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Rostker v. Goldberg: Gender Based Equal Protection v. the War Power, 15 J. Marshall L. Rev. 725 (1982)

James Graney

*ROSTKER v. GOLDBERG** : GENDER BASED EQUAL PROTECTION v. THE WAR POWER

In 1980 President Carter concluded that recent world events required draft registration to be reactivated.[1] The President recommended[2] that Congress appropriate funds to register men and women, and that the registration of women be authorized by an appropriate amendment to the Military Selective Service Act[3] (M.S.S.A.). Congress agreed that it was necessary to reinstate draft registration, but allocated only enough funds to register men.[4] The Senate Armed Services Committee determined that only men should be registered and expressly declined to recommend the registration of women.[5] These events revived *Goldberg v. Rostker*,[6] a civil sex discrimination case which had been mooted since draft registration was terminated in 1975.

Rostker commenced in 1972 when several men filed a complaint challenging the M.S.S.A. on constitutional grounds.[7] All plaintiffs' claims were eventually dismissed[8] except for the claim that the Act was an unlawful gender-based classification

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* 509 F. Supp. 586 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

1. 16 WEEKLY COMP. OF PRES. DOC. 198 (State of the Union Address) (Jan. 23, 1980).

2. Presidential Recommendations for Selective Service Reform—A Report to Congress Prepared Pursuant to Pub. L. 96-107 (Feb. 11, 1980).

3. "Except as otherwise provided in this title it shall be the duty of every male citizen of the United States . . . to present himself for registration . . . ." 50 U.S.C. app. §§ 451, 453, 454, 456(h) and 467(c) (1970 & Supp. III 1973).

4. S. REP. NO. 96-789, 96th Cong., 2d Sess. 1 (1980).

5. S. REP. NO. 96-826, 96th Cong., 2d Sess. 159-61 (1980).

6. 509 F. Supp. 586 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

7. The original suit was designated Rowland v. Tarr. Plaintiffs contended that the Act amounted to a taking of property without due process, imposed involuntary servitude, violated rights of free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated against men and women. Rowland v. Tarr, 341 F. Supp. 339 (E.D. Pa. 1972).

8. Plaintiffs' five-count complaint filed in 1971 against Curtis Tarr, then director of the Selective Service System, and others, sought convocation of a three-judge district court. This application to consider the constitutionality of the Military Selective Service Act was denied. The court concluded that the issues raised by plaintiffs regarding the fairness of conscription were properly committed to the legislative branch. Therefore, these issues were nonjusticiable political questions. Moreover, the court noted that previous Supreme Court cases upholding the constitutionality of conscription foreclosed plaintiffs' claims. *Id.* at 341-43.

On appeal, the Third Circuit found that three of the five counts had been foreclosed by decisions of the Supreme Court. These counts alleged the taking of property without due process of law, involuntary servitude,

which violated the due process clause of the fifth amendment.[9] On July 18, 1980, a three-judge district court panel ruled the Act unconstitutional because the gender-based classification was not substantially related to an important government interest.[10] The United States filed a notice of appeal,[11] and Justice Brennan stayed the district court's order enjoining registration.[12]

On June 25, 1981, the United States Supreme Court, in an opinion by Justice Rehnquist, reversed the district court and up-

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and unconstitutional deprivation of certain first and fifth amendment rights. The count alleging illegality of the Vietnam war was considered moot because the war had ended. The court determined, however, that the claim of unconstitutional discrimination between males and females had never been adjudicated by the Supreme Court. The district court failed to specify its precise grounds for denying plaintiffs' contentions on this count. The court of appeals vacated the lower court decision on the sex discrimination issue and affirmed on all other counts. The case was remanded for consideration of whether the plaintiffs had standing and whether the constitutional attack was substantial. Rowland v. Tarr, 480 F.2d 545, 546-47 (3d Cir. 1973).

On remand, the district court found that plaintiffs had both standing and a constitutional claim. A three-judge court was convened. In an initial ruling on the government's motion to dismiss, the court found that plaintiffs were still subject to affirmative duties under the Act and to penalties for their failure to comply with those duties. The court concluded that the controversy was real. Furthermore, the declaratory judgment sought by plaintiffs was an appropriate remedy under the applicable jurisdictional statute. Finally, the court found that 50 U.S.C. app. § 460(b)(3) (precluding judicial review of pre-induction classification of registrants) did not preclude judicial review of the constitutionality of the Act. The government's motion to dismiss was denied. Rowland v. Tarr, 378 F. Supp. 766 (E.D. Pa. 1974).

When registration procedures ended in 1975, discovery in the litigation proceeded slowly and sporadically. On June 6, 1979, the clerk of the district court notified the parties of the case's inactive status. Pursuant to local rule, the notice stated that the district court would dismiss the case unless the parties showed good cause for pursuing the suit. Plaintiffs requested additional discovery and a trial date. The government moved for summary judgment on the grounds of mootness and nonjusticiability. The three-judge court ordered plaintiffs to file a motion for class certification if they wished to so proceed. Discovery was ordered to proceed and the court requested briefs on the issues of class certification, standing, and the merits of the claim that the Military Selective Service Act unconstitutionally discriminated between males and females. Trial commenced on May 21, 1980. The court's opinion declaring that registration of males only was unconstitutional and its order enjoining enforcement of registration is reported in Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980).

9. While the Fifth Amendment does not contain an equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. Schlesinger v. Ballard, 419 U.S. 498 (1975).

10. The district court applied the important government interests test to the gender-based classification made in the M.S.S.A. The court ruled that military flexibility is limited by the exclusion of women. It relied on an independent evaluation of the evidence and held that the complete exclusion of women from the pool of registrants does not serve important government objectives, and is not substantially related to any government interest. Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980).

11. 28 U.S.C. § 1252 (1959) (providing for direct appeals to the Supreme Court from decisions invalidating acts of Congress).

12. Rostker v. Goldberg, 453 U.S. 57, 58 (1981).

held the Act's constitutionality.[13] The Court reasoned that, under the Constitution, Congress has the express power "to raise and support Armies . . . provide and maintain a Navy"[14] and "to make rules for the Government and Regulation of the land and Naval Forces."[15] In cases involving the military, the Court is to defer to Congress' "broad and sweeping powers in this area."[16] Therefore, the pivotal question was whether Congress, in exercising its broad grant of authority, had at the same time violated an explicit guarantee of individual rights under the due process clause of the fifth amendment.[17]

The Court reviewed the congressional decision to exclude women from registration, and found that policy sufficiently rational to the primary purpose of the draft, *i.e.*, to raise combat troops.[18] The Court felt bound to validate this legislative determination because of its extraordinary deference to Congress' authority in military affairs.[19] Since women are statutorily excluded from combat,[20] men and women are not similarly situated in this area, and thus may be treated differently.[21]

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13. *Id.*

14. U.S. CONST. art. I, § 8, cl. 12-14.

15. *Id.*

16. Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981). *Accord*, Middendorf v. Henry, 425 U.S. 25 (1976) (deference to Congress' ruling that counsel is not necessary in court-martial); Greer v. Spock, 424 U.S. 828 (1976) (Court deferring to Congress in regulation of first amendment rights on military bases); Schlesinger v. Ballard, 419 U.S. 498 (1975) (deference to Congress regarding a statute regulating mandatory discharge for failing to be promoted); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Court accords great weight to the decisions of Congress); United States v. O'Brien, 391 U.S. 367 (1968) (deference to Congress in regulating draft registration); Orloff v. Willoughby, 345 U.S. 83 (1953) (commissioning of officers is a discretionary executive act); United States v. MacIntosh, 283 U.S. 605 (1931) (war power overriding certain fundamental constitutional liberties); Simmons v. United States, 406 F.2d 456 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969) (student deferments held constitutional); Bertleson v. Cooney, 213 F.2d 275 (5th Cir.), *cert. denied*, 348 U.S. 856 (1954) (judiciary cannot rule on required strength for the military). *See also* Schlesinger v. Councilman, 420 U.S. 738 (1979) (refusal of federal court to intervene in court-martial); Parker v. Levy, 417 U.S. 733 (1974) (deference to Congress' regulation of first amendment rights in military realm); Gilligan v. Morgan, 413 U.S. 1 (1973) (Court refused to regulate National Guard); Gillette v. U.S., 401 U.S. 437 (1971) (incidental burdens justified by military requirements); United States v. Carolene Prod., 304 U.S. 144 (1938) (presumption that facts supporting a Congressional decision exist).

17. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

18. *Id.* at 79.

19. *Id.* at 83.

20. "Women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions." 10 U.S.C. § 6015 (1948). "Women may not be assigned to duty in aircraft engaged in combat missions." 10 U.S.C. § 8549 (1948).

21. Rostker v. Goldberg, 453 U.S. 57, 78 (1981).

Justice Rehnquist stated that the district court erred in independently evaluating the evidence rather than deferring to Congress' evaluation.[22] Also, Congress' lengthy examination[23] of the possible registration of women showed the Court that excluding women from registration was not "an accidental by-product of a traditional way of thinking about women";[24] excluding women from registration was constitutional because it was based on a rational determination by Congress in exercising its broad constitutional war powers.[25]

The Court's decision, however, must be viewed against the broader background of equal protection cases.[26] Statutory classifications were traditionally tested for compliance with equal protection standards by applying one of two tests, the rational relation test,[27] or the compelling government interest test.[28] The latter test was applied where the classification involved a suspect class[29] or denied a class a fundamental right.[30] The ra-

22. *Id.* at 83.

23. *Id.* at 74.

24. *Id.*

25. *Id.* at 83.

26. *See generally*, Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths*, 43 ALB. L. REV. 73 (1978).

27. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (classification which has a rational basis does not offend the Constitution); Vance v. Bradley, 440 U.S. 93 (1979) (age requirement has a rational relation to tough overseas duty); Schlesinger v. Ballard, 419 U.S. 498 (1975) (gender-based classification rationally related to womens' ineligibility for combat); Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1973) (regulations concerning maternity leave rationally related to government interest); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1974) (statute rationally apportioning taxes to schools on basis of local property taxes); McGowan v. Maryland, 366 U.S. 420 (1961) (ban on selling certain merchandise on Sunday rationally related to promoting a recreational atmosphere).

28. The compelling government interest test requires that the allegedly discriminatory classification be supported by a compelling government interest. If a less intrusive means of achieving the compelling government interest is available, the classification violates equal protection. This test was applied where the statutory classification disadvantaged a suspect class, or denied the class a fundamental right. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (statute requiring proof that husband is dependent on wife); Dunn v. Blumstein, 405 U.S. 330 (1972) (statute denying recent state residents the right to vote); Korematsu v. United States, 323 U.S. 214 (1943) (strict scrutiny applied to statute relocating Japanese during World War II). For further discussion on the relevance of *Korematsu*, *see infra* notes 55-57 and accompanying text.

29. A suspect classification is one based on race or national origin. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (strict scrutiny applied to a statute relocating Japanese during World War II).

30. Fundamental rights include suffrage and interstate travel. *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education held not

tional relation test, the lowest level of judicial scrutiny, was the test applied to gender-based classifications before 1976.[31] This relaxed level of judicial scrutiny seemed appropriate because sex was not considered a suspect classification.[32] Under the rational relation test, the challenged statute is presumed constitutional and the classification need be only rationally related to a legitimate government purpose.[33]

Recognition of the need for heightened scrutiny in gender-based equal protection cases was first reflected in the 1973 case of *Frontiero v. Richardson*.[34] Acknowledging a history of discrimination against women, four Justices agreed that classifications based on sex were inherently "suspect," and required more than a rational purpose to be valid. This concern soon led to the development of a third test, the "important government interest" test.[35]

The important government interest test applies a higher level of judicial scrutiny by requiring that a gender-based classification be substantially related to an important government interest.[36] The burden is on the government to establish such a relation.[37] The classification must not be arbitrary, and all per-

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to be a fundamental right); Dunn v. Blumstein, 405 U.S. 330 (1972) (statute denying plaintiffs the right to vote); Shapiro v. Thomson, 394 U.S. 618 (1969) (a classification which restricts a person's constitutional right to move from one jurisdiction to another is unconstitutional unless shown to promote a compelling government interest); Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966) (state's conditioning of a right to vote on payment of a fee or tax violated equal protection).

31. Craig v. Boren, 429 U.S. 190 (1976) (burden is on the government to prove the classification is substantially related to an important government interest in gender-based discrimination cases).

32. All the lower court cases which addressed the constitutionality of the M.S.S.A. were decided before the intermediate scrutiny test was established. *See, e.g.*, United States v. Reiser, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976); United States v. Baechler, 509 F.2d 13 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975); United States v. Bertram, 477 F.2d 1329 (10th Cir. 1973); United States v. Fallon, 407 F.2d 621 (7th Cir.), *cert. denied*, 395 U.S. 908 (1969); United States v. Offord, 373 F. Supp. 1117 (E.D. Wis. 1974); United States v. Watson, 373 F. Supp. 1119 (E.D. Wis. 1974); United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973); United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968).

33. Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of* Kahn v. Shevin *and* Orr v. Orr, 30 SYRACUSE L. REV. 639 (1979).

34. 411 U.S. 677 (1973) (plurality opinion with four Justices holding sex a suspect class because of the tradition of sex discrimination in the United States).

35. Craig v. Boren, 429 U.S. 190 (1976) (sex based classification must have a substantial relationship to an important government interest).

36. *Id.* at 197.

37. *Id.* at 204.

sons similarly situated must be similarly treated.[38] Administrative convenience alone is not enough to justify a classification based on sex.[39] Gender based classifications which reinforce sexual stereotypes are not permitted where the government's interest can be attained by a gender-neutral classification.[40]

In *Rostker*, the Court did not apply the heightened scrutiny of the important government interest test because of its deference to Congress' judgment on military affairs. The Court relied on its own mandate, established through case law, to hold that the courts must defer to Congress' power "to make Rules for Government and Regulation of the land and Naval Forces," expressly granted in Article I, Section 8 of the United States Constitution.[41]

Justice Rehnquist distinguished decisions holding that Congress, even under the war power, cannot remove constitutional limitations safeguarding essential liberties.[42] Those decisions recognized that the legislature's exercise of its war powers must be constantly checked because of potentially substantial infringements on individual rights.[43] The Court should act to prevent Congress from removing constitutional safeguards such as equal protection, regardless of Congress' superior authority in military affairs.[44]

There is a distinction between these two seemingly contradictory lines of precedent. The cases advocating judicial defer-

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

39. Craig v. Boren, 429 U.S. 190, 198 (1976).

40. Orr v. Orr, 440 U.S. 268, 283 (1979).

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

42. This line of case law would not relax constitutional safeguards where in conflict with acts under the war power. *See, e.g.*, United States v. Robel, 389 U.S. 258, 263-64 (1967) (acts under the war power cannot remove constitutional limitations safeguarding essential liberties; Congress could not violate first amendment rights of civilians in the interest of national defense); Home Bldg. and Loan Ass'n. v. Blaisdell, 290 U.S. 398, 426 (1934) (emergency police power of state could interfere with a contract only where vital public interests would suffer); United States v. Cohen Grocery, 255 U.S. 81, 88 (1921) (war power cannot act to suspend the protection of the fifth and sixth amendments); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (neither the President, Congress, nor the Judiciary can disturb the safeguards of constitutional liberty even in time of war). *Cf.* Gillette v. United States, 401 U.S. 437, 462 (1971) (incidental burdens are justified by substantial government interest in procuring manpower for military purposes); Hamilton v. Kentucky Distilleries and Warehouse Co., 251 U.S. 146, 156 (1919) (war power of Congress is no more limited by the fifth amendment than a like exercise of the police power would be limited by the fourteenth amendment).

43. United States v. Cohen Grocery, 255 U.S. 81, 88 (1921) (war powers cannot suspend the protection of the fifth and sixth amendments).

44. *See supra* note 42.

ence involved statutes regulating the military,[45] while the other cases concerned statutes affecting the constitutional rights of civilians.[46] The latter cases applied established constitutional standards and did not simply defer to Congress' conclusions.[47]

Ex parte Milligan[48] was the first decision to hold that the constitutional safeguards of civilians cannot be disturbed by statutes enacted pursuant to the war power. In that decision, the Court held that, even if justified by the war power, the right of a United States citizen to the constitutional safeguard of *habeas corpus* could not be suspended.[49] Constitutional safeguards could be relaxed when applied to military regulations, but not when applied to enactments affecting the liberties of civilians.[50]

One hundred and one years later, *United States v. Robel*[51] proved that the *Milligan* holding was still good law. In *Robel*, a statute prohibiting government workers from belonging to the Communist Party, enacted under the war power, was ruled invalid because it unconstitutionally abridged a civilian's first amendment right of association.[52] When legitimate legislative concerns are expressed in a statute which imposes a burden on first amendments rights of civilians, the resulting legislation must have a minimal impact on constitutional safeguards.[53] Acts passed under the war power cannot remove constitutional safeguards of essential civilian liberties.[54]

In *Korematsu v. United States*,[55] decided during World War II, a Japanese-American civilian was convicted of being in a restricted area. The Court refused to diminish the defendant's constitutional safeguards in his equal protection challenge to a statute enacted under the war power.[56] The Court not only did not defer to Congress' decision to restrict the movement of the Japanese, but applied heightened scrutiny because the plaintiff was a member of a suspect class.[57] Thus, even though the stat-

45. *See supra* note 16.
46. *See supra* note 42.
47. *See supra* note 42.
48. 71 U.S. (4 Wall.) 2 (1866) (civilian plaintiff convicted of treason by a military court sought a writ of *habeas corpus*).
49. *Id.*
50. *Id.*
51. 389 U.S. 258 (1967) (civilian plaintiff was fired from his government job because he was a member of the Communist Party).
52. *Id.* at 261.
53. *Id.* at 268.
54. *Id.*
55. 323 U.S. 214 (1944).
56. *Id.*
57. *Id.*

ute was upheld, the Court refused to lower the level of scrutiny merely because the statute was enacted pursuant to the war power.

In *Greer v. Spock*,[58] the Court departed from the precedent set by *Korematsu*, and allowed the war power to effectuate diminished constitutional safeguards.[59] In *Greer*, the commander of a military base strictly regulated the distribution of literature on the base and banned political speeches. The plaintiff claimed that these actions violated rights guaranteed by the first amendment. The Court upheld this restriction because it concerned the military, but stated that such regulations would not be valid outside of a military jurisdiction.[60]

In *Rostker*, Justice Rehnquist distinguished the nondeference cases by reasoning that draft registration is sufficiently related to military affairs to require "all the deference due Congress in national defense."[61] This reasoning only supports Congress' authority to enact a draft as an action related to the war power; it does not justify the removal of constitutional safeguards designed to protect individual liberties. Draft registration directly and substantially affects the rights of civilians. Therefore, adhering to holdings that the war power cannot be used to remove civilians' constitutional safeguards, the Court should have applied the heightened-scrutiny, important-government-interest test to the gender-based classification in the M.S.S.A. to determine if it was substantially related to a legitimate end.

Intermediate scrutiny of the all-male classification in *Rostker* would require the Court to determine if excluding women from the draft substantially furthers the important government interest of national defense. The burden would be on the government to prove this substantial relationship. The Court would independently evaluate all of the evidence and would not have to defer to Congress' conclusions merely because they appear rational.

An independent evaluation of the evidence shows that no substantial relationship exists between excluding women from the draft and the government interest in national defense. In fact, the evidence shows that registering and inducting women

58. 424 U.S. 828 (1976) (military post commander banned political speeches and strictly regulated what kind of printed material could be distributed on the post.)

59. *Id.*

60. *Id.* at 836-37. The Court relied on Flower v. United States, 407 U.S. 197 (1970), which reversed a conviction for distributing material contrary to a military regulation where the military no longer controlled the area.

61. Rostker v. Goldberg, 453 U.S. 57, 69 (1981).

as the need dictates would actually promote military flexibility and benefit national defense.

The Senate Report relied on by the majority in *Rostker* stated that the main reason for not registering women is their ineligibility for combat, and that the main purpose of the draft is to raise combat troops.[62] The report argued that drafting large numbers of women would hamper military flexibility because support troops made up of women could not be rotated into combat areas to relieve combat troops.[63] The report also stated that inducting equal numbers of men and women would result in sexually mixed units, a dangerous experiment in a time of war.[64]

The reasoning employed by Congress and the *Rostker* Court ignores reality; registering women does not mean that women must be inducted in numbers equal with men, or that women must be placed in combat roles. Women could be inducted in limited numbers as the need requires. The main criterion for induction is not combat eligibility, but whether that person can "be expected to be productive in the military establishment."[65] The Armed Services Committee recognized that women make an important contribution to the Armed Forces, and accordingly requested that their role be expanded.[66] The Defense Department has acknowledged that in the event of mobilization, women could fill 80,000 of the jobs for which 650,000 people would be inducted.[67] Induction of this limited number of women would free men from support positions to fill combat positions in case of mobilization.[68] Congress also admitted that, in the event of mobilization, women would be eligible for 48% of the available positions.[69] This fact alone justifies at least a partial draft of women. If a peacetime draft were reinstituted, the primary role of inductees would not be in combat.

Congress determined that drafting women would put a strain on training facilities, administrative systems, and family life because of the traditional role of women in the home.[70] Also noted by the Court was Congress' concern that deferments and

62. S. REP. No. 96-789, 96th Cong., 2d Sess. 1 (1980).
63. *Id.*
64. *Id.*
65. ARMY REGULATION 40-501.
66. S. REP. No. 96-789, 96th Cong., 2d Sess. 1 (1980).
67. *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing Before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee*, 96th Cong., 1st Sess. 10 (1980).
68. *Id.*
69. S. REP. No. 96-789, 96th Cong., 2d Sess. 1 (1980).
70. *Id.* The old tradition of women in the home has drastically changed to the extent that 41.0% of the labor force is women. By 1979, more than half

exemptions available to men because of hardships and dependents[71] would be equally available to women. These arguments are based on administrative convenience and arbitrary classifications whose only possible basis is the traditional role of women in society. As established by *Craig v. Boren*,[72] these are insufficient justifications for gender-based classifications.

In light of the Court's emphasis on the war power, *Rostker* establishes an exception to intermediate scrutiny, but does not eliminate the standard. In cases normally requiring heightened scrutiny, the Court will now apply minimal scrutiny where the challenged statute was enacted pursuant to the war power. This exception is illustrated by *Michael M. v. Sonoma County*,[73] and *Kirchberg v. Feenstra*,[74] both decided during the same term as *Rostker*.

Michael M. was a plurality opinion in which Justice Rehnquist, joined by Chief Justice Burger, Justice Stewart and Justice Powell, upheld a statutory rape statute that was challenged on equal-protection grounds. Minimal scrutiny was applied.[75] The key to Justice Rehnquist's opinion was that men and women are not similarly situated with respect to the risks of pregnancy, and the challenged statute adequately reflected that fact.[76] Justice Blackmun concurred, but favored the application of intermediate scrutiny.[77] Pursuant to *Michael M.*, the Court will not apply intermediate scrutiny where men and women are not similarly situated because of inherent sexual differences.

Kirchberg v. Feenstra,[78] decided the same day as *Michael M.*, applied intermediate scrutiny to invalidate a statute giving a husband the right to unilaterally dispose of jointly-owned property without the consent of his spouse.[79] There are no inherent sexual differences between men and women with respect to owning property, as there are with respect to the burdens of an unwanted pregnancy. The statute in *Kirchberg* was not enacted under the war power as was the case in *Rostker*. Thus, without

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of all women were working or looking for work. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, June 1980.

71. Military Selective Service Act, 50 U.S.C. app. §§ 456, 457(a)-(d), (f), (h), (j) (1976).

72. 429 U.S. 190, 198 (1976).

73. 450 U.S. 464 (1981).

74. 450 U.S. 455 (1981).

75. Michael M. v. Sonoma County, 450 U.S. 464 (1981).

76. Women bear the brunt of teenage pregnancies and are the ones to be protected by the statute. *Id.* at 471.

77. *Id.* at 483.

78. 450 U.S. 455 (1981).

79. *Id.*

inherent sexual differences or military connections, the application of intermediate scrutiny was justified.

The impact of *Rostker* on the constitutional safeguards of individual liberties *vis à vis* the war power is enormous. The Court set a dangerous precedent by relaxing the constitutional safeguards of civilians when Congress acts pursuant to the war power. Until *Rostker*, the Court only relaxed these safeguards where regulations within the military realm were involved. The draft directly affects civilian rights. Thus, this case opens the door for the diminution of constitutional safeguards when Congress is acting under the war power. Constitutional safeguards will not suffer if *Rostker* is narrowly construed so that equal protection standards for gender-based classifications are lowered only when the activity is sufficiently related to military affairs.[80]

Rostker might also be construed as falling within the *Michael M.* exception that men and women are not similarly situated. This possibility is supported by Justice Rehnquist's statement that men and women are not similarly situated in the military because women are not eligible for combat.[81] However, such a construction of *Rostker* is doubtful considering the Court's strong emphasis on deference to congressional action under the war power. Also, the argument that women are not similarly situated because they are not eligible for combat is invalid because their ineligibility is not based on inherent sexual differences but on decisions made by the military.

The practice of applying intermediate scrutiny to gender-based classifications, as followed by courts since *Craig v. Boren*,[82] remains viable. *Rostker* has not eliminated this standard in light of *Kirchberg*. The significance of *Rostker* in equal protection law is yet to be determined; it will depend on whether the case is broadly or narrowly construed. If broadly construed, *Rostker* sets a precedent for the relaxation of constitutional safeguards of individual liberties when Congress acts under the war power. If narrowly construed *Rostker* is an exception to the application of intermediate scrutiny to gender-based classifications where men and women are not similarly situated,[83] or where the activity regulated is sufficiently related to military affairs. The definition of sufficiently related to military affairs is

80. *See supra* note 61 and accompanying text.
81. *See supra* notes 20-21 and accompanying text.
82. *See supra* note 35 and accompanying text.
83. *See supra* note 61 and accompanying text.

uncertain. If broadly defined, it represents an unwarranted expansion of Congress' authority under the war power.

James Graney