ROSTKER v. GOLDBERG
SUPREME COURT OF THE UNITED STATES
453 U.S. 57
June 25, 1981
[6 - 3]

OPINION: JUSTICE REHNQUIST...The question presented is whether the Military Selective Service Act violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

Congress is given the power under the Constitution "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." **Art. I, §8, cls. 12-14**. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act (the MSSA or the Act). Section 3...empowers the President...to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription...[and] serves no other purpose beyond providing a pool for subsequent induction.

Registration for the draft...was discontinued in 1975. In early 1980, President Carter determined that it was necessary to reactivate the draft registration process...[due to] the Soviet armed invasion of Afghanistan...The Selective Service System had been inactive, however, and funds were needed before reactivating registration. The President therefore recommended that funds be transferred from the Department of Defense to the separate Selective Service System. He also recommended that Congress take action to amend the MSSA to permit the registration and conscription of **women** as well as men...Although Congress considered the question at great length, it declined to amend the MSSA to permit the registration of women.

On July 2, 1980, the President, by Proclamation, ordered the registration of specified groups of young men pursuant to the authority conferred by §3 of the Act. Registration was to commence on July 21, 1980...

On Friday, July 18, 1980, three days before registration was to commence, the District Court issued an opinion finding that the Act violated the Due Process Clause of the Fifth Amendment and permanently enjoined the Government from requiring registration under the Act. The court... rejected plaintiffs' suggestions that the equal protection claim should be tested under "strict scrutiny," and also rejected defendants' argument that the deference due Congress in the area of military affairs required application of the traditional "minimum scrutiny" test. Applying the "important government interest" test articulated in *Craig v. Boren (1976),* the court struck down the MSSA. The court stressed that it was not deciding whether or to what extent women should serve in combat, but only the issue of registration, and felt that this "should dispel any concern that we are injecting ourselves in an inappropriate manner into military affairs." The court...concluded...that "military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it." It rejected Congress' contrary determination in part because of what it

viewed as Congress' "inconsistent positions" in declining to register women yet spending funds to recruit them and expand their opportunities in the military...

Whenever called upon to judge the constitutionality of an Act of Congress...the Court accords "great weight to the decisions of Congress." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee (1973).* The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee v. McGrath (1951)* (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." 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.** The "specific findings" section of the Report of the Senate Armed Services Committee, later adopted by both Houses of Congress, began by stating:

> "Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary."

This Court has consistently recognized Congress' "broad constitutional power" to raise and regulate armies and navies. 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 all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien* (1968).

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. In *Gilligan v. Morgan* (1973), the Court noted:

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

The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court. In *Parker v. Levy (1974),* the Court rejected both vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society, and that "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 of the military mission requires a different application of those protections." In *Middendorf v. Henry (1976),* the Court noted that in considering due process claims in the context of a summary court-martial it "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, §8," concerning what rights were available. Deference to the judgment of other branches in the area of military affairs also played a major role in *Greer v. Spock (1976),* where the Court upheld a ban on political speeches by civilians on a military base, and *Brown v. Glines* (1980) where the Court upheld regulations imposing a prior restraint on the right to petition of military personnel.

In *Schlesinger v. Ballard* the Court considered a due process challenge, brought by males, to the Navy policy of according females a longer period than males in which to attain promotions necessary to continued service. The Court distinguished previous gender-based discriminations held unlawful in *Reed v. Reed (1971)* and *Frontiero v. Richardson (1973).* In those cases, the classifications were based on "overbroad generalizations." In the case before it, however, the Court noted:

> "[The] different treatment of men and women naval officers...reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty."

In light of the combat restrictions, women did not have the same opportunities for promotion as men, and therefore it was not unconstitutional for Congress to distinguish between them.

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, see *Ex parte Milligan (1866),* 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. 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.

The District Court purported to recognize the appropriateness of deference to Congress when that body was exercising its constitutionally delegated authority over military affairs, but it stressed that "we are not here concerned with military operations or day-to-day conduct of the military into which we have no desire to intrude." Appellees also stress that this case involves civilians, not the military,

and that "the impact of registration on the military is only indirect and attenuated." We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive. *United States v. O'Brien* (1968) recognized the broad deference due Congress in the selective service area before us in this case. Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction. Congressional judgments concerning registration and the draft are based on judgments concerning military operations and needs ("the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat"), and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well. Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization. It would be blinking reality to say that our precedents requiring deference to Congress in military affairs are not implicated by the present case.

The Solicitor General argues, largely on the basis of the foregoing cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination. We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced 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. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

No one could deny that under the test of *Craig v. Boren,* the Government's interest in raising and supporting armies is an "important governmental interest." Congress and its Committees carefully considered and debated two alternative means of furthering that interest: the first was to register only males for potential conscription, and the other was to register both sexes. 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.

...The reconciliation between the deference due Congress and our own constitutional responsibility is perhaps best instanced in *Schlesinger v. Ballard,* where we stated:

> "This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *U.S. ex rel. Toth v. Quarles*.

> The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see **U.S. Const., Art. I, §8, cls. 12-14**, and with the President. See U.S. Const., **Art. II, § 2, cl. 1**. We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment."

Or, as put a generation ago in a case not involving any claim of gender-based discrimination:

> "Judges are not given the task of running the Army. The responsibility for setting up channels through which...grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly 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." *Orloff v. Willoughby.*

Schlesinger v. *Ballard* did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance. In light of the floor debate and the Report of the Senate Armed Services Committee hereinafter discussed, it is apparent that Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, but of the current thinking as to the place of women in the Armed Services. In such a case, we cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal.

This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appellees' assertions, Congress did not act "unthinkingly" or "reflexively and not for any considered reason." The 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. Hearings held by both Houses of Congress in response to the President's request for authorization to register women adduced extensive testimony and evidence concerning the issue. These hearings built on other hearings held the previous year addressed to the same question.

The House declined to provide for the registration of women when it passed the Joint Resolution allocating funds for the Selective Service System...

The MSSA established a plan for maintaining "adequate armed strength...to insure the security of the Nation." Registration is the first step "in a united and continuous process designed to raise an army speedily and efficiently" and Congress provided for the reactivation of registration in order to "provide the means for the early delivery of inductees in an emergency." Although the three-judge District Court often tried to sever its consideration of registration from the particulars of induction,

Congress rather clearly linked the need for renewed registration with its views on the character of a subsequent draft. The Senate Report specifically found that "an ability to mobilize rapidly is essential to the preservation of our national security...A functioning registration system is a vital part of any mobilization plan." As Senator Warner put it, "I equate registration with the draft." Such an approach is certainly logical, since under the MSSA induction is interlocked with registration: only those registered may be drafted, and registration serves no purpose beyond providing a pool for the draft. Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve.

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that "[if] mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements."...The purpose of registration, therefore, was to prepare for a draft *of combat troops*.

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*, "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. Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. In the words of the Senate Report:

> "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee...Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy."

The Senate Report specifically found that "women should not be intentionally or routinely placed in combat positions in our military services." The President expressed his intent to continue the current military policy precluding women from combat and appellees present their argument concerning registration against the background of such restrictions on the use of women in combat. Consistent with the approach of this Court in *Schlesinger v. Ballard (1975),* we must examine appellees' constitutional claim concerning registration with these combat restrictions firmly in mind.

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...

The District Court stressed that the military need for women was irrelevant to the issue of their registration. As that court put it: "Congress could not constitutionally require registration under the MSSA of only black citizens or only white citizens, or single out any political or religious group simply because those groups contain sufficient persons to fill the needs of the Selective Service System." This reasoning is beside the point. The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.

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. As was the case in *Schlesinger v. Ballard*, "the gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated" in this case. The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality...

Although the military experts who testified in favor of registering women uniformly opposed the actual drafting of women, there was testimony that in the event of a draft of 650,000 the military could absorb some 80,000 female inductees. The 80,000 would be used to fill noncombat positions, freeing men to go to the front. In relying on this testimony in striking down the MSSA, the District Court palpably exceeded its authority when it ignored Congress' considered response to this line of reasoning.

In the first place, assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans. "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution." As the Senate Committee recognized a year before, "training would be needlessly burdened by women recruits who could not be used in combat." See also S. Rep. No. 96-826 ("Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist"). It is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.

Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers...Most significantly, Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility.

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

The point was repeated in specific findings. In sum, Congress carefully evaluated the testimony that 80,000 women conscripts could be usefully employed in the event of a draft and rejected it in the permissible exercise of its constitutional responsibility. The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence...We conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act....[Judgment Reversed.]

DISSENT: JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting. I assume what has not been challenged in this case -- that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say that Congress concluded as much and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality. It should not be ascribed to Congress, particularly in the face of the testimony of military authorities, hereafter referred to, that there would be a substantial number of positions in the services that could be filled by women both in peacetime and during mobilization, even though they are ineligible for combat.

I would also have little difficulty agreeing to a reversal if all the women who could serve in wartime without adversely affecting combat readiness could predictably be obtained through volunteers. In that event, the equal protection component of the Fifth Amendment would not require the United States to go through...the expensive and essentially useless procedure of registering women. But again I cannot agree with the Court that Congress concluded or that the legislative record indicates that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization. On the contrary, the record as I understand it, supports the District Court's finding that the services would have to conscript at least 80,000 persons to fill positions for which combat-ready men would not be required. The consistent position of the Defense Department representatives was that their best estimate of the number of women draftees who could be used productively by the services in the event of a major mobilization would be approximately

80,000 over the first six months. This number took into account the estimated number of women volunteers. Except for a single, unsupported, and ambiguous statement in the Senate Report to the effect that "women volunteers would fill the requirements for women," there is no indication that Congress rejected the Defense Department's figures or relied upon an alternative set of figures...I cannot agree that the record supports the view that all positions for which women would be eligible in wartime could and would be filled by female volunteers...

On the record before us, the number of women who could be used in the military without sacrificing combat readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all.

As I understand the record, then, in order to secure the personnel it needs during mobilization, the Government cannot rely on volunteers and must register and draft not only to fill combat positions and those noncombat positions that must be filled by combat-trained men, 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...

DISSENT: JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting. The Court today...upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

...The only question presented by this case is whether the exclusion of women from registration under the Military Selective Service Act contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. Although the purpose of registration is to assist preparations for drafting civilians into the military, *we are not asked to rule on the constitutionality of a statute governing conscription*. With the advent of the All-Volunteer Armed Forces, the MSSA was specifically amended to preclude conscription as of July 1, 1973 and reactivation of the draft would therefore require a legislative amendment. Consequently, we are not called upon to decide whether either men or women can be drafted at all, whether they must be drafted in equal numbers, in what order they should be drafted, or, once inducted, how they are to be trained for their respective functions. In addition, this case does not involve a challenge to the statutes or policies that prohibit female members of the Armed Forces from serving in combat. It is with this understanding that I turn to the task at hand.

By now it should be clear that statutes like the MSSA, which discriminate on the basis of gender, must be examined under the "heightened" scrutiny mandated by *Craig v. Boren (1976).* Under this test, a gender-based classification cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective. This test applies

whether the classification discriminates against males or females. The 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. Consequently before we can sustain the MSSA, the Government must demonstrate that the gender-based classification it employs bears "a close and substantial relationship to the achievement of important governmental objectives."

The MSSA states that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." I agree with the majority that "[no] one could deny that...the Government's interest in raising and supporting armies is an 'important governmental interest.'" Consequently, the first part of the *Craig* v. *Boren* test is satisfied. But the question remains whether the discriminatory means employed itself substantially serves the statutory end. In concluding that it does, the Court correctly notes that Congress enacted (and reactivated) the MSSA pursuant to its constitutional authority to raise and maintain armies. The majority also notes that "the Court accords 'great weight to the decisions of Congress'" and that the Court has accorded particular deference to decisions arising in the context of Congress' authority over military affairs. I have no particular quarrel with these sentiments in the majority opinion. I simply add that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions. As the Court has pointed out:

> "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. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'"

One such "safeguard of essential liberties" is the Fifth Amendment's guarantee of equal protection of the laws. When, as here, a federal law that classifies on the basis of gender is challenged as violating this constitutional guarantee, it is ultimately for this Court, not Congress, to decide whether there exists the constitutionally required "close and substantial relationship" between the discriminatory means employed and the asserted governmental objective. 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 "announced degree of 'deference' to legislative judgment" as a "facile abstraction...to justify a result."

...Congress has never disagreed with the judgment of the military experts that women have made significant contributions to the effectiveness of the military. On the contrary, Congress has repeatedly praised the performance of female members of the Armed Forces, and has approved efforts by the Armed Services to expand their role...

The justification for the MSSA's gender-based discrimination must therefore be found in considerations that are peculiar to the objectives of registration.

...According to the Senate Report, "the policy precluding the use of women in combat is...the most important reason for not including women in a registration system." In reaffirming the combat restrictions, the Report declared:

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

Had appellees raised a constitutional challenge to the prohibition against assignment of women to combat, this discussion in the Senate Report might well provide persuasive reasons for upholding the restrictions. But the validity of the combat restrictions is not an issue we need decide in this case. Moreover, since the combat restrictions on women have already been accomplished through statutes and policies that remain in force whether or not women are required to register or to be drafted, including women in registration and draft plans will not result in their being assigned to combat roles. Thus, even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal.

The Court's opinion offers a different though related explanation of the relationship between the combat restrictions and Congress' decision not to require registration of women. The majority states that "Congress...clearly linked the need for renewed registration with its views of the character of a subsequent draft." The Court also states that "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops." The Court then reasons that since women are not eligible for assignment to combat, Congress' decision to exclude them from registration is not unconstitutional discrimination inasmuch as "[men] and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." There is a certain logic to this reasoning, but the Court's approach is fundamentally flawed.

In the first place, although the Court purports to apply the *Craig* v. *Boren* test, the "similarly situated" analysis the Court employs is in fact significantly different from the *Craig* v. *Boren* approach. The Court essentially reasons that the gender classification employed by the MSSA is constitutionally permissible because nondiscrimination is not necessary to achieve the purpose of registration to prepare for a draft of combat troops. In other words, the majority concludes that women may be excluded from registration because they will not be needed in the event of a draft.

This analysis, however, focuses on the wrong question. The relevant inquiry under the *Craig* v. *Boren* test is not whether a *gender-neutral* classification would substantially advance important governmental interests. Rather, the question is whether the gender-based classification is itself

substantially related to the achievement of the asserted governmental interest. Thus, the Government's task in this case is to demonstrate that excluding women from registration substantially furthers the goal of preparing for a draft of combat troops. Or to put it another way, the Government must show that registering women would substantially impede its efforts to prepare for such a draft. Under our precedents, the Government cannot meet this burden without showing that a gender-neutral statute would be a less effective means of attaining this end. As the Court explained in *Orr v. Orr*:

> "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing sexual stereotypes about the 'proper place' of women and their need for special protection...Where, as here, the [Government's]...purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [Government] cannot be permitted to classify on the basis of sex."

In this case, the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by *registering* both men and women but *drafting* only men if only men turn out to be needed. Nor can the Government argue that this alternative entails the additional cost and administrative inconvenience of registering women. This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig* v. *Boren* test.

The fact that registering women in no way obstructs the governmental interest in preparing for a draft of combat troops points up a second flaw in the Court's analysis. The Court essentially reduces the question of the constitutionality of male-only *registration* to the validity of a hypothetical program for *conscripting* only men. The Court posits a draft in which *all* conscripts are either assigned to those specific combat posts presently closed to women or must be available for rotation into such positions. By so doing, the Court is able to conclude that registering women would be no more than a "gesture of superficial equality," since women are necessarily ineligible for every position to be filled in its hypothetical draft. If it could indeed be guaranteed in advance that conscription would be reimposed by Congress only in circumstances where, and in a form under which, all conscripts would have to be trained for and assigned to combat or combat rotation positions from which women are categorically excluded, then it could be argued that registration of women would be pointless.

But of course, no such guarantee is possible. Certainly, nothing about the MSSA limits Congress to reinstituting the draft only in such circumstances. For example, Congress may decide that the All-Volunteer Armed Forces are inadequate to meet the Nation's defense needs even in times of peace and reinstitute peacetime conscription. In that event, the hypothetical draft the Court relied on to sustain the MSSA's gender-based classification would presumably be of little relevance, and the Court could then be forced to declare the male-only registration program unconstitutional. This difficulty comes about because both Congress and the Court have lost sight of the important distinction between *registration* and *conscription*. Registration provides "an inventory of what the available strength is within the military qualified pool in this country." Conscription supplies the

military with the personnel needed to respond to a particular exigency. The fact that registration is a first step in the conscription process does not mean that a registration law expressly discriminating between men and women may be justified by a valid conscription program which would, in retrospect, make the current discrimination appear functionally related to the program that emerged.

...The Department of Defense indicated that in the event of a mobilization requiring reinstitution of the draft, the primary manpower requirement would be for combat troops and support personnel who can readily be deployed into combat. But the Department indicated that conscripts would also be needed to staff a variety of support positions having no prerequisite of combat eligibility, and which therefore could be filled by women...The Defense Department also concluded that there are no military reasons that would justify excluding women from registration...

The testimony at the congressional hearings focused on projections of manpower needs in the event of an emergency requiring reinstitution of the draft, and, in particular, on the role of women in such a draft...The Defense Department reached the following conclusion about the number of female draftees that could be absorbed:

> "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs that we would be inducting 650,000 people for. The reason for that is because some 80,000 of those jobs, indeed more than 80,000 of those jobs are support related and not combat related. We think women could fill those jobs quite well."

Finally, the Department of Defense acknowledged that amending the MSSA to authorize registration and induction of women did not necessarily mean that women would be drafted in the same numbers as men...This review of the findings contained in the Senate Report...demonstrates that there is no basis for the Court's representation that women are ineligible for *all* the positions that would need to be filled in the event of a draft. Testimony about personnel requirements in the event of a draft established that women could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted. Thus, with respect to these 80,000 or more positions, the statutes and policies barring women from combat do not provide a reason for distinguishing between male and female potential conscripts; the two groups are, in the majority's parlance, "similarly situated." As such, the combat restrictions cannot by themselves supply the constitutionally required justification for the MSSA's gender-based classification. Since the classification precludes women from being drafted to fill positions for which they would be qualified and useful, the Government must demonstrate that excluding women from those positions is substantially related to the achievement of an important governmental objective.

...The Defense Department's recommendation that women be included in registration plans was based on its conclusion that drafting a limited number of women is consistent with, and could contribute to, military effectiveness. It was against this background that the military experts concluded that "equity" favored registration of women. Assistant Secretary Pirie explained:

> "Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated."

By "considerations of equity," the military experts acknowledged that female conscripts can perform as well as male conscripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft. Thus, what the majority so blithely dismisses as "equity" is nothing less than the Fifth Amendment's guarantee of equal protection of the laws which "requires that Congress treat similarly situated persons similarly." Moreover, whether Congress could subsume this constitutional requirement to "military need," in part depends on precisely what the Senate Report meant by "military need."

The Report stated that "both the civilian and military leadership agreed that there was no military need to draft women." An examination of what the "civilian and military leadership" meant by "military need" should therefore provide an insight into the Report's use of the term. Several witnesses testified that because personnel requirements in the event of a mobilization could be met by drafting men, including women in draft plans is not a military necessity. For example, Assistant Secretary of Defense Pirie stated:

> "It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men...is sufficiently large to meet projected wartime requirements."

Similarly, Army Chief of Staff General Meyer testified:

> "I do not believe there is a need to draft women in peacetime. In wartime, because there are such large numbers of young men available, approximately 2 million males in each year group of the draft age population, there would be no military necessity to draft females except, possibly, doctors, and other health professionals if there are insufficient volunteers from people with those skills."

To be sure, there is no "military need" to draft women in the sense that a war could be waged without their participation. This fact is, however, irrelevant to resolving the constitutional issue. As previously noted, it is not appellees' burden to prove that registration of women substantially furthers the objectives of the MSSA. Rather, because eligibility for combat is not a requirement for some of the positions to be filled in the event of a draft, it is incumbent on the Government to show that excluding women from a draft to fill those positions substantially furthers an important governmental objective.

It may be, however, that the Senate Report's allusion to "military need" is meant to convey Congress' expectation that women volunteers will make it unnecessary to draft any women. The majority apparently accepts this meaning when it states: "Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by

volunteers." But since the purpose of registration is to protect against unanticipated shortages of volunteers, it is difficult to see how excluding women from registration can be justified by conjectures about the expected number of female volunteers. I fail to see why the exclusion of a pool of persons who would be conscripted only *if needed* can be justified by reference to the current supply of volunteers. In any event, the Defense Department's best estimate is that in the event of a mobilization requiring reinstitution of the draft, there will not be enough women volunteers to fill the positions for which women would be eligible: "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs we would be *inducting* 650,000 people for." Thus, however the "military need" statement in the Senate Report is understood, it does not provide the constitutionally required justification for the total exclusion of women from registration and draft plans.

Recognizing the need to go beyond the "military need" argument, the Court asserts that "Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility." None would deny that preserving "military flexibility" is an important governmental interest. But to justify the exclusion of women from registration and the draft on this ground, there must be a further showing that staffing even a limited number of noncombat positions with women would impede military flexibility. I find nothing in the Senate Report to provide any basis for the Court's representation that Congress believed this to be the case.

The Senate Report concluded that "military reasons...preclude *very large numbers* of women from serving." The Report went on to explain:

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

This discussion confirms the Report's conclusion that drafting *"very large numbers* of women" would hinder military flexibility. The discussion does not, however, address the different question whether drafting only a *limited* number of women would similarly impede military flexibility. The testimony on this issue at the congressional hearings was that drafting a limited number of women is quite compatible with the military's need for flexibility...

Similarly, there is no reason why induction of a limited number of female draftees should any more divide the military into "permanent combat" and "permanent support" groups than is presently the case with the All-Volunteer Armed Forces. The combat restrictions that would prevent a female draftee from serving in a combat or combat rotation position also apply to the 150,000-250,000 women volunteers in the Armed Services. If the presence of increasing but controlled numbers of

female volunteers has not unacceptably "divided the military into two groups," it is difficult to see how the induction of a similarly limited additional number of women could accomplish this result. In these circumstances, I cannot agree with the Court's attempt to "interpret" the Senate Report's conclusion that drafting *very large numbers* of women would impair military flexibility, as proof that Congress reached the entirely different conclusion that drafting a limited number of women would adversely affect military flexibility.

The Senate Report itself recognized that the "military flexibility" objective speaks only to the question whether "very large numbers" of women should be drafted. For the Report went on to state:

> "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The committee finds this a confused and ultimately unsatisfactory solution."

The Report found the proposal "confused" and "unsatisfactory" for two reasons.

> "First, the President's proposal to require registration of women does not include any change in section 5(a)(1) of the [MSSA], which requires that the draft be conducted impartially among those eligible. Administration witnesses admitted that the current language of the law probably precludes induction of women and men on any but a random basis, which should produce roughly equal numbers of men and women. "Second, it is conceivable that the courts, faced with a congressional decision to *register* men and women equally because of equity considerations, will find insufficient justification for then *inducting* only a token number of women into the Services in an emergency."

The Report thus assumed that if women are registered, any subsequent draft would require simultaneous induction of equal numbers of male and female conscripts. The Report concluded that such a draft would be unacceptable:

> "It would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need.
>
> "Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist."

Relying on these statements, the majority asserts that even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." In actual fact, the conclusion the Senate Report reached is significantly different from the one the Court seeks to attribute to it.

The specific finding by the Senate Report was that "if the law required women to be drafted *in equal*

numbers with men, mobilization would be severely impaired because of strains on training facilities and administrative systems." There was, however, no suggestion at the congressional hearings that simultaneous induction of *equal numbers* of males and female conscripts was either necessary or desirable. The Defense Department recommended that women be included in registration and draft plans, with the number of female draftees and the timing of their induction to be determined by the military's personnel requirements. In endorsing this plan, the Department gave no indication that such a draft would place any strains on training and administrative facilities. Moreover, the Director of the Selective Service System testified that a registration and induction process including both males and females would present no administrative problems.

The Senate Report simply failed to consider the possibility that a limited number of women could be drafted because of its conclusion that §5(a)(1) of the MSSA does not authorize drafting different numbers of men and women and its speculation on judicial reaction to a decision to register women. But since Congress was free to amend §5(a)(1), and indeed would have to undertake new legislation to authorize any draft, the matter cannot end there. Furthermore, the Senate Report's speculation that a statute authorizing differential induction of male and female draftees would be vulnerable to constitutional challenge is unfounded. The unchallenged restrictions on the assignment of women to combat, the need to preserve military flexibility, and the other factors discussed in the Senate Report provide more than ample grounds for concluding that the discriminatory means employed by such a statute would be substantially related to the achievement of important governmental objectives. Since Congress could have amended §5(a)(1) to authorize differential induction of men and women based on the military's personnel requirements, the Senate Report's discussion about "added burdens" that would result from drafting equal numbers of male and female draftees provides no basis for concluding that the total exclusion of women from registration and draft plans is substantially related to the achievement of important governmental objectives.

In sum, neither the Senate Report itself nor the testimony presented at the congressional hearings provides any support for the conclusion the Court seeks to attribute to the Report -- that drafting a limited number of women, with the number and the timing of their induction and training determined by the military's personnel requirements, would burden training and administrative facilities.

...The most I am able to say of the Report is that it demonstrates that drafting *very large numbers* of women would frustrate the achievement of a number of important governmental objectives that relate to the ultimate goal of maintaining "an adequate armed strength...to insure the security of this Nation." Or to put it another way, the Senate Report establishes that induction of a large number of men but only a limited number of women, as determined by the military's personnel requirements, would be substantially related to important governmental interests. But the discussion and findings in the Senate Report do not enable the Government to carry its burden of demonstrating that *completely* excluding women from the draft by excluding them from registration substantially furthers important governmental objectives.

In concluding that the Government has carried its burden in this case, the Court adopts "an appropriately deferential examination of Congress' evaluation of [the] evidence." The majority then

proceeds to supplement Congress' actual findings with those the Court apparently believes Congress could (and should) have made. Beyond that, the Court substitutes hollow shibboleths about "deference to legislative decisions" for constitutional analysis. It is as if the majority has lost sight of the fact that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution. For the Constitution is the supreme law of the land, and *all* legislation must conform to the principles it lays down. As the Court has pointed out, "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." *United States v. Robel.*

Furthermore, "when it appears that an Act of Congress conflicts with a constitutional provision, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop v. Dulles (1958)* (plurality opinion). In some 106 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. I believe the same is true of this statute...I would affirm the judgment of the District Court.