Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?

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In 1971, a group of men challenged the constitutionality of the Military Selective Service Act ("MSSA") on Fifth Amendment due process grounds for subjecting males, but not females, to draft registration. A three-judge district court panel found that the MSSA was unconstitutional. In 1981, the Supreme Court held on appeal that the MSSA did not violate the Fifth Amendment to the Constitution. The Court noted that the purpose of the MSSA was to register potentially combat-ready troops. Since women were excluded from combat, the Court reasoned that they were not similarly situated to men, and therefore, no equal protection


The Third Circuit vacated the district court's ruling dismissing the issue of equal protection as "nonjusticiable," remanding the case to a three-judge district court panel for determination of whether the plaintiffs had "standing." Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973). "Standing" concerns whether the party has a legally sufficient interest to sustain a case. BLACK'S LAW DICTIONARY 1405 (6th ed. 1990). "Justiciable" describes matters that are within a court's proper jurisdiction. Id. at 865. On remand, the panel determined that the plaintiffs had standing to bring the suit. Rowland v. Tarr, 378 F. Supp. 766, 768 (E.D. Pa. 1974).


2. Goldberg, 509 F. Supp. at 605. The panel concluded that "the complete exclusion of women from the pool of registrants does not serve 'important governmental objectives' (citation omitted) and is not 'substantially related' (citation omitted), to any alleged government interest." Id. The court decided that the "important government interest test" was applicable in this case because the case involved a gender classification. Id. at 593.

3. Rostker v. Goldberg, 453 U.S. 57 (1981). The Director of the Selective Service, Bernard Rostker, appealed the district court's decision. Id. at 64. At this time, Justice Brennan, sitting as a Third Circuit judge, stayed the order issued by the district court to stop registration. Rostker, 448 U.S. at 1311.

4. Rostker, 453 U.S. at 77. The Supreme Court's reliance on the legislative history of the MSSA in arriving at this conclusion is discussed later in this comment.
The roles that women play in the military, particularly in combat, have changed substantially since the Supreme Court's decision in 1981. In addition, statutes and policies excluding women from combat, upon which the Court relied in *Rostker*, have been repealed or changed. Given these changes, women are now more similarly situated to men for purposes of the draft than they were in 1981. This comment explores the changes in the status of women in the military, specifically in regard to combat, and how these changes may affect the Supreme Court's analysis of the constitutionality of the MSSA today.

This comment does not challenge the correctness of the existing combat exclusion, but analyzes whether the MSSA now violates due process, in light of the intervening statutory and policy changes. It is entirely possible that a present day challenge to the MSSA would succeed on equal protection grounds.

**BACKGROUND**

*The Military Selective Service Act*

The MSSA was originally enacted on June 24, 1948. With minor exceptions, the Act today is very similar to the 1948 version. This Act requires every male citizen and male resident of the United States, between the ages of eighteen and twenty-six, to register for the draft at a time and place prescribed by the President. The Selective Service System was originally designed to provide the

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5. *Id.* The Supreme Court looked to statutory and policy reasons for combat exclusion. *Id.* at 71-77. These reasons are discussed subsequently.


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

*Id.*
Department of Defense with a list of potential male combatants. In 1975, President Gerald R. Ford suspended registration procedures under the MSSA until new procedures could be adopted. President Jimmy Carter reinitiated registration in 1980, under the Military Selective Service Act. In doing so, President Carter requested that Congress provide funding for the registration of both males and females. Congress, however, declined to authorize funds to register females, allocating funds exclusively for the registration of males.

Congress' decision revived the gender discrimination case of Rowland v. Tarr, that had been languishing in the federal system since 1971. Today, the MSSA still excludes women from

11. LT. GEN. LEWIS B. HERSHEY, THE DRAFT: A HANDBOOK OF FACTS AND ALTERNATIVES; CHAPTER 1: A FACT PAPER ON SELECTIVE SERVICE, at 3, 4 (Sol Tax ed., Univ. of Chic. Press 1967). General Hershey was the Director of the Selective Service System at the time this handbook was written. Id. He contends that the Selective Service System should be distinguished from the "draft." Id. at 4. Although the Selective Service System provides the Department of Defense with a list of potential soldiers, the Department of Defense, with few exceptions, determines which registrants are chosen to serve in, or are drafted into, the armed forces. Id.


15. Id. Congress' decision to provide for the registration of males only was the result of numerous hearings and debates. Id. at 72-73. Supporters of female registration included the President, certain representatives of the Department of Defense and the Director of the Selective Service. Goldberg, 509 F. Supp. at 604.


17. Rostker, 453 U.S. at 61. In 1971, one male registered with the selective service and three others not yet registered sought declaratory and injunctive relief from the United States District Court for the Eastern District of Pennsylvania. Rowland, 341 F. Supp. at 340. The plaintiffs contended that the MSSA was unconstitutional because it violated equal protection by not treating men and women the same in regard to registration. Goldberg, 480 F.2d at 547. A single district court judge dismissed the case as nonjusticiable. Rowland, 341 F. Supp. at 341. The judge held that issues concerning Congress' constitutional power to raise and support armies present political questions that, because of the separation of powers doctrine, are beyond judicial review. Id.

On appeal, the United States Court of Appeals for the Third Circuit vacated the judgment, remanding the case for consideration of the equal protection claim alone. Rowland, 480 F.2d at 547. The court of appeals stated that a three-judge district court panel is necessary when "there is a challenge to the constitutionality of a federal statute." Id. at 546. If the three-judge panel determines that the plaintiff has standing, then the court may be requested to hear the matter en banc. Id. at 547.

On remand, a three-judge panel held that the plaintiffs had standing to challenge the
registration, despite the many changes in the attitudes and roles of women in the military. This comment addresses whether the Supreme Court would hold the MSSA constitutional if faced with the issue today.

**Gender Discrimination**

Whether the present MSSA is unconstitutional, as a violation of the Fifth Amendment, must be considered in light of the Supreme Court's treatment of a number of landmark gender discrimination cases. The Fourteenth Amendment to the United States Constitution prohibits any State from denying "any person within its jurisdiction the equal protection of the laws." The Fifth Amendment, applicable to the federal government, contains no such equal protection clause. The Supreme Court, however, has found equal protection implicit in the due process clause of the Fifth Amendment. Equal Protection does not require all persons, but only those persons similarly situated, to be treated the same. When the government treats one class of people differently than another, the classification is subject to review under the Equal Protection Clause. For example, in *Reed v. Reed*, an Idaho statute was challenged on equal protection grounds for preferring administration of a decedent's estate by a male, rather than a female. The Supreme Court held that the gender classification was unconstitutional, despite the many changes in the attitudes and roles of women in the military. This comment addresses whether the Supreme Court would hold the MSSA constitutional if faced with the issue today.

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MSSA. *Rowland*, 378 F. Supp. at 768. The court also denied the defendants' motion to dismiss. *Id.* at 772. This case did not resurface again until 1979, when a clerk of courts sought to dismiss the inactive case. *Goldberg*, 510 F. Supp. at 294 & n.9. The defendants subsequently moved for judgment on the pleadings and a protective order precluding further discovery by the plaintiffs. *Id.* at 294. The court treated the motion as a request for summary judgment, denying the motion because it found the record incomplete. *Id.* at 297.

In 1980, a three-judge district court panel considered the case on the merits, holding that the MSSA was unconstitutional and granting declaratory and injunctive relief to the plaintiffs. *Goldberg*, 509 F. Supp. at 605. In 1981, the United States Supreme Court stayed enforcement of the district court's judgment. *Rostker*, 448 U.S. at 1311. Finally, in 1981, the Supreme Court reviewed the case, holding the MSSA constitutional. *Rostker*, 453 U.S. at 83.


19. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In *Bolling*, black children were segregated from other students in the District of Columbia school system. *Id.* at 498. The minors claimed that this segregation violated their rights to due process of law. *Id.* The district court dismissed the complaint. *Id.* The plaintiffs appealed, but before the court of appeals ruled on the matter, the Supreme Court granted certiorari. *Id.*

20. *Id.* at 499. The *Bolling* Court recognized that "equal protection of the laws" is more defined than "due process of law" and that the two "are [not] always interchangeable phrases." *Id.*


23. *Id.* at 71. The statute, in pertinent part, provided:
unconstitutional because it was unrelated to the state's objective of avoiding conflict between those seeking to administer an estate. 24

The Supreme Court has adopted various standards for testing whether a classification violates equal protection. 25 For classifications based on gender to survive an equal protection challenge, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." 26

This standard was first enunciated in Craig v. Boren. 27 The plaintiffs, in Craig, challenged an Oklahoma law prohibiting the sale of 3.2% beer to males under the age of twenty-one, but allowing the sale to females over the age of eighteen. 28 The Craig Court considered whether this gender classification was a violation of equal protection of the laws. 29 Presumably, the Oklahoma statute was designed to ensure "public health and safety." 30 Without
discussion or suggestion by Oklahoma, the Supreme Court accepted this as an important governmental objective.\textsuperscript{31} The Court found, however, that the statute was not substantially related to ensuring the public health and safety.\textsuperscript{32} Oklahoma presented the Court with "statistical surveys" indicating that males between the ages of eighteen and twenty were arrested more often for alcohol-related offenses, were involved in more injurious and fatal car accidents, and were more likely to drink and drive, than females.\textsuperscript{33} Nevertheless, the Supreme Court held that the statistics were insufficient to establish a substantial relationship between the classification and ensuring public health and safety.\textsuperscript{34} The statute was, therefore, struck down as unconstitutional on equal protection grounds.\textsuperscript{35}

In 1977, the Supreme Court upheld a Social Security Act provision challenged on equal protection grounds.\textsuperscript{36} The Act allowed a woman to subtract three of her lowest wage-earning years from a calculation used to determine Social Security benefits.\textsuperscript{37} As a result of this calculation, a woman received higher benefits than a man with a similar wage-earning history.\textsuperscript{38} The Court held that the stated objective of compensating female

that the legislature had expressed no clear intent or objective. \textit{Id.}

31. \textit{Craig}, 429 U.S. at 199.
32. \textit{Id.} at 200.
33. \textit{Id.} at 200-01.
34. \textit{Id.} at 201. The Court reasoned that "proving broad propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." \textit{Id.} at 204.
35. \textit{Id.} at 210.

(1) . . . [A]n individual's 'average monthly wage' shall be the quotient obtained by dividing:

(A) the total of his wages paid in and self-employment income credited to his 'benefit computation years' . . . , by
(B) the number of months in such years.

(2)(A) The number of an individual's 'benefit computation years' shall be equal to the number of elapsed years . . . reduced by five . . .
(3) . . . the number of an individual's elapsed years is the number of calendar years after 1950 . . . and before

(a) in the case of a woman, the year in which she died or, if it occurred earlier but after 1960, the year in which she attained age 62 . . .
(c) in the case of a man who has not died, the year occurring after 1960, in which he attained (or would attain) age 65.

37. \textit{Id.} at 315-16.
38. \textit{Id.}
wage-earners for past wage discrimination was an "important governmental objective" because the statute was designed to remedy past discrimination.39 Since the classification was not based on "archaic and overbroad generalizations about women, or of the role-typing society has long imposed upon women," the Court accepted the classification as a means of remedying the past discrimination.40 The Court also held that the classification was substantially related to the government's objective, and therefore, the statute was constitutional.41

In 1981, the Supreme Court reviewed the constitutionality of a criminal statute holding men, but not women, criminally liable for "unlawful sexual intercourse."42 The Court found that the state has an important interest in preventing teenage pregnancies, and thus, may accommodate women for this "special problem."43 The statute was also found to be substantially related to this interest because it deterred activity resulting in teenage pregnancy.44 Since the state had an important interest, and the statute was substantially related to the achievement of that interest, the Supreme Court upheld the statute as constitutional.45

In 1982, in Mississippi University for Women v. Hogan,46 the Supreme Court struck down a policy excluding men from nursing

39. Id. at 317-18. The Court reasoned that "the mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Id. at 317. The Court cited Schlesinger v. Ballard, 419 U.S. 498 (1975), in support of this proposition. Id. In Schlesinger, the Court upheld a federal statute that required male naval officers to be discharged after nine years without promotion. Schlesinger, 419 U.S. at 513-14. Female officers, in contrast, were discharged after thirteen years without promotion. Id. The Court found that male and female naval officers were not similarly situated because of differences in career opportunities, and therefore, were not constitutionally subject to the same standard. Id. at 508.

40. Webster, 430 U.S. at 317. The Court also ruled that Congress' amendment of the statute in 1972, that treated men and women identically in the application of the benefit calculation, did not indicate that Congress had unconstitutionally discriminated against men when it originally enacted the statute. Id. at 320.

41. Id. at 318.

42. Michael M., 450 U.S. at 464. The California statute defined "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Id. at 466.

43. Id. at 469-70. The Court, in Michael M., concluded that "inquiries into [Congressional motives or purposes are a hazardous matter." Id. Further, the Court held that it would accept a state's given reason for the classification if it could reasonably be construed as satisfying a valid purpose. Id.

44. Id. at 473. The Court also noted that since females were the ones ultimately harmed by teenage pregnancy, it was within the legislature's discretion to exclude them from liability under the statute. Id.

45. Id. at 475.

school because of their gender. The Court again applied an intermediate scrutiny test to the gender classification. Mississippi cited past educational discrimination against women as a reason for excluding men. The Court cautioned that remedial measures for past discrimination are sufficient justification for present discrimination only if the benefitted class actually suffered past discrimination. Mississippi, however, failed to show that women in nursing had been discriminated against in the past. Therefore, Mississippi failed to establish an important government interest. The Court also found that the classification was not substantially related to remedying past discrimination against women. Because the policy of excluding men failed to pass intermediate scrutiny, the statute was struck down as unconstitutional on equal protection grounds.

Finally, in United States v. Virginia, the Supreme Court held that Virginia's policy of excluding women from the Virginia Military Institute ("VMI") was unconstitutional because it violated equal protection. The Supreme Court again employed the intermediate scrutiny test. The Court, however, used the term "exceedingly

47. Mississippi Univ. for Women, 458 U.S. at 733. Joe Hogan, notwithstanding his gender, qualified for, but was refused, admission to the four-year baccalaureate program in nursing at the Mississippi University for Women ("MUW"). Id. at 720-21.
48. Id. at 724.
49. Id. at 727. The Supreme Court noted that the state, in its reply brief, discarded its argument that the school was created expressly to offer women an educational opportunity not provided to men. Id. at 727 n.13.
50. Id. at 728.
51. Id. at 729.
52. Mississippi Univ. For Women, 458 U.S. at 729. The Court concluded that Mississippi's policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." Id.
53. Id. at 730. The Supreme Court stated that MUW's acceptance of men who wanted to audit classes was not consistent with MUW's purported interest of compensating women for past discrimination. Id.
54. Id. at 731.
56. Virginia, 116 S. Ct. at 2269. The Supreme Court also held that the creation of the Virginia Women's Institute for Leadership ("VWIL"), an exclusively female college, did not remedy any equal protection violation caused by maintaining VMI as an exclusively male college. Id. at 2286. The Court stated that VWIL was not "comparable" to VMI for numerous reasons, and therefore, did not remedy the equal protection violation associated with the exclusion of women from VMI. Id. at 2285-86. Furthermore, VWIL did not offer: the military training and experience that VMI offered, the same courses as VMI, the same athletic program or facilities as VMI, nor the same advantages and prestige inherent in a VMI degree. Id. at 2285-86.
57. Id. at 2271, 2275. The Court reasoned that "the justification must be genuine, not hypothesized or invented post hoc in response to litigation. The justification offered must not
persuasive justification" interchangeably with the term "important
government interest." Virginia asserted that its exclusion of
women was motivated by its interest in furthering the "important
educational benefits" and diversity of an all male school. In
support of the gender classification, Virginia argued that if the
school were forced to admit women, the very character of the
school would have to change. The Court disagreed that VMI's
classification was intended to achieve diversity, because VMI was
not created to offer equal opportunities for men and women, and
Virginia had only recently admitted women to other higher
educational institutions. The Court also disagreed that the
character of VMI would change if women were admitted because
some women would be able to meet the rigorous requirements of
the school. The Court cautioned that the State "may not exclude
qualified individuals based on 'fixed notions concerning the roles
and abilities of males and females.'" For these reasons, VMI's
exclusion of women was not related to VMI's asserted interest, and
therefore, the exclusion of women by VMI violated equal protection
of law.

Rostker v. Goldberg

By applying the intermediate scrutiny test in *Rostker v. Goldberg*, the Supreme Court determined that the MSSA was
constitutional on equal protection grounds. The Court recognized
that Congress had an "important governmental interest" "in raising

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rely on overbroad generalizations about the different talents, capacities, or preferences of
males and females." *Id.*

58. *Id.*
59. *Id.* at 2276.
60. *Id.*
61. *Virginia*, 116 S. Ct. at 2276-78. Virginia defined "diversity" as offering different
educational experiences to the public within the state of Virginia. *Id.* at 2277. The Court
found that diversity may be a public concern, but that Virginia failed to show that VMI was
created with this purpose in mind. *Id.* Instead, the Court found that VMI was created in the
tradition of the University of Virginia, excluding women from its inception because Virginians
did not support higher education for women. *Id.* at 2277-78.
62. *Id.* at 2279. In support of this assertion, the Court noted that women have
succeeded at the federal military academies as well as in the military. *Id.* at 2281.
63. *Id.* at 2280 (citation omitted). The Court also found that testimony in the district
court revealed that there were women who wanted to attend VMI and who were physically
capable of meeting all standards required of male cadets. *Id.* at 2279.
64. *Id.* at 2282.
and supporting armies." In this area Congress enjoys "broad constitutional powers" to carry out these functions. The Supreme Court noted that it must give a heightened deference to Congressional decisions made pursuant to this enumerated power. In addition, the Court commented that the judiciary is not competent to make judgments regarding military affairs, but Congress, nevertheless, does not have unlimited power. Congress must act consistently with the Due Process Clause of the Constitution in exercising its power.

67. Id. at 70. Congress' power to raise, support, and regulate armies stems from specifically enumerated powers in the United States Constitution. U.S. Const. art. I, § 8, cls. 12-14. Section 8 provides, in part: "The Congress shall have Power . . . [t]o raise and support Armies . . . [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces." Id.

68. Rostker, 453 U.S. at 65.

69. Id. at 64, 65. There is a "customary deference" given to acts of Congress because the legislative branch of government is the equal of the judicial branch. Id. at 64. The Supreme Court concluded that the exercise of Congress' constitutionally-enumerated military power deserved more than the "customary deference" afforded ordinary acts of Congress. Id. at 64, 65.

70. Id. at 65-67.

71. Id. The Court cautioned that it must not "substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." Id. at 68. The Court also commented that it is not constitutionally authorized to decide whether Congress made the right choice, but only if that choice violates an individual's right to equal protection. Id. at 69.

The Supreme Court has upheld several legislative decisions regarding the military. In Parker v. Levy, the Supreme Court upheld the constitutionality of the Uniform Code of Military Justice ("UCMJ"). Parker v. Levy, 417 U.S. 733 (1974). The Court noted that Congress has "greater breadth and . . . greater flexibility when the statute governs military society. . . ." Id., at 756. In Greer v. Spock, the Supreme Court upheld an Army regulation that prohibited "speeches and demonstrations of a partisan political nature" on Army installations. Greer v. Spock, 424 U.S. 828, 831 (1976). The Court noted that it was the "business of a military installation . . . to train soldiers not to provide a public forum." Id. at 837. See also Middendorf v. Henry, 425 U.S. 25 (1976) (soldiers under summary court-martial not entitled to Fifth Amendment due process); Brown v. Glines, 444 U.S. 348 (1980) (Air Force regulation prohibiting distribution of petitions on post did not violate the First Amendment).

The Supreme Court has reviewed, and occasionally struck down, military-related law. For example, in Frontiero v. Richardson, the Supreme Court invalidated a federal statute concerning military benefits. Frontiero v. Richardson, 411 U.S. 677 (1973). The statute permitted a male service member to declare that his wife was his dependent for benefit purposes, even if she was not actually financially dependent on him. Id. at 678. A female service member, on the other hand, was required to prove that her husband was financially dependent upon her in order to gain the same benefits. Id. The Supreme Court determined that the only basis for the classification was gender. Id. As a result of this determination, examination of the statute under a heightened standard of scrutiny was in order. Id. at 688. The Court found that the Government's reason for different treatment ("administrative convenience"), was unsupported by the facts. Id. at 688-89. The Court decided that men and women service members with spouses were "similarly situated." Id. at 690-91. Therefore, the
Following its determination that the Congressional objectives were important, the Rostker Court explored whether the MSSA was substantially related to achieving the goal of raising and maintaining the nation's armed forces. In holding that there was a substantial relationship, the Court focused specifically on whether males and females were similarly situated with respect to the draft. The Court began its examination with the draft because the legislative history of the MSSA indicated that the purpose of registration was to provide the Department of Defense with a list of potential combat troops in the event of a draft. In support of this purpose, the Supreme Court cited Congress' reliance on combat exclusions when determining whether women should be registered under the MSSA. Women, by statute, were forbidden to serve on Navy ships and Air Force planes involved in combat. The Army and Marine Corps also maintained policies that excluded women from participating in combat. In view of these combat restrictions, the Court held that women were "not similarly situated for purposes of a draft or registration for a draft." Since women were not similarly situated, there was no justification for treating them the same under the MSSA. Therefore, the gender classification did not violate equal protection under the Due Process Clause of the Fifth Amendment.

ANALYSIS

Changes Since Rostker

Since the Supreme Court's decision in 1981, upholding the constitutionality of the MSSA, there have been substantial changes

difference in treatment was discriminatory and violated due process. Id. at 690-91. See also supra note 39, at 498.
72. Rostker, 453 U.S. at 79.
73. Id. at 78.
74. Id. at 75. The Supreme Court reviewed congressional hearings and debates when making this determination. Id. at 76.
75. Id. at 77, 78 (citation omitted).
76. Id. at 77. Section 6015 of Title 10, United States Code, provides: "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U.S.C.A. § 6015 (1959) (repealed 1993). Section 8549 of Title 10 provides: "[f]emale members of the Air Force . . . may not be assigned to duty in aircraft engaged in combat missions." 10 U.S.C.A. § 8549 (1959) (repealed 1991).
77. Rostker, 453 U.S. at 76.
78. Id. at 78.
79. Id. at 79.
80. Id. at 78, 79.
in the roles played by women in the military. In addition, statutes and policies excluding women from combat, upon which the Supreme Court relied in 1981, have been repealed and changed. In light of these changes, the MSSA would probably not survive a gender discrimination challenge today.

Intermediate scrutiny is still employed as the standard of review for gender discrimination cases. The outcome of applying the first part of the test (that the classification serves an important governmental interest) would remain the same as in Rostker. Congress still has a constitutionally enumerated power to raise and support armies. The gender classification constructed by the MSSA would, therefore, serve the important governmental interest of raising and supporting armies under the United States Constitution.

The second prong of the intermediate scrutiny test (that the classification must be substantially related to an important governmental interest) would probably be decided differently today than in 1981. The circumstances under which the MSSA was found to be substantially related to raising and supporting armies in 1981 have changed significantly. The changes have made women more similarly situated to men than they were in 1981. Therefore, women are entitled to be treated the same as men, with respect to the MSSA. Consequently, the gender classification in the MSSA is no longer substantially related to raising and supporting armies.

Since 1981, statutes and policies regarding women in combat have been repealed or changed. In 1991, Congress repealed a statute forbidding women from serving as combat pilots in the Air Force and Navy. In 1993, a statute restricting women from serving on Navy ships involved in combat was repealed. In 1994, Secretary of Defense, Les Aspin, succeeded in having the "risk rule" replaced by the "Direct Ground Combat Rule" ("DGC Rule").

81. Morris, supra note 6, at 734.
82. See supra note 7.
83. Virginia, 116 S. Ct. at 2275.
86. Morris, supra note 6, at 735.
87. Id. The "risk rule" forbade women from participating in any noncombat position if the likelihood of being exposed to "direct combat, hostile fire, or capture equaled or exceeded those risks in the combat units they supported." Id. at 734. The "Direct Ground Combat" rule is narrower than the risk rule and forbids women from participating in positions of "direct combat on the ground" which is defined as "engaging an
Thus, women are currently eligible for more than 99% of Air Force positions. As a result of the implementation of the DGC Rule and the repeal of restrictive statutes, more than 94% of Navy occupational specialties are open to women today. In the Marine Corps, 62% of all positions are open to women, an increase from 33% in 1994. Finally, the Army has increased the percentage of positions open to women from 61% in 1994 to 67% today. These increases indicate that today, unlike in 1981, women can participate in combat duties such as flying combat jets or attack helicopters. Furthermore, unlike in 1981, women are now eligible to serve on combat ships.

Although there are still combat restrictions for women under the DGC Rule, the positions open to women, including combat positions, have increased significantly. Women have become an integral part of the Armed Forces, and are now eligible to work in 80% of the jobs in the military, including combat postings.

In 1981, women were excluded all together from combat. Today, women are eligible for some combat positions. In 1981, Congress' most important reason for excluding women from the MSSA was the fact that women were excluded from combat. Today, the basis for Congress' decision lacks the force that it had in 1981.

Also in 1981, Congress determined that volunteers could fill any need for women in time of draft, so there was no need to register and draft women. Today, the number of women in the military, as well as the positions available to them, has increased. As a result, more women would be needed during a draft for military positions, including combat positions. Due to these changes, the exclusion of women from registration under the MSSA is no longer substantially

enemy on the ground . . . while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel." Id. at 735.

88. Id. at 736.
89. Id.
90. Id. at 737.
91. Morris, supra note 6, at 737.
93. Morris, supra, note 6, at 734.
94. Id.
95. Id.
96. Rostker, 453 U.S. at 77.
97. Morris, supra note 6, at 734-35.
98. Rostker, 453 U.S. at 78.
99. Id. at 81. See id. at 112 (Marshall, J., dissenting). Justice Marshall was joined in dissent by Justice Brennan. The dissent argued that drafting women in numbers equal to the military's need would pass constitutional muster. Id.
related to the important governmental interest of raising and supporting armies. As a result, the MSSA would most likely fail the intermediate scrutiny test and be held unconstitutional as a violation of the due process clause of the Fifth Amendment.

CONCLUSION

The Supreme Court has not reexamined the constitutionality of the MSSA since 1981. In the intervening years, Congress and the military have amended the statutes and policies relied upon by the Court in formulating its earlier decision. Women are now more similarly situated to men than they were in 1981 in regard to combat. The Supreme Court has acknowledged that "[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."\footnote{100} The Court has also stated that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."\footnote{101} With all this in mind, the next time the MSSA is challenged on equal protection grounds, the challenger may well succeed.

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\footnote{100}{Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966).}
\footnote{101}{Id.}