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Overruling Rostker v. Goldberg: Toward an Equal Obligation to Register for Selective Service

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OVERRULING *ROSTKER V. GOLDBERG*: TOWARD AN EQUAL OBLIGATION TO REGISTER FOR SELECTIVE SERVICE

Tom James, J.D.

In 1981, in *Rostker v. Goldberg*, the United States Supreme Court held that male-only Selective Service registration requirements do not violate equal protection rights.[1] The decision was issued just as the Court was beginning to develop its gender discrimination jurisprudence. Since then, three significant changes have occurred: (1) statutory and regulatory prohibitions against women serving in combat positions have been lifted; (2) military needs have changed; and (3) the Court has clarified how the heightened scrutiny standard is to be applied in cases challenging gender-based classifications. These developments significantly undermine the foundations underpinning the decision to uphold the constitutionality of male-only Selective Service registration requirements. The time has come to overrule *Rostker*.

Conscription, the mandatory enrollment in a country's armed forces, is a practice that has been around for thousands of years, dating back at least to ancient Babylonia.[2] The first mass conscription, applicable to all unmarried, able-bodied, young men occurred in 1793 during the French Revolution.[3] A draft was established in the United States during the Civil War.[4] Male citizens between the ages of twenty and forty-five were subject to it.[5] Conscription was instituted again in 1917 in preparation for World War I, but this time the legislation providing for it required "Selective Service" registration rather than direct enrollment in the armed forces.[6] Earlier conscription laws had enrolled all eligible men. The Selective Service Draft Act of 1917 required

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[1] Rostker v. Goldberg, 453 U.S. 57 (1981).
[2] *The Draft*, HISTORY.COM, https://www.history.com/topics/us-government/conscription (Jan. 24, 2020).
[3] *Id.*
[4] Act for Enrolling and Calling Out the National Forces, and for Other Purposes (Enrollment Act), ch. 75, 12 Stat. 731 (1863).
[5] *Id.*
[6] Selective Service Draft Act of 1917, ch. 15, § 4, 40 Stat. 78–80.

men to register their personal information, leaving it to the government to "select individuals from a pool of registrants" to call up for military induction while leaving others to perform what were considered vital civilian roles.[7] All subsequent Selective Service enactments have followed that model, requiring all men within a specified age range (typically eighteen to twenty-six) to register but to report for actual military duty only if called.[8]

Draft registration was suspended in 1975.[9] It was reinstated in 1980 and has remained in force ever since.[10]

Under the current Military Selective Service Act ("MSSA"), it is "the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration" for the Selective Service within thirty days of his eighteenth birthday or upon arrival in the United States.[11] To register, a man must provide his name, date of birth, address, and Social Security number.[12] Thereafter, he has a continuing obligation to notify the Selective Service System within ten days of any changes to the information provided, including a change of address, until he turns twenty-six years of age.[13] Failure to comply with the MSSA is punishable by up to five years in prison, a $250,000 fine, or both.[14] In addition, men who fail to register may be denied federal employment, federal student loans, and job training assistance.[15] They may also be denied

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[7] KRISTY N. KAMARCK, CONG. RSCH. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 3 (2020) (emphasis omitted).
[8] *See* Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100; Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604; Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885.
[9] KAMARCK, *supra* note 7, at 14.
[10] *Id.*
[11] 50 U.S.C. § 3802(a).
[12] 50 U.S.C. § 3802(b).
[13] 32 C.F.R. § 1621.1(a) (2016).
[14] 50 U.S.C. § 3811(a); 18 U.S.C. § 3571(b), (e).
[15] *See* 5 U.S.C. § 3328(a); 50 U.S.C. § 3811(f); 29 U.S.C. § 3249(h).

citizenship.[16]

States have piled on a host of other penalties. In some states, men who fail to register for Selective Service are not permitted to obtain or renew a driver's license.[17] Several states bar men from state financial aid, state employment, and/or enrollment in public colleges and universities.[18] Women do not face these burdens or penalties.[19] Both men and women may voluntarily enlist in the armed forces, but only men are required to register for possible compulsory induction.[20]

This Article argues that the male-only Selective Service registration requirement is unconstitutional and the Supreme Court decision upholding it needs to be overruled. Part I describes the cases that have challenged the constitutionality of Selective Service laws because they unconstitutionally discriminate on the basis of sex, beginning with *Rostker v. Goldberg.*[21] Part II argues that *Rostker*, which upheld the male-only Selective Service System,[22] should be overruled for two reasons: (1) it was based on a set of circumstances that no longer exists; and (2) it was wrongly decided in the first place. An explanation of why the policies underlying the doctrine of stare decisis support overruling *Rostker* is also provided.

I. CONSTITUTIONAL CHALLENGES TO ALL-MALE DRAFT REGISTRATION

Rostker v. Goldberg

In *Rostker v. Goldberg*, several men subject to the Selective Service registration requirement challenged the validity of the MSSA, arguing, *inter alia*, that it unlawfully

[16] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 245A(a)(4)(D), 100 Stat. 3359, 3395.
[17] *See State-Commonwealth Legislation*, SELECTIVE SERV. SYS., https://www.sss.gov/registration/state-common wealth-legislation (last visited May 9, 2021).
[18] *Id.*
[19] 50 U.S.C. § 3802(a).
[20] *See* Women's Armed Services Integration Act of 1948, ch. 449, 62 Stat. 356; 50 U.S.C. § 3802(a).
[21] 453 U.S. 57 (1981).
[22] *Id.* at 83.

discriminates against men on the basis of sex.[23] The Court upheld the Act.[24]

The rationale for the decision in *Rostker* was that the purpose of Selective Service registration was to ensure the availability of soldiers for combat.[25] Because women were not permitted to serve in combat positions,[26] there was no need to include them in the registration requirement.[27]

Three justices dissented.[28] Justice Marshall astutely observed that male-only Selective Service registration is "one of the most potent remaining public expressions of ancient canards about the proper role of women."[29] The principal thrust of Justice Marshall's dissent was that the majority had misapplied the standard of review that is used for scrutinizing gender-based classifications. Specifically, he contended that the majority had asked the wrong question. "The relevant inquiry," Marshall contended, "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."[30]

Schwartz v. Brodsky

In 2003, a group of Massachusetts students challenged the male-only registration requirement on Equal Protection grounds.[31] The district court dismissed the case because the two key factual underpinnings on which *Rostker* relied had not changed. The purpose of Selective

[23] *Id.* at 61 n.2.
[24] *Id.* at 83.
[25] *Id.* at 76.
[26] *Id.*
[27] *Id.* at 76–79, 81.
[28] Justice White filed a dissent in which Justice Brennan joined. *Id.* at 83 (White, J., dissenting). Justice Marshall filed a dissent, in which Justice Brennan also joined. *Id.* at 86 (Marshall, J. dissenting).
[29] *Id.* at 86 (Marshall, J., dissenting) (internal quotation marks omitted).
[30] *Id.* at 94.
[31] Schwartz v. Brodsky, 265 F. Supp. 2d 130 (D. Mass. 2003).

Service registration was still to facilitate a draft of combat troops, and women were still excluded from combat.[32]

Elgin v. United States

An Equal Protection challenge was asserted again in 2009 with the same result. The Massachusetts district court ruled that "there has not been a sufficient change in the material circumstances underpinning the Court's equal protection analysis in *Rostker* to justify relitigation of the issue at this time."[33]

National Coalition For Men v. Selective Service System

The National Coalition For Men ("NCFM") is a 501(c) nonprofit educational corporation that is "committed to ending harmful discrimination and stereotypes against boys, men, their families and the women who love them" and that "effects civil rights reform through advocacy, education, outreach, services and litigation."[34] It has members who are subject to the Selective Service registration requirements.[35]

On April 4, 2013, NCFM and individual plaintiff James Lesmeister filed a complaint against the Selective Service System and others alleging that the MSSA violates the Equal Protection rights of men.[36] Counsel for the Selective Service System argued, *inter alia*, that *Rostker* had already decided the constitutionality of male-only Selective Service registration, requiring women to register would decrease female enlistment, and registering women would be administratively inconvenient for the government.[37] The district court rejected all three

[32] *Id.* at 132–34.
[33] Elgin v. United States, 594 F. Supp. 2d 133, 136, 145–48 (D. Mass. 2009).
[34] *About Us*, NAT'L COAL. FOR MEN, https://ncfm.org/ncfm-home/ (last visited Mar. 28, 2021).
[35] Nat'l Coal. For Men v. Selective Serv. Sys., 355 F. Supp. 3d 568, 572 (S.D. Tex. 2019), *rev'd on other grounds* 969 F.3d 546 (5th Cir. 2020).
[36] *Id*.
[37] *Id.* at 575, 579–80.

arguments.[38] The court found *Rostker* to be factually distinguishable because "while historical restrictions on women in the military may have justified past discrimination, men and women are now 'similarly situated for purposes of a draft or registration for a draft.'"[39] Moreover, the court ruled, "[d]efendants have not carried the burden of showing that the male-only registration requirement continues to be substantially related to Congress's objective of raising and supporting armies."[40]

The Fifth Circuit Court of Appeals reversed, but solely on the basis that "only the Supreme Court may overrule its precedents."[41] On July 11, 2020, while awaiting the Fifth Circuit Court of Appeals decision, NCFM attorney Marc Angelucci was shot and killed at his home.[42] In January 2021, attorneys for the American Civil Liberties Union (ACLU) filed a petition for certiorari to the United States Supreme Court in his stead.[43]

II. WHY *ROSTKER* SHOULD BE OVERRULED

A. Women's Entry into Combat Positions

Rostker upheld the gender classification in the MSSA because of the combat restriction on women. For the Court, that meant that men and women were not similarly situated for purposes of a draft or draft registration.[44]

Restrictions against women in combat positions have been lifted since the time *Rostker* was decided. In the 1990s, Congress removed the prohibition against women on combat ships and

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[38] *Id.* at 579–81.
[39] *Id.* at 582.
[40] *Id.*
[41] Nat'l Coal. For Men v. Selective Serv. Sys., 969 F.3d 546, 550 (5th Cir. 2020), *petition for cert. filed* (U.S. Jan. 8, 2021) (No. 20-928).
[42] *NCFM Vice-President and Dear Friend Marc Angelucci Murdered*, NAT'L COAL. FOR MEN (Aug. 10, 2019), https://ncfm.org/2020/07/authors/steven-svoboda/ncfm-vice-president-and-dear-friend-marc-angelucci-murdered/.
[43] Petition for Writ of Certiorari at 38, Nat'l Coal. For Men v. Selective Serv. Sys. (U.S. Jan. 8, 2021) (No. 20-928).
[44] Rostker v. Goldberg, 453 U.S. 57, 78 (1981).

aircraft.[45] In 1994, the Department of Defense rescinded the prohibition against women serving in positions at risk of direct combat.[46] In 2012, the Department of Defense rescinded its "co-location policy," which had prohibited women from serving alongside "direct ground combat units."[47] In 2013, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff withdrew the categorical ban on women serving in direct ground combat roles "effective immediately."[48] In 2015, the Department of Defense announced that all military roles, units, and schools would be open to women with "no exception."[49] The Defense Secretary asserted that women "should have the opportunity to serve in any position."[50] In a press briefing, the Secretary acknowledged that the Department of Defense's previous standards were "either outdated or didn't reflect the tasks actually required in combat" given the "real-world operational requirements."[51] Women are now permitted to "drive tanks, fire mortars, and lead infantry soldiers into combat. They[] [are] able to serve as Army Rangers and Green Berets, Navy SEALS, Marine Corps infantry, Air Force parajumpers, and everything else that previously was open only to men."[52] The armed services'

[45] KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 27 (2019).

[46] Memorandum from the Sec'y of Def. to Sec'ys of the Army, Navy, Air Force; Chairman, Joint Chiefs of Staff; and Asst. Sec'ys of Def. 1 (Jan. 13, 1994), https://www.govexec.com/pdfs/031910d1.pdf. At that time, however, the Department retained the prohibition against women serving in units "whose primary mission is to engage in direct combat on the ground." *Id.*

[47] OFF. OF UNDER SEC'Y OF DEF., PERSONNEL & READINESS, DEP'T OF DEF., REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES ii (Feb. 2012), https://apps.dtic.mil/dtic/tr/fulltext/u2/a556468.pdf.

[48] Memorandum from Chairman of the Joint Chiefs of Staff, and Sec'y of Def., to Sec'ys of the Mil. Dept's Acting Under Sec'y of Def. for Personnel & Readiness, and Chiefs of the Mil. Servs. 1 (Jan. 24, 2013), https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf.

[49] Memorandum from Sec'y of Def., to Sec'ys of the Mil. Dep'ts Acting Under Sec'y of Def. for Personnel & Readiness, Chiefs of the Mil. Servs., and Commander, U.S. Special Operations Command 1 (Dec. 3, 2015), https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf.

[50] *Id.*

[51] Ash Carter, Sec'y of Def., Dep't of Def., Pentagon Press Briefing (Dec. 3, 2015), (transcript available at https://www.defense.gov/Newsroom/Speeches/Speech/Article/632495/remarks-on-the-women-in-service-review/).

[52] *Id.*

final implementation plan for the full integration of women was approved in 2016.[53]

Since restrictions have been lifted, nearly 3,000 women have served in combat positions.[54] Women have graduated from Army Ranger School,[55] the Navy Seal officer assessment and selection program,[56] and the Green Berets.[57]

In 2017, Congress established a commission to study and make recommendations about extending the registration requirement to women.[58] Both the Department of Defense and the appointed commission, the National Commission on Military, National, and Public Service ("the Commission") now agree that requiring both women and men to register will "promote fairness and equity" and further the government's interest in military readiness.[59] The Commission characterized this as a "necessary—and overdue—step"[60] that would "promote[] the national security of the United States by allowing the President to leverage the full range of talent and skills available during the national mobilization," "reaffirm[] the Nation's fundamental belief in a common defense, and signal[] that both men and women are valued for their contributions in defending the Nation."[61]

Now that women are eligible to serve and are serving in combat positions, men and women

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[53] Memorandum from Sec'y of Def. to Sec'ys of the Mil. Dept's, Under Sec'y of Def. for Personnel & Readiness, Chiefs of the Mil. Servs., and Commander, U.S. Special Operations Command (Mar. 9, 2016), https://www.hsdl.org/?view&did=791183.

[54] NAT'L COMM'N ON MIL., NAT'L & PUB. SERV., INSPIRED TO SERVE: THE FINAL REPORT 114 (2020), https://inspire2serve.gov/reports/final-report#expandRegistration [hereinafter INSPIRED TO SERVE].

[55] Ellen Haring, *Meet the Quiet Trailblazers*, ARMY TIMES (May 3, 2020), https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers/.

[56] Hope Hodge Seck, *The First Woman Has Made it Through SEAL Officer Screening*, MILITARY.COM (Dec. 11, 2019), https://www.military.com/daily-news/2019/12/11/first-woman-has-made-it-through-seal-officer-screening.html.

[57] Thomas Gibbons-Neff, *First Woman Joins Green Berets After Graduating From Special Forces Training*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/09/us/politics/woman-green-berets-army.html.

[58] *See* Nat'l Def. Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 555(c)(2)(A), 130 Stat. 2000, 2135 (2016).

[59] OFF. OF THE UNDER SEC'Y OF DEF. FOR PERSONNEL & READINESS, DEP'T OF DEF., REPORT ON THE PURPOSE AND UTILITY OF A REGISTRATION SYSTEM FOR MILITARY SELECTIVE SERVICE 17–19 (Mar. 2017), https://hasbrouck.org/draft/FOIA/DOD-report-17MAR2017.pdf [hereinafter 2017 REPORT].

[60] INSPIRED TO SERVE, *supra* note 54, at 122.

[61] *Id.* at 115.

are similarly situated for purposes of registration. The need to replenish the supply of combat troops through conscription is no longer available as a justification for requiring only men to register for a draft. Other concerns cited in *Rostker*, such as that "training would be needlessly burdened by women recruits who could not be used in combat" and that "divid[ing] the military into two groups—one in permanent combat and one in permanent support"—would impede flexibility,[62] assumed that women do not serve in combat roles. That assumption is no longer true.

B. Changed Military Needs

Military needs and the government's acknowledgement of women's equal ability to fill them have also changed. "[N]early 80 percent of today's military positions are classified as noncombat" and "the very notion of a front line is outdated."[63] A "draft in support of today's modern military is likely to require [support services,] intelligence and communication specialists, linguists, logisticians, medical personnel, and drone or cyber operators."[64] In view of the increasingly diverse needs of the modern military, the Department of Defense has said that "[i]t would appear imprudent to exclude approximately 50% of the population—the female half—from availability for the draft in the case of a national emergency."[65] The Department of Defense now acknowledges that requiring women to register would "enhance the ability of the [Selective Service System] to provide manpower" in "accordance with its force needs."[66] In fact, it is now the position of the Department of Defense that requiring only men to register actually *undermines* military readiness and national security.[67]

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[62] Rostker v. Goldberg, 453 U.S. 57, 81–82 (1981) (quoting S. REP. NO. 96-226, at 9 (1979); S. REP. NO. 96-826 at 158 (1980)).
[63] INSPIRED TO SERVE, *supra* note 54, at 116.
[64] *Id.*
[65] 2017 REPORT, *supra* note 59, at 17.
[66] *Id.* at 17–18.
[67] *See* INSPIRED TO SERVE, *supra* note 54, at 116; 2017 REPORT, *supra* note 59, at 17–19.

C. Rostker Was Wrongly Decided

Rostker should be overruled because it was erroneous at the time it was decided.

1. The Need for Women in the Military in 1981

Military needs have changed since 1981 when *Rostker* was decided, but it was not even true at that time that women were not needed in the military. The majority opinion in *Rostker* gave short shrift to the important functions women performed. At the time the case was decided, 150,000 women were on active duty and the number was expected to nearly double in the next five years to come.[68] 350,000 women served in World War II.[69] Many served as nurses or in a similar capacity. At one point, President Roosevelt had even called for a draft of women, believing the need for nurses to care for wounded soldiers was "too pressing to await the outcome of further efforts at recruiting."[70] Congress had "repeatedly praised the performance of female members of the Armed Forces" and "approved efforts by the Armed Services to expand their role."[71] During Senate hearings in 1980, representatives of the Department of Defense and the Armed Services testified that the participation of women in the armed forces contributed substantially to military effectiveness.[72] President Carter stated that women "perform well in skills and jobs needed by the military" and that subjecting women to registration would enable the military to meet wartime personnel requirements.[73]

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[68] *See Department of Defense Authorization for Appropriations for Fiscal Year 1981*: *Hearings on S. 2294 before the S. Comm. on Armed Servs.*, 96th Cong., 2d Sess. 116 (1980); *Women in the Military: Hearings before the Military Personnel Subcommittee of the House Committee on Armed Services*, 96th Cong., 1st and 2d Sess., 13–23 (1979 and 1980)).

[69] *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 269 n.21 (1979).

[70] KAMARCK, *supra* note 7, at 6–7.

[71] Rostker v. Goldberg, 453 U.S. 57, 91 (1981) (Marshall, J., dissenting.)

[72] *Id.* at 90–91.

[73] STAFF OF H. COMM. ON ARMED SERVS., 96TH CONG., PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM 1, 23 (Comm Print, 1980).

2. The Legal Standard in Sex Discrimination Cases

The Court applied what has come to be known as the intermediate standard of review for sex discrimination cases, namely, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[74]

The Court first determined that "the Government's interest in raising and supporting armies is an important governmental interest."[75] There can be little doubt about that. It was in applying the second prong of the test that the Court faltered. The Court attempted to explain how limiting draft registration to males was substantially related to that interest this way: "The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration" so the "exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration."[76] "The purpose of registration . . . was to prepare for a draft of combat troops" and "[w]omen . . . are not eligible for combat."[77] Therefore, the Court held, women and men are not similarly situated with respect to registration for a draft.[78]

The Court used one form of sex discrimination (the exclusion of women from combat duty) to justify another (excluding women from the registration requirement). If one form of sex-based discrimination can serve as the "important governmental objective" justifying another form of sex-based discrimination, then a circular argument could be constructed to justify every sex-based classification under the sun. The Court rejected this kind of reasoning in *United States v. Virginia* where it described as "notably circular" the government's stated justification that preserving a military institution's male-only admission policy was needed to preserve the institution's single-

[74] Craig v. Boren, 429 U.S. 190, 197 (1976); *Rostker*, 453 U.S. at 70.
[75] *Rostker*, 453 U.S. at 70 (internal quotation marks omitted).
[76] *Id.* at 77, 79.
[77] *Id.* at 76 (emphasis omitted).
[78] *Id.* at 78.

sex character.[79] The Court has had no difficulty grasping this concept in employment discrimination cases, where it has stated that once a prima facie case of sex discrimination has been made, the employer must articulate not just a legitimate justification, but a legitimate *nondiscriminatory* justification for the discrimination.[80]

The Court relied heavily on a Senate Armed Services Committee Report (later adopted by both Houses of Congress) about military needs.[81] The Report asserted that drafting women would put "unprecedented strains on family life."[82] The prospect of "a young mother being drafted and a young father remaining home with the family in a time of national emergency" would be "unacceptable to a large majority of our people."[83] In essence, the Senators were saying that a woman's place is in the home, raising children, because a lot of people think so. Cases decided after *Rostker* have made it clear that gender classifications based on stereotypes do not comport with Equal Protection.[84] "[I]f a 'statutory objective is to exclude or "protect" members of one gender' in reliance on 'fixed notions concerning [that gender's] roles and abilities,' the 'objective itself is illegitimate.'"[85] Congressional hand-wringing about the prospect of fathers raising children is one such fixed notion concerning a gender's roles and abilities.[86] The presence of these statements in the Congressional report makes it evident that the *Rostker* majority's assertion, that the Congressional decision to exempt women from registration was not the by-product of

[79] United States v. Virginia, 518 U.S. 515, 545 (1996).
[80] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[81] *See, e.g.*, *Rostker*, 453 U.S. at 65, 82.
[82] S. REP. NO. 96-826 at 159 (1980).
[83] *Id.*
[84] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994); *Virginia*, 518 U.S. 515 (1996).
[85] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 (2017) (quoting *Miss. Univ. for Women*, 458 U.S. at 725) (alteration in original).
[86] *Cf*. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (rejecting the "self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver").

traditional ways of thinking about men and women,[87] was plainly wrong.

The fundamental error the *Rostker* majority made was in giving what amounted to complete deference to Congress in the realm of military preparedness. There is no other explanation for the Court's choice to ignore clear record evidence of Congress's discriminatory intent. It is true, as the *Rostker* majority pointed out, that the Court traditionally has accorded great deference to Congress in this area.[88] Even the *Rostker* majority recognized, however, that deference does not mean abdicating responsibility to review Congressional action.[89] "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[90] One such essential liberty is the Fifth Amendment's guarantee of equal protection of the laws.[91] Indeed, the *Rostker* majority purported to apply the heightened scrutiny standard set out in *Craig v. Boren*.[92]

Under this standard, a gender-based classification is constitutionally infirm unless the classification is substantially related to the achievement of an important governmental objective.[93] The same standard is supposed to be applied whether the classification discriminates against males or females.[94] Sex-based classifications are presumptively invalid; the government carries the burden of proof that they meet the two prongs of the *Craig v. Boren* test, i.e., the importance of the governmental objective the classification serves and "the substantial relationship between the discriminatory means and the asserted end."[95] In addition, subsequent cases have made it clear that

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[87] *See* Rostker v. Goldberg, 453 U.S. 57, 74 (1981).
[88] *Id.* at 69 n.6.
[89] *Id.* at 67, 70 (explaining that "[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question" and "deference does not mean abdication"). *See also* United States v. Robel, 389 U.S. 258, 263–64 (1967) (observing that "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").
[90] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).
[91] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[92] *Rostker*, 453 U.S. at 70, 79.
[93] Craig v. Boren, 429 U.S. 190, 197 (1976).
[94] Caban v. Mohammed, 441 U.S. 380, 391 (1979).
[95] *Rostker*, 453 U.S. 57, 88 (1981) (Marshall, J., dissenting).

any justification offered must be "exceedingly persuasive."[96] This heightened scrutiny standard applies to all sex-based classifications.[97]

The *Rostker* majority turned these principles on their heads. Instead of asking whether discriminating on the basis of sex is substantially related to achieving an asserted governmental interest, the Court framed the issue as involving the question whether *not* discriminating on the basis of sex would advance the governmental interest.[98] Sex-based classifications are supposed to be presumptively invalid.[99] Requiring a demonstration that nondiscrimination will advance an important governmental interest effectively nullifies that presumption and shifts the burden of proof to the person challenging a sex-based classification.

Cases decided after *Rostker* have clarified that the relevant question in sex discrimination cases is not whether including members of an excluded gender will help promote a governmental interest but whether excluding them will. In *Mississippi University for Women v. Hogan*, the Court rejected the argument that including only women in a state nursing school was constitutional because it was substantially related to the state's objective of providing opportunities for women to obtain training.[100] The Court explained that the pertinent question was whether excluding men furthered that objective and answered that question in the negative.[101] Likewise, *United States v. Virginia* was not decided on the basis that the state's goal of producing soldiers could be achieved without admitting women; rather, the Court framed the question as whether the state's objective was "substantially advanced by women's categorical *exclusion*."[102]

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[96] United States v. Virginia, 518 U.S. 515, 532–33 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).
[97] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689–90 (2017).
[98] *Rostker*, 453 U.S. at 94 (Marshall, J., dissenting).
[99] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).
[100] *Miss. Univ. for Women*, 458 U.S. at 729–30 (1982).
[101] *Id.* at 731.
[102] United States v. Virginia, 518 U.S. 515, 545–46 (1996) (emphasis added).

The *Rostker* majority improperly relieved the government of its burden of demonstrating that excluding women from Selective Service registration advances the goal of military preparedness. The error materially affected the outcome of the case. Had the *Rostker* majority asked whether excluding women from draft registration would advance military preparedness, the answer almost certainly would have been no. At the time the case was decided, the record showed that approximately 80,000 non-combat positions were open to women and filling those positions with women would free a corresponding number of men to serve in combat positions.[103] Military officials had testified that they supported registering women.[104] Congress and presidents often weighed in on the importance of women in the military.[105] The Court should have ruled that the government failed to meet its burden of showing that excluding women advanced military preparedness.

Rostker cannot be saved by applying other stereotypes or overgeneralizations about the sexes either, such as that women are not as well suited for combat as men because they are weaker, more emotional, or less brave than men. *United States v. Virginia* has made it clear that gender-based classifications are not constitutionally permissible if they "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[106]

The conclusion is inescapable that the Court simply "got it wrong" in *Rostker*. Whether it was because the Court was not prepared to lay the foundation for the government to take the historically unprecedented step of enrolling and potentially drafting women into military service or because members of the Court themselves subscribed to paternalistic or stereotypical beliefs about the relative strengths and weaknesses of men and women, we may never know. What we do

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[103] *Rostker*, 453 U.S. at 80–81; *id.* at 100 (Marshall, J., dissenting).
[104] S. Rep. No. 96-226 (1979) at 14.
[105] *See supra* notes 71–74 and accompanying text.
[106] United States v. Virginia, 518 U.S. 516, 533 (1996).

know for certain is that the Court should have held that male-only Selective Service registration laws impose unequal obligations on men in violation of their Equal Protection rights. Whether intentionally or not, the Court fortified and entrenched negative stereotypes about both sexes.

D. Stare Decisis

Because circumstances have changed in material ways since *Rostker*, the Court has two options if it grants review in *NCFM v. Selective Service System*. It could overrule *Rostker* or it could allow *Rostker* to stand and hold that *NCFM* is factually distinguishable from it because of changed circumstances. At first blush, the reverence for precedent embodied in the doctrine of stare decisis might seem to favor the second option. On closer analysis, however, the policies underlying the doctrine support overruling *Rostker*.

Stare decisis advances three broad objectives: economy, stability, and legitimacy.[107] It facilitates the predictable and consistent development of the law.[108] In so doing, it fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.[109] Fairness and equality are also considerations that have been referenced as justifications for it.[110] Overruling *Rostker* would advance these objectives.

1. Judicial economy

Adherence to precedent generally advances the goal of judicial economy by saving judges the time that would be lost if every decision could be reopened.[111] "It expedites the work of the courts by preventing the constant reconsideration of settled questions."[112] This is true, however,

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[107] Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652 (1999).
[108] Payne v. Tennessee, 501 U.S. 808, 827 (1991).
[109] *Id. See generally* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine,* 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988).
[110] *See, e.g.*, RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 56–83 (1961) (identifying certainty, consistency, fairness, equality, efficiency, and predictability as justifications for the doctrine).
[111] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).
[112] Robert von Moschzisker, *Stare Decisis in Courts of Last Resort,* 37 HARV. L. REV. 409, 410 (1924).

only when the legal standards announced and applied in judicial decisions do not conflict. When they conflict, the goal of judicial economy would be better served by clarifying which of the two should prevail. Allowing conflicting precedents to stand obviously would increase the range of possible claims and defenses available to litigants, thereby increasing the burden on courts.

2. Stability

The principle of stability is of particular importance in contract and property cases. People rely on precedent to guide their decisions in connection with title to property or the interpretation and implementation of contracts. Overruling precedents in these areas of the law could undermine vested contract or property rights.[113] The constitutionality of the Selective Service System does not implicate a contract or property issue. Overruling *Rostker* would not undermine any vested property or contract rights.

It is sometimes argued that because governmental action might be taken in reliance on a precedent, overruling it may unfairly burden the government.[114] Overruling *Rostker* would not implicate any reliance interest. The all-male Selective Service system was not implemented in reliance on the holding in *Rostker*. Consistent with the language of the MSSA and previous enrollment and conscription laws in the United States, the government had already implemented an exclusively male registration obligation. It did not rely on any guidance from a court when doing that. If implementing *Rostker* would impose an administrative burden on the government, it is a burden the government brought upon itself by establishing a discriminatory Selective Service system in the first place. It does not make sense to characterize the burden of having to stop

[113] *See Payne*, 501 U.S. at 828 (noting that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved").

[114] *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part) (suggesting that approval of the Seventeenth Amendment may have been premised on the validity of Hans v. Louisiana, 134 U.S. 1 (1890), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

practicing sex discrimination as "unfair." In any case, reliance interests do not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[115]

Moreover, it is not even clear that overruling *Rostker* will impose any unmanageable burden on Congress. In fact, given that there is currently no draft in effect, now would be an ideal time to make changes to Selective Service laws and regulations. Even if overruling *Rostker* did add major administrative burdens for the government, though, "the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig v. Boren* test."[116]

3. Legitimacy

Stare decisis also serves the objective of ensuring the legitimacy of the judiciary and the public's perception of it. A perception that the Court's decisions are governed by the rule of law rather than personal prejudices or political processes engenders respect for the judiciary.

> The Court's continued ability to function effectively in this structure as the ultimate arbiter of constitutional law depends on the willingness of the public to accept the Court in this role; this acceptance in turn depends upon the public perception that in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes.[117]

This principle, too, counsels against the retention of conflicting precedents. In these situations, the application of stare decisis would require the perpetuation of an error. The legitimacy of a judiciary that deliberately perpetuates error is questionable.

A concern is sometimes raised that judicial freedom to ignore a precedent anytime it is

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[115] Arizona v. Gant, 556 U.S. 332, 349 (2009).
[116] *Rostker v. Goldberg*, 453 U.S. 57, 95 (1981) (Marshall, J., dissenting).
[117] Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 WIS. L. REV. 467, 484 (1980).

believed to be erroneous would threaten the continuing viability of the doctrine of stare decisis.[118] For this reason, it has been suggested that courts should have some additional reason for overruling a precedent besides the fact that it is erroneous.[119]

One such "additional reason" is that an earlier precedent has been undermined (even if not actually overruled) by subsequent factual or legal developments.[120] The nature of the case is also a factor. The Court will give "great weight to *stare decisis* in the area of statutory construction"[121] but the doctrine "is at its weakest when [it] interpret[s] the Constitution."[122] Indeed, it has been suggested that the Court has an affirmative "duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question."[123]

A challenge to the constitutionality of all-male Selective Service laws meets both criteria. It calls upon the Court to interpret the Fifth Amendment of the Constitution, not simply to interpret a statute.[124] The holding in *Rostker* has been undermined by subsequent developments.[125] Finally, acknowledging that women and men have the same civic obligations will give the public greater confidence that the Court has not merely been paying lip service to the ideal of equality all this time.

III. CONCLUSION

The MSSA is one of the few remaining laws from an era when unequal rights were granted and unequal obligations were imposed solely on the basis of sex. It assigns exclusively to men the obligations to involuntarily leave one's home, family, and employment if called up to serve and to

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[118] *See* Lee, *supra* note 107, at 654.
[119] *See* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring).
[120] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).
[121] Neal v. United States, 516 U.S. 284, 295 (1996).
[122] Agostini v. Felton, 521 U.S. 203, 235 (1997).
[123] Mitchell v. W.T. Grant Co., 416 U.S. 600, 627–28 (1974) (Powell, J., concurring).
[124] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[125] *See* discussion *supra* subsection II.C.2.

place themselves at risk of being required to kill or be killed. It also imposes other significant burdens on men that go far beyond merely providing a name and address to a government agency. Men are under a continuing obligation to update that information until they turn twenty-six. Failure to register or comply with the MSSA carries severe penalties. In addition to a $250,000 fine and five years of imprisonment, men who fail to register face the loss of a wide variety of federal and state rights and benefits. They lose their eligibility for student loans, civil service jobs, and immigration. Many states do not allow men who fail to register for Selective Service to obtain or renew a driver's license. In some states, men are barred from state financial aid, state employment, or enrollment in public colleges and universities if they do not register.

The male-only Selective Service registration requirement also perpetuates sex-based stereotypes that are harmful to both men and women. It stereotypes men as disposable and nonessential to their children (or at least considerably less important than women). It stereotypes women as physically weaker than men and not as well suited for combat. In short, it reinforces the old saw that a woman's place is in the home raising children and the tacit corollary that a man's place is not.

Rostker v. Goldberg is an anachronism. It was wrongly decided at the time and that is even clearer now. Its presence in the universe of outstanding precedents is a continuing affront to both women and men. It is an embarrassment in a country that purports to stand for equality. The Supreme Court should overrule it, Congress should amend the MSSA to make the registration requirement applicable to both men and women, and the Department of Defense should enact implementing regulations with all deliberate speed.