in combat as a matter of established policy.
>
> . . . .
>
> The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them.[126]

Ultimately, the Supreme Court reversed the decision of the district court,[127] found that the government met its burden under the important government interest test, and held that the MSSA did not violate the

---

120 *Id.* at 73.

121 *Id.* at 74 (citation omitted).

122 *Id.* at 75 (quoting 50 U.S.C. app. § 451(b) (1973)).

123 *Id.* (quoting Falbo v. United States, 320 U.S. 549, 553 (1944)).

124 *Id.* at 76.

125 *Id.* at 78 (emphasis added).

126 *Id.* at 76–77.

127 *Id.* at 83.

equal protection component of the Fifth Amendment's Due Process Clause:

> Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration. The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.[128]

4. Dissenting Opinions Argued that the MSSA Violates the Due Process Clause

Three justices dissented from the majority's opinion, and Justices White and Marshall wrote dissenting opinions.[129] Justice White's concern was that while Congress determined that noncombat roles "can be performed by persons ineligible for combat without diminishing military effectiveness," Congress' decision to register for conscription only males (even to fill noncombat roles) was an impermissible form of gender-based discrimination.[130]

Justice Marshall argued that the majority opinion perpetuated an archaic judgment of the proper role of women which "categorically excludes women from a fundamental civic obligation."[131] As Justice Marshall noted:

> In my judgment, there simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense. The Court reaches a contrary conclusion only by using an "[a]nnounced degre[e] of 'deference' to legislative judgmen[t]" as a "facile abstractio[n] . . . to justify a result."[132]

---

[128] *Id.* at 78–79 (citations omitted).

[129] *Id.* at 83, 86. Justice Brennan joined both dissenting opinions. *Id.*

[130] *Id.* at 85–86 (White, J., dissenting) ("As I understand the record . . . the Government cannot rely on volunteers and must register and draft not only to fill combat positions . . . but also to secure the personnel needed for jobs that can be performed by persons ineligible for combat without diminishing military effectiveness. The claim is that in providing for the latter category of positions, Congress is free to register and draft only men. I discern no adequate justification for this kind of discrimination between men and women.").

[131] *Id.* at 86 (Marshall, J., dissenting) (noting that "[t]he Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.' It upholds a statute that requires males but not females to register for the draft" (citation omitted)).

[132] *Id.* at 90.

IV. WHY THE COURTS SHOULD HOLD THE MSSA UNCONSTITUTIONAL IN LIGHT OF THE DEFENSE DEPARTMENT'S DECISION TO ALLOW WOMEN TO SERVE IN COMBAT ROLES

A. Policy Change to Allow Women to Engage in Combat Roles

As noted by the Supreme Court in *Rostker*, there were statutory provisions that barred women's combat duties in the Navy and Air Force and administrative policies which barred women's combat duties in the Army and Marines.[133] Throughout the last three decades, Congress and various presidential administrations changed the laws and regulations to open up more combat-oriented positions to women.[134]

On January 24, 2013, then-Secretary of Defense Leon Panetta announced that the military was ending its policy of excluding women from combat roles.[135] Department of Defense "officials cautioned, however, that 'not every position will open all at once.'"[136] Rather, "the Department of Defense will enter what is being called an 'assessment phase,' in which each branch of service will examine all its jobs and units not currently integrated and then produce a timetable for integrating them."[137] The Department's goal is to complete integration of women into all units in all branches by January 2016.[138]

B. Why Rostker *is Bad Law and the MSSA is Unconstitutional*

In light of the Defense Department's decision to end the ban on women in combat roles, the author argues that *Rostker* is no longer controlling precedent and that the MSSA is unconstitutional. The author will discuss the wisdom of this policy decision below in Section V of this Note. At this point, the discussion will be limited to the legal issues and ramifications of this policy decision. At least one legal scholar has raised questions about future challenges to the MSSA.[139] Indeed, the plaintiffs in the National Coalition of Men's case, *infra*, have defended jurisdictional, venue, and standing issues in opposing the government's motion to

---

[133] *Id.* at 76–77 (majority opinion).

[134] *Pentagon Makes Women in Combat Rule Change Official*, USA TODAY (Jan. 24, 2013, 6:10 PM), http://www.usatoday.com/story/news/nation/2013/01/24/women-combat-change-panetta/1861995/.

[135] *Id.*

[136] Chris Lawrence, *Military to Open Combat Jobs to Women*, CNN (Jan. 23, 2013, 3:21 PM), http://security.blogs.cnn.com/2013/01/23/military-to-open-combat-jobs-to-women/?hpt=hp_inthenews.

[137] *Id.*

[138] *Id.*

[139] Gerard Magliocca, *Selective Service Discrimination*, CONCURRING OPINIONS (Jan. 24, 2013), http://concurringopinions.com/?s=Selective+Service+Discrimination (discussing standing in a selective service challenge).

dismiss.[140] However, those procedural issues are beyond the scope of this Note. Rather, the author will consider the substantive merits of a challenge to the MSSA.

The key rationale on which the Supreme Court based its decision in *Rostker* was that the MSSA did not violate the equal protection component of the Fifth Amendment's Due Process Clause because "[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."[141] By "similarly situated" the Court meant that "[w]omen as a group . . . unlike men as a group, are not eligible for combat."[142] Furthermore, "[s]ince women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them."[143] Accordingly, the Court held that

> Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration. The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.[144]

However, given the Defense Department's decision to open up combat positions to women, the central holding and rationale of *Rostker* are now extremely suspect because men and women are now "similarly situated." The Supreme Court has long held that equal protection "is essentially a direction that all persons similarly situated should be treated alike."[145] However, men and women are not being treated alike for purposes of the Selective Service registration requirement. Men and women are similarly situated in terms of combat roles, but only men are required to register.[146] Accordingly, the author argues that *Rostker* is now bad law and should be overturned by the courts and the MSSA should be held unconstitutional.

---

[140] *NCFM's Opposition to the Federal Government's Motion to Dismiss NCFM's Lawsuit Against the Selective Service System*, NAT'L COALITION FOR MEN (July 8, 2013), http://ncfm.org/2013/07/action/ncfms-opposition-to-the-federal-governments-motion-to-dismiss-ncfms-lawsuit-against-the-selective-service-system/. The case was ultimately dismissed on ripeness grounds, but has since been appealed to the Ninth Circuit Court of Appeals. *NCFM Files Opening Appellate Brief in* NCFM v. Selective Service System, NAT'L COALITION FOR MEN (June 25, 2014), http://ncfm.org/2014/06/action/ncfm-files-opening-appellate-brief-in-ncfm-v-selective-service-system/.

[141] Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) (emphasis added).

[142] *Id.* at 76.

[143] *Id.* at 77.

[144] *Id.* at 78–79 (citations omitted).

[145] City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985).

[146] *See* Proclamation No. 4771, 3 C.F.R. 83 (1981), *reprinted as amended in* 50 U.S.C. app. § 453 (2012).

In April 2013, the National Coalition for Men ("NCFM") filed a lawsuit against the Selective Service System in the United States District Court for the Central District of California.[147] Given the Defense Department's policy change to end the restrictions on women in combat roles, the NCFM alleges in its complaint that "the sole legal basis for requiring only males to register with the S[elective] S[ervice] S[ystem] for the military draft no longer applies, and Defendants should now treat men and women equally."[148] The NCFM seeks "injunctive and declaratory relief for Defendants to treat women and men equally by requiring both women and men to register for the U.S. military draft."[149]

In the NCFM case, the courts should refuse to apply *Rostker* and should find the MSSA unconstitutional. The doctrine of *stare decisis* compels lower courts to adhere to the constitutional rulings of the Supreme Court, and generally compels the Supreme Court to adhere to its previous rulings.[150] But there are some nuances to the doctrine which allow the Supreme Court to depart from precedent in certain circumstances, particularly in cases where the legal "'underpinnings' have been 'eroded'"[151] or "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[152]

In the NCFM case, the courts should refuse to apply the holding from *Rostker* because the legal "'underpinnings' have been 'eroded'"[153] and the "facts have so changed . . . as to have robbed the old rule of significant application or justification."[154] The Court in *Rostker* reasoned that "[t]he fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops."[155] However, given the Defense Department's decision to end the exclusion on women in combat positions and open up

---

147 Complaint, Nat'l Coal. of Men v. Selective Serv. Sys., No. CV13-02391 (C.D. Cal. Apr. 4, 2013), *available at* http://ncfm.org/wp-content/uploads/2013/04/130404-NCFM-Selective-Service-lawsuit-complaint.pdf.

148 *Id.* at 5.

149 *Id.* at 1.

150 *See* Alleyne v. United States, 133 S.Ct. 2151, 2164 (2013) (Sotomayor, J., concurring) ("we require a 'special justification' when departing from precedent").

151 *Id.*

152 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 854–55 (1992). ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

153 *Alleyne*, 133 S.Ct. at 2164.

154 *Casey*, 505 U.S. at 855.

155 Rostker v. Goldberg, 453 U.S. 57, 79 (1981).

combat positions to women, the central holding and rationale of *Rostker* are extremely suspect, and the courts should refuse to apply *Rostker* in the NCFM case.

Because the courts should refuse to apply *Rostker*, the courts should again review the constitutionality of the MSSA and ultimately hold the MSSA unconstitutional. As an initial matter, much of the Court's rationale in *Rostker* was based on giving great deference to the judgment of Congress in military matters.[156] The Supreme Court recognized there are limits on judicial deference to Congress, but ultimately decided that Congress should be afforded great deference in that case.[157] The court in the NCFM case should not defer to an outdated political judgment of Congress from 1980 when analyzing the important legal issues of a significant Defense Department policy change some thirty-three years later. Indeed, the court in the NCFM case should "not abdicate [its] ultimate responsibility to decide the constitutional question."[158]

The NCFM complaint alleges that the MSSA and Selective Service System are discriminatory in violation of the Fifth and Fourteenth Amendments and 28 U.S.C. § 1983.[159] As in *Rostker*, the key issue is ultimately whether the MSSA violates the equal protection component of the Fifth Amendment's Due Process Clause.[160] Though the Fifth Amendment, which applies to the federal government, does not contain an Equal Protection Clause, the Supreme Court in *Bolling v. Sharpe*[161] read into the Fifth Amendment's Due Process Clause an equal protection component that applies to the federal government.[162] Accordingly, as in *Rostker*, the proper analysis is equal protection analysis. Although the ruling of the district court in *Rostker* was overturned, the district court succinctly laid out the various equal protection tests:

> [t]he opinions of the Supreme Court have established three standards of review which may be applied in analyzing discriminatory

---

156 *Id.* at 64–65 ("Th[is] 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.").

157 *Id.* at 67 ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice." (citations omitted)).

158 *Id.*

159 Complaint at 2, para. 1, Nat'l Coal. of Men v. Selective Serv. Sys., No. CV13-02391 (C.D. Cal. Apr. 4, 2013), *available at* http://ncfm.org/wp-content/uploads/2013/04/130404-NCFM-Selective-Service-lawsuit-complaint.pdf.

160 *See Rostker*, 453 U.S. at 59.

161 347 U.S. 497 (1954).

162 *Id.* at 498–500.

> classifications under the Equal Protection clause and the Fifth Amendment to the United States Constitution. Any statutory discrimination, at a minimum, must bear a reasonable relationship to a permissible governmental purpose (hereinafter the "reasonable relationship" test). Ordinarily, statutory classifications based on gender are unconstitutional unless they are substantially related to an important government interest (hereinafter the "important government interest" test). Racial or religious classifications or other "suspect" classifications will be unconstitutional unless they are necessary to accomplish a compelling state interest (hereinafter the "compelling government interest" test).[163]

As in *Rostker*, the NCFM courts should apply the important government interest test. Gender-based classifications are subjected to a "'heightened' scrutiny" and "cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective."[164] Furthermore, "[t]he party defending the challenged classification carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end."[165] That is, in the NCFM case, the government has the burden of proving why the current male-only registration regime is substantially related to an important government interest.

The government is likely to argue, as it did in *Rostker*, that the courts should defer to the expertise of the other branches in military matters and apply the reasonable relationship test. The reasonable relationship test, the lowest level of scrutiny, requires that "[a]ny statutory discrimination, at a minimum, must bear a reasonable relationship to a permissible governmental purpose."[166] This argument did not work with the district court or Supreme Court in *Rostker*, and it should not work in the NCFM case.[167] Because there is a gender-based classification, the courts should apply the heightened important government interest test rather than the reasonable relationship test. If the important government interest test applies, then the government "carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end."[168]

In *Rostker*, the Court held that "[n]o one could deny that . . . the Government's interest in raising and supporting armies is an 'important

---

[163] Goldberg v. Rostker, 509 F. Supp. 586, 592–93 (E.D. Pa. 1980), *rev'd,* 453 U.S. 57 (1981) (citations omitted).

[164] *Rostker*, 453 U.S. at 87 (Marshall, J., dissenting).

[165] *Id.* at 88.

[166] *Rostker*, 509 F. Supp. at 593.

[167] *See Rostker*, 453 U.S. at 69-70.

[168] *Id.* at 88 (Marshall, J., dissenting).

governmental interest.'"[169] Furthermore, the Court held that the government met its burden under the important government interest test when it concluded that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration."[170] The Court reasoned that because men and women were not "similarly situated" for purposes of combat roles, Congress was "fully justifie[d]" in requiring only the registration of men.[171]

However, in the NCFM case, the government is unlikely to meet its burden. Even if the plaintiffs concede or the court determines the government has an important objective in raising and supporting a military force, the government fails the second prong of the important government interest test. The linchpin of the Court's holding in *Rostker* no longer exists; that is, there is no sufficient or closely related justification. By virtue of the Defense Department's 2013 policy changes, men and women are now similarly situated in terms of combat roles in all branches of the military, even if full integration does not occur immediately.[172] To require only men to register and exclude women from the registration requirement is to treat similarly situated persons differently. This violates the very heart of equal protection. No longer is "[t]he exemption of women from registration . . . sufficiently but also closely related to Congress' purpose in authorizing registration."[173] No longer is the government "fully justifie[d]" as the Supreme Court said it was in 1981.[174] Rather, the government now lacks a substantial or closely related (or even reasonable, for that matter) justification for an unconstitutionally discriminatory law.

Therefore, because the court should apply the important government interest test, and because the government is unlikely to meet its burden, the NCFM court should hold the MSSA unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause.

V. POSSIBLE SOLUTIONS: WHY CONGRESS SHOULD REPEAL THE MILITARY SELECTIVE SERVICE ACT AND ELIMINATE THE DRAFT

Having argued that *Rostker* is bad law and the courts should hold the MSSA unconstitutional, the author now presents several solutions to remedy the legal and policy problems created by the Defense Department's decision to end combat restrictions for women. Ultimately,

---

[169] *Id.* at 70 (majority opinion).

[170] *Id.* at 79.

[171] *Id.* at 78–79.

[172] See *Pentagon Makes Women in Combat Rule Change Official, supra* note 134 (noting integration is to be completed in January 2016).

[173] *Rostker*, 453 U.S. at 79.

[174] *Id.*

the author argues that Congress should repeal the MSSA and eliminate the registration and conscription regime.

One way to cure the equal protection infirmities of the MSSA is to require women to register. Because men and women are now similarly situated in the military in terms of combat positions, there would be no discrimination and thus no constitutional infirmities if the MSSA is amended to require men and women to register and be subject to potential conscription. This is one of the arguments made by the plaintiffs in the NCFM case.[175]

However, the author argues that amending the MSSA to require women to register with the Selective Service System would be bad policy. This argument can be made whether one supports or opposes the decision to open up combat positions to women. Some question the wisdom of the policy decision to eliminate restriction on women in combat roles.[176] There are several reasons. First, some argue that it is bad policy to conscript women and involuntarily subject them to the horrors of combat.[177] Second, allowing women to serve in combat positions adds potential emotional and sexual complications to units defined by male camaraderie, cohesion, and the warrior ethos inherent in the male nature.[178] Third, the Defense Department insists that women must meet rigorous testing standards in order to qualify for a combat position.[179] However, it is conceivable that if few women are able to meet these benchmarks, military or policymakers will either lower the standards for women or institute a quota or affirmative action system that will require certain numbers of women to serve in combat roles.[180]

---

[175] *NCFM Sues Selective Service for Requiring Only Men to Register for the Draft*, NAT'L COALITION FOR MEN (Nov. 22, 2014), http://ncfm.org/2014/11/action/ncfm-sues-selective-service-for-requiring-only-men-to-register-for-the-draft/ [hereinafter *NCFM Sues Selective Service*].

[176] *See, e.g.*, Debra Bell, *Arguing For and Against Women in Combat, in 1978*, US NEWS & WORLD REP. (May 15, 2013, 3:00 PM), http://www.usnews.com/news/blogs/press-past/2013/05/15/arguing-for-and-against-women-in-combat-in-1978; Kingsley Browne, *Putting Women in Combat is a Disastrous Decision*, US NEWS & WORLD REP. (Jan. 25, 2013, 5:50 PM), http://www.usnews.com/debate-club/should-women-be-allowed-to-fight-in-combat/putting-women-in-combat-is-a-disastrous-decision.

[177] *See, e.g.,* Dave Carter, *From Burning Draft Cards to Drafting Women?*, RICOCHET (Apr. 4, 2014, 1:44 AM), http://www.ricochet.com/main-feed/From-Burning-Draft-Cards-to-Drafting-Women.

[178] *See* Browne, *supra* note 176.

[179] *See* Lawrence, *supra* note 136.

[180] *See* Paul Hair, *Why Women Shouldn't be Allowed to Serve in Combat*, DAILY CALLER (Jan. 20, 2011, 4:55 PM), http://dailycaller.com/2011/01/20/why-women-shouldnt-be-allowed-to-serve-in-combat/.

On the other hand, some argue that opening up combat positions to women is good policy.[181] However, even if opening up combat positions to women is a good policy decision, the author concludes that amending the MSSA to require men and women to register is bad policy even if doing so eliminates any constitutional infirmities.[182] Rather, the author argues that Congress should repeal the MSSA and eliminate the registration and draft requirements altogether. This is also an alternative argument raised by the plaintiffs in the NCFM case.[183]

First, eliminating the registration requirement for men and women would also eliminate the equal protection concerns of the current Selective Service regime. The equal protection analysis and arguments constitute the heart of Section IV of this Note, so the author will not rehash them here.

Second, the courts may not declare the MSSA unconstitutional. If the courts uphold the constitutionality of the male-only registration regime, the judiciary would be perpetuating ongoing discrimination against men.

Third, if the courts do not declare the MSSA unconstitutional, Congress may not decide to amend the MSSA to require women to register or may not repeal the registration and conscription requirement for men. Even though our military is currently an all-volunteer force and no one has been drafted since 1973, Congressman Charles Rangel has advocated for reinstituting the draft since 2003.[184] Congressman Rangel has also written "the Universal National Service Act, known as the 'draft' bill, which requires all men and women between ages 18 and 25 to give two years of service in any capacity that promotes our national defense."[185] While Congressman Rangel's views appear to be the minority, the current registration and conscription regime only places men at risk of conscription.

---

[181] *See, e.g.*, Bell, *supra* note 176; Chelsea J. Carter & Steve Almasy, *Former Troops Say Time Has Come for Women in Combat Units*, CNN (Jan. 24, 2013, 5:04 PM), http://www.cnn.com/2013/01/23/us/women-combat-troop-reaction/index.html.

[182] For an argument on why Congress should amend the MSSA to require women to register with the Selective Service System, *see, e.g.*, Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, ARMY LAW., Apr. 2009, at 1, 1–2, 10–15. Dunn's article was written before the Defense Department's 2013 policy change to allow women to serve in combat roles. Dunn argues that Congress should amend the MSSA to require women to register for a number of reasons. First, the system of conscription should be more egalitarian because the American ethic is largely egalitarian. Second, public attitude towards women in combat has become more favorable in recent years. Third, it is bad military policy to exclude half of the population from filling primarily non-combat, support roles that make up the majority of military positions. Fourth, it is bad political policy to excuse half the population from an important civic obligation.

[183] *NCFM Sues Selective Service*, *supra* note 175.

[184] Charles B. Rangel, *A More Equal Military? Bring Back Draft*, CNN (Jan. 26, 2013, 10:33 AM), http://www.cnn.com/2013/01/25/opinion/rangel-military-draft/.

[185] *Id.*

Fourth, even though no one has been drafted since 1973, the President and Congress may choose to re-implement the registration and draft requirement at any time. The United States has employed an all-volunteer force since 1973, and the author argues that there is great merit to the use of an all-volunteer force rather than the use of forced conscription.[186] But that does not mean that the President and Congress will always rely on an all-volunteer force or refrain from re-implementing the registration or draft requirements,[187] especially in a post-9/11 world. Furthermore, even though the courts have long rejected such arguments,[188] the author argues that the time has come to reconsider whether a forced conscription regime violates the Thirteenth Amendment's Involuntary Servitude Clause.[189]

Fifth, it would make a powerful statement for Congress to take a definitive stand and eliminate the registration and conscription regime which has been controversial and unpopular throughout much of American history.[190] Unless Congress acts to either require women to register or eliminate the registration requirement for men, the government continues to place men in an unfair position of being required to register, criminally liable with limited access to certain federal benefits if they do not register, and men alone remain at risk of being drafted. If the courts do not declare the MSSA unconstitutional, what motivation does Congress have to amend or repeal it? Very little indeed. Even though no one has been drafted since 1973, it is a political and strategic risk to eliminate a ready pool of draftees should the military need arise, particularly in a post-9/11 world.

For these reasons, the author concludes that Congress should repeal the MSSA and eliminate the registration and draft requirements altogether.

---

[186] *See The Evolution of the All-Volunteer Force*, RAND CORP., http://www.rand.org/pubs/research_briefs/RB9195/index1.html (last visited Dec. 15, 2013).

[187] *See* Rostker v. Goldberg, 453 U.S. 57, 61 n.1 (1981) ("any actual conscription would require further congressional action").

[188] Selective Draft Law Cases, 245 U.S. 366, 390 (1918) ("[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

[189] *See, e.g.*, Ilya Somin, Butler v. Perry *and the Constitutionality of Forced Labor Under the Thirteenth Amendment*, VOLOKH CONSPIRACY (Sept. 25, 2007, 2:16 AM), http://www.volokh.com/posts/1190700994.shtml; Ilya Somin, *Does Mandatory "National Service" Violate the Thirteenth Amendment?*, VOLOKH CONSPIRACY (Sept. 24, 2007, 8:59 PM), http://www.volokh.com/archives/archive_2007_09_23-2007_09_29.shtml#1190681955.

[190] Kindig, *supra* note 44.

VI. CONCLUSION

This Note analyzed the legal and policy considerations of the MSSA, military conscription, and the role of men and women in combat. The author began this Note by providing a historical context, reviewing the various legislative iterations of the Selective Service System, selective implementations of the registration and conscription requirements, and case law interpreting the Selective Service System. The author heavily reviewed the seminal case *Rostker v. Goldberg* in which the Supreme Court of the United States upheld the constitutionality of the MSSA against a Fifth Amendment Due Process Challenge.

The author proceeded to make several legal and policy arguments and presented possible solutions. First, the author considered the constitutionality of the MSSA in light of the Defense Department's decision to end restrictions on women in combat roles and open up combat positions to women. The author argues that *Rostker* is now bad law and that the MSSA is now unconstitutional. Second, the author considered possible solutions to the remedy these constitutional concerns. While requiring women to register with the Selective Service System may alleviate some of the constitutional infirmities of the MSSA, the author argues that this is bad policy. Ultimately, the author concludes that Congress should repeal the MSSA and eliminate the registration and conscription requirements altogether and rely on an all-volunteer force.