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Constitutional Law—Due Process—Equal Protection—Exclusion of Females from Registration for Draft Not Violative of Fifth Amendment

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NOTES

CONSTITUTIONAL LAW—DUE PROCESS—EQUAL PROTECTION—EXCLUSION OF FEMALES FROM REGISTRATION FOR DRAFT NOT VIOLATIVE OF FIFTH AMENDMENT. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

On July 2, 1980, section three of the Military Selective Service Act[1] was reinstated, requiring that males eighteen years of age or older register for the draft.[2] Three days before registration was to begin, *Goldberg v. Rostker*[3] was decided, holding that male-only registration was an unconstitutional form of gender-based discrimination. The district court enjoined registration under the Act. However, Justice Brennan, acting in his capacity as Circuit Justice for the Third Circuit, granted a stay of the order pending appeal to the United States Supreme Court.[4] On appeal, the Supreme Court noted that Congress, in passing the Act, was operating under an explicit constitutional grant of authority,[5] therefore its powers were broad and sweeping.[6] Since Congress had specifically considered the constitutionality of the Act and had extensively examined the question of registering women, the Supreme Court deferred to Con-

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1. 50 U.S.C. § 453 (1976).

2. Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980).

3. 509 F. Supp. 586 (E.D. Pa. 1980). The proceeding was initiated during the Vietnam era (1971). The plaintiffs originally attacked the Selective Service System on several grounds, but only the equal protection claim survived. Rowland v. Tarr, 480 F.2d 545, 547 (3d Cir. 1973). President Ford ended draft registration in 1975 causing the case to be postponed, but when registration was renewed in 1980, it moved quickly to decision.

4. Rostker v. Goldberg, 448 U.S. 1306 (1980).

5. U.S. CONST. art. 1, § 8, provides in pertinent part:

> The Congress shall have Power . . .
>
> [11] To declare War . . .
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> [12] To raise and support Armies . . .
>
> [13] To provide and maintain a Navy;
>
> [14] To make Rules for the Government and Regulation of the land and naval Forces;
>
> . . . .
>
> [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .

6. Rostker v. Goldberg, 101 S. Ct. 2646, 2651-52 (1981) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

gress' judgment.[7] The Court noted that Congress specifically linked its consideration of registration with induction and concluded that the purpose of registration was to prepare for a draft of combat troops.[8] In reversing the lower court, the Supreme Court held that due process was not violated since women are excluded from combat by statute[9] or by military policy and therefore are not " 'similarly situated'[10] to males for purposes of a draft or registration for a draft."[11] *Rostker v. Goldberg*, 101 S.Ct. 2646 (1981).

Federal and state governmental powers are limited by the United States Constitution. The Supreme Court has the ultimate authority to interpret these limitations.[12] The fourteenth amendment to the Constitution, which is applicable only to the states, contains a guarantee of equal protection.[13] However, this guarantee does not insure that all persons will be treated alike. States have the power to differentiate classes for legislative purposes, but the classification must be "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."[14] The fifth amendment[15] contains no equal protection clause to limit the federal government, but "discrimination may be so unjustifiable as to be violative of due process."[16] The scope of equal protection under the fifth amendment has been construed as coextensive with that under the fourteenth amendment only "when there is no special national interest involved."[17]

The Warren Court applied a two-tier standard in equal protection cases.[18] In most cases the test was whether there was a "rational legislative basis" for laws having a different impact on persons simi-

7. *Id.* at 2653.

8. *Id.* at 2653, 2657.

9. 10 U.S.C. §§ 6015, 8549 (1976 & Supp. III 1979).

10. "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." 101 S. Ct. at 2659.

11. *Id.* at 2658.

12. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. U.S. CONST. amend. XIV provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

14. Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150, 165-66 (1897).

15. U.S. CONST. amend. V provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

16. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

17. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

18. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

larly situated.[19] Alternatively, cases involving suspect classifications[20] or affecting fundamental liberties[21] required an examination of the relation between legislative means and ends with "strict scrutiny."[22]

Reed v. Reed[23] originated a middle-tier standard by which to evaluate laws involving gender-based discrimination.[24] The Burger Court held that administrative convenience was not a sufficiently rational basis to uphold an Idaho statute granting preference to male estate executors. The Court modified the "rational basis" test by stating that "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[25]

The Court in *Frontiero v. Richardson*[26] voided gender-based regulations involving benefits for dependents of military service members. However, the plurality[27] went beyond *Reed* and found that sex was a "suspect classification" requiring the application of the "strict scrutiny" test. Since *Frontiero*, however, no plurality has

19. *E.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). The older of the two levels of review, the rational basis, was used for "classifications employed in economic and general social welfare regulation." J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW 524 (1978). The traditional criterion used by the Court is that a statue is valid unless it is without a rational basis. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). "[I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

20. *E.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (race).

21. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (right of indigent to free transcript).

22. Under the strict scrutiny test the government must prove that a discriminatory classification is necessary to promote a compelling government interest in order to withstand constitutional scrutiny. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

23. 404 U.S. 71 (1971).

24. *See* Gunther, *supra* note 18, at 33-34; Johnson, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV. 617, 622 (1974); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1076 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 953 (1975).

25. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

26. 411 U.S. 677 (1973) (plurality opinion). Under the challenged regulations, a male service member could claim his wife as a dependent without proof of her dependency but a female service member had to prove that her husband was an actual dependent before being able to obtain increased living quarters allowances and medical and dental benefits.

27. All members of the Court, except Justice Rehnquist, agreed that there was a violation of equal protection, but four Justices refused to find sex to be a suspect classification.

insisted upon the strict scrutiny standard for gender-based discrimination.[28]

Viewing gender-based discrimination after the imposition of elevated scrutiny in *Reed*, the Court in *Kahn v. Shevin*[29] indicated that gender-based classifications in statutes which evidence a benign purpose would be upheld. In *Kahn*, the Court held that compensation for discrimination in the job market was a rational basis for a statute granting property tax exemptions for women only.[30] The Court distinguished *Reed* and *Frontiero* on the basis that the statutes questioned in those cases differentiated between the sexes solely for administrative convenience, an unconstitutional justification.[31] The Court again used a higher scrutiny test when it subsequently upheld a gender-based scheme for the promotion of military officers in *Schlesinger v. Ballard*.[32] The preferential treatment afforded females was permissible because it reflected "the demonstrable fact that male and female line officers . . . are not similarly situated with respect to opportunities for professional service" since women are excluded from combat duty.[33] However, the Court appears to have signaled a retreat from this type of reasoning[34] in *Weinberger v. Wiesenfeld*.[35] The Court struck down a provision of the Social Security Act granting greater benefits to women than to men. The provision's purpose was to allow women to decline to work in order to care for children, which, the Court said, did not attempt to compensate for the special disadvantages of women.[36]

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28. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

29. 416 U.S. 351 (1974).

30. *Id.* at 355. "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' " *Id.* (citing Reed v. Reed, 404 U.S. 71, 76 (1971), quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

31. 416 U.S. at 355. *Kahn* was also distinguished as a tax statute to which the Court grants special latitude for classification purposes. *Id.*

32. 419 U.S. 498 (1975). The military promotion system was challenged for allowing female officers to remain in the service four years longer than male officers after failing to be promoted a second time.

33. *Id.* at 508. "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." 101 S. Ct. at 2659.

34. *See* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35, 48-49 (1980).

35. 420 U.S. 636 (1975).

36. The Court said that:

> [T]he 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. Here, it is apparent both from the statutory scheme itself and from the legislative history . . . that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of

Craig v. Boren[37] completed the process begun with *Reed* by clearly articulating a middle-tier test for gender-based discrimination.[38] Invalidating an Oklahoma law allowing females to purchase 3.2 beer at an earlier age than males, the Court said "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[39] Although *Craig* was only a plurality opinion, it has since gained acceptance by a majority of the Court.[40]

The Court has had frequent opportunity to examine cases alleging gender-based discrimination since *Craig*,[41] but only a few of its decisions have added to the development of the middle-tier standard. The Court did, however, modify the *Craig* test in *Wengler v. Druggists Mutual Insurance Co.*[42] In voiding a provision of the Missouri workers' compensation laws automatically allowing death benefits to widows but not to widowers,[43] the Court stated that simply describing a benign purpose is not sufficient.[44] In addition, the Court required that the government bear the burden of proving that a gender-neutral statute would be a less effective means of achieving

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economic discrimination, unable to provide for themselves. Rather, [the statute], linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work.

Id. at 648 (citation omitted).

37. 429 U.S. 190 (1976) (plurality opinion).

38. *See* Roberts, *supra* note 34, at 48-49.

39. 429 U.S. at 197.

40. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977). Note, however, that the majority obtained support for the *Craig* standard by upholding provisions of the Social Security Act which provided preferential treatment for female wage earners. The Court found that reducing the disparity in economic conditions between men and women caused by the long history of discrimination against women was an "important governmental objective." *Id.* at 317.

41. *E.g.*, Califano v. Westcott, 443 U.S. 76 (1979); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977) (plurality opinion).

42. 446 U.S. 142 (1980).

43. The challenged provision denied a widower benefits from his wife's work related death unless he either was physically incapacitated or proved dependence on his wife's earnings. However, the law provided death benefits to widows without proof of dependence on their husbands' earnings.

44. The purpose intended by the Missouri Legislature was to assist all widows with death benefits while limiting death benefits to only those widowers in need. 446 U.S. at 151. *Accord*, Roberts, *supra* note 34, at 51.

an important governmental interest under the *Craig* test.[45]

The Court's most recent examinations of the issue of sex discrimination appear to indicate differences in the application of the middle-tier standard of review. In *Parham v. Hughes*[46] and *Caban v. Mohammed*,[47] decided on the same day, the Court reached different conclusions about an unmarried father's rights in relation to his children.[48] In *Kirchberg v. Feenstra*[49] a unanimous Court struck down a Louisiana statute giving a husband the unilateral right to dispose of jointly owned property without his spouse's consent. While the majority applied the *Craig* test, Justices Stewart and Rehnquist concurred in the result by finding that for the purposes of the questioned statute the sexes were similarly situated, which also resulted in a finding of unconstitutionality.[50] The Court in *Michael M. v. Superior Court*[51] found a statutory rape law, under which only men could be criminally liable, to be constitutionally permissible. However, the dissent argued that the government failed to meet its burden of proof under the middle-tier standard of review.[52]

The exclusion of females from registration for the draft presents an issue of gender-based discrimination that must be considered concomitantly with Congress' powers under the war powers clause.[53] Under this clause the Court has recognized a constitutionally defensible basis to differentiate between the scope of civil liberties pertaining to military service personnel and those pertaining to

45. The Court said that the burden is "[o]n those defending the discrimination to make out the claimed justification" which can only be achieved by a "persuasive demonstration as to what the economic consequences . . . might be if . . . men and women . . . were treated equally under the law. . . ." 446 U.S. at 151-52. This requirement was more clearly articulated in later cases. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 490 (1981) (plurality opinion) (Brennan, J., dissenting); Orr v. Orr, 440 U.S. 268, 281, 283 (1979).

46. 441 U.S. 347 (1979) (plurality opinion).

47. 441 U.S. 380 (1979).

48. The Court, in *Parham*, found no violation of equal protection in a statute precluding a father but not a mother from suing for the wrongful death of a child who had not been legitimized. The Court in *Caban*, however, invalidated a statute allowing an unwed mother, subject to some exceptions, to block the adoption of her child by withholding consent while the unwed father had no such power.

49. 450 U.S. 455 (1981).

50. *Id.* at 463 (Stewart, J., dissenting).

51. 450 U.S. 464 (1981) (plurality opinion).

52. "The burden is on the government to prove both the importance of its asserted objective and the substantial relationship between the classification and that objective . . . . And the State cannot meet that burden without showing that a gender-neutral statute would be a less effective means of achieving that goal." *Id.* at 490 (Brennan, J., dissenting) (citations omitted). Justice Stevens wrote a separate dissent. *Id.* at 496.

53. U.S. CONST. art. 1, § 8, text reprinted *supra* note 5.

civilians.[54] When civilian activities relate to national security they too may be restricted under Congress' broad authority.[55] One of the areas in which Congress exercises such control is draft registration.[56]

In *Rostker v. Goldberg*[57] Justice Rehnquist, writing for the majority, said that in "judging the constitutionality of an act of Congress—'the gravest and most delicate duty that this Court is called upon to perform,'[58] . . . the Court accords 'great weight to the decisions of Congress.' "[59] Although the power of Congress is broad and the Court's lack of competence in this area is marked, the Court said that Congress was not free to disregard the Constitution when acting in the area of military affairs and remained subject to the limitations of the due process clause.[60] Thus, despite the deference accorded congressional determinations in the area of military affairs, it remained for the Court to determine whether Congress' decision denies equal protection but not to substitute its "own evaluation of evidence for a reasonable evaluation by the Legislative Branch."[61]

The Court said that it found no reason to depart from the heightened scrutiny used to approach gender-based discrimination in *Reed*, *Craig*, and *Michael M.*[62] and proceeded to find that raising

54. *E.g.*, Brown v. Glines, 444 U.S. 348 (1980) (regulations restricting circulation of petitions on base justified by military requirements for discipline and respect for duty); Middendorf v. Henry, 425 U.S. 25, 36-37 (1976) (denial of right to counsel in summary court martial proceedings justified on the basis that mechanical application of Argersinger v. Hamlin, 407 U.S. 25 (1972) (providing counsel to civilians in all prosecutions that could result in imprisonment) would interfere substantially with military procedures for punishment of the most minor offenses); Parker v. Levy, 417 U.S. 733, 758 (1974) (restriction of free speech of military personnel justified by "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline . . . .").

55. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (upheld prohibition against partisan speech by civilian within confines of military base).

56. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (upheld Congress' exemption from compulsory military service for those whose religions forbid them to engage in all wars although those whose religions forbid them to engage in only unjust wars were not exempted); United States v. O'Brien, 391 U.S. 367 (1968) (imposition of criminal penalties for draft card destruction upheld).

57. 101 S. Ct. 2646 (1981).

58. *Id.* at 2651 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927), *modified*, 276 U.S. 594 (1928)).

59. *Id.* (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)). The Court found that Congress was acting under an explicit grant of constitutional authority, had extensively evaluated the question of registering women, and had specifically examined the question of the Act's constitutionality. *Id.*

60. *Id.* at 2653.

61. *Id.*

62. *Id.* at 2654.

and supporting armies is "an important governmental interest" under the *Craig* test.[63] The Court considered registration to be "the first step 'in a united and continuous process designed to raise an army speedily and efficiently' "[64] and accepted Congress' determination that the need would be for combat troops if a draft took place.[65] Therefore, the Court reasoned that the purpose of registration was to prepare for a draft of combat troops,[66] and since women were not eligible for combat,[67] they "are simply not similarly situated" to men for purposes of registration for a draft.[68] The Court concluded that "exemption of women from registration [was] not only sufficiently but closely related to Congress' purposes in authorizing registration,"[69] thereby satisfying the second part of the *Craig* test.

Justice Marshall, joined by Justice Brennan, dissented,[70] objecting to the majority's failure to separate registration from conscription.[71] They reasoned that the purpose of registration was to create a pool of military inventory and that this could be accomplished just as effectively by registering men and women regardless of the fact that only combat troops might be conscripted.[72] Therefore, the dissenters found that the only justification for excluding women from registration was administrative convenience, an inadequate constitutional justification.[73] Additionally, they thought that the majority paid only lip service to the *Craig* test while actually avoiding it by applying a substantially different approach.[74]

The holding in *Rostker* appears to be congruent with the Court's prior decisions.[75] The history of the Court's deference to

63. *Id.*

64. *Id.* at 2656 (quoting Falbo v. United States, 320 U.S. 549, 553 (1944)).

65. *Id.* at 2657.

66. *Id.*

67. *Id.*

68. *Id.* at 2658.

69. *Id.* (citations omitted).

70. *Id.* at 2662-76. Justice White, joined by Justice Brennan, also dissented. They felt that the case should have been remanded for further findings on Congress' conclusion that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization. *Id.* at 2661-62.

71. *"[W]e are not asked to rule on the constitutionality of a statute governing conscription." Id.* at 2662 (Marshall, J., dissenting) (emphasis in original) (citation omitted).

72. *Id.* at 2667.

73. *Id.*

74. "[A]lthough the Court purports to apply the *Craig v. Boren* test, the 'similarity situated' analysis the Court employs is in fact significantly different from the *Craig v. Boren* approach." *Id.* at 2666.

75. For an excellent analysis of the lower court's opinion and a well reasoned application to Supreme Court precedent, *see* Roberts, *supra* note 34.

congressional choice in military matters and the overriding national interests exception to equal protection under the fifth amendment might have permitted the Court to achieve the same result without applying the middle-tier test for gender-based discrimination.[76] The case is significant because it represents another step in the Court's acceptance of the middle-tier standard as a consistent and reliable method by which to evaluate gender-based discrimination.

Since the middle-tier standard was articulated it has slowly gained acceptance by members of the Court.[77] Justice Rehnquist has been its strongest opponent.[78] His majority opinion in *Rostker* indicates that his opposition to *Craig* is weakening and perhaps indicates a decision to embrace the standard.[79]

Justice Rehnquist specifically refused to accept the government's contention that the *Craig* test should not be applied to *Rostker*.[80] Justice Rehnquist could have chosen to concur in the judgment if he were still strongly opposed to the intermediate standard of review.[81] It thus appears that *Rostker* indicates at least a

76. Previous decisions have held that certain rights must be interpreted differently in a military context. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 353-58 (1980). This reasoning might easily have been used to justify a retreat from the middle-tier standard when raising an army, an overriding national interest. This was an option offered to the Court which they declined. 101 S. Ct. at 2654.

77. The test as articulated in *Craig* was embraced at that time only by Justices Brennan and Marshall. The seven other Justices filed separate opinions although all the Justices, except Justice Rehnquist, have since joined in opinions employing the *Craig* test. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (Justices White, Powell, Stevens, Blackmun, and Chief Justice Burger); Orr v. Orr, 440 U.S. 268 (1979) (Justices Stewart and White).

78. Justice Rehnquist filed the strongest dissent in *Craig*, clearly stating his preference for the rational basis test as the method for judging gender-based discrimination. Craig v. Boren, 429 U.S. 190, 217-18 (1976) (Rehnquist, J., dissenting). Although Chief Justice Burger has agreed with him, Justice Rehnquist has generally been the spokesman for the two. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981) (plurality opinion); Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting); Craig v. Boren, 429 U.S. 190, 215 (1976) (Burger, C.J., dissenting). *But see* Califano v. Webster, 430 U.S. 313, 321 (1977) (Burger, C.J., dissenting).

79. From refusal to accept the *Craig* standard, Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting); Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting), to joining a plurality recognizing the validity of the *Craig* test, *see* Parham v. Hughes, 441 U.S. 347, 353-54 (1979), and then recognizing "that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged," Michael M. v. Superior Court, 450 U.S. 464, 468 (1981) (citing Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring)), it seems apparent that Justice Rehnquist has at least retreated from his original stance.

80. 101 S. Ct. at 2653-54.

81. *Rostker* was a six to three decision. Justice Rehnquist could easily have chosen to ignore *Craig*, *supra* note 76, or he could have filed a concurring opinion had his brothers chosen to adhere to *Craig* in their determinations.

tentative acceptance by Justice Rehnquist of the *Craig v. Boren* middle-tier standard.

Although Justice Marshall said that the majority applied a test different from that in *Craig*,[82] his assertion is questionable. Justice Rehnquist did, however, follow a different procedure. He applied an initial test to determine whether the sexes were similarly situated for purposes of the statute in question, based on the *Reed* rationale.[83] A determination that the parties are similarly situated results in a per se finding of unconstitutionality.[84] If the parties are not similarly situated then the appropriate test[85] is applied. In *Rostker*, Justice Rehnquist found the sexes not to be similarly situated[86] and then appropriately applied the *Craig* test.[87]

Apart from the problem of discerning whether Justice Rehnquist has accepted the *Craig v. Boren* standard, there is the additional problem that Justice Rehnquist and Justices Marshall and Brennan clearly differ on how it is to be applied. For example, Justice Rehnquist seems more easily persuaded than his brothers that the sexes are not similarly situated[88] which has the effect of requiring a middle-tier evaluation when his brothers would find a per se constitutional violation.[89] Also, he affords a greater degree of deference to legislative enactments, and thus is more likely to find signifi-

82. 101 S. Ct. at 2666 (Marshall, J., dissenting).

83. "Regardless of their sex, persons within any one of the enumerated classes of [the challenged statute] are similarly situated with respect to [the objective of the statute]. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." Reed v. Reed, 404 U.S. 71, 77 (1971) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).

84. *See* Kirchberg v. Feenstra, 450 U.S. 455, 463 (1981) (Stewart, J., dissenting); Reed v. Reed, 404 U.S. 71, 76-77 (1971).

85. For Justices Rehnquist and Stewart the appropriate test may or may not be the *Craig* test. *See* Michael M. v. Superior Court, 450 U.S. 464, 468-469 (1981) (plurality opinion); Parham v. Hughes, 441 U.S. 347, 357 (1979) (plurality opinion). However, Justice Rehnquist appears to find that the appropriate test in *Rostker* is the *Craig* test. 101 S. Ct. at 2654.

86. 101 S. Ct. at 2658.

87. *Id.* at 2654, 2658.

88. For example, Justice Rehnquist has joined in opinions holding that past discrimination supports a finding that women are not similarly situated to men. *See* Kahn v. Shevin, 416 U.S. 351, 353-55 (1974). To the contrary, Justices Marshall and Brennan find this reasoning leads to the enforcement of stereotyped inferiority. *See id.* at 357 (Brennan, J., dissenting).

89. This assumes that Justices Brennan and Marshall impliedly follow Justice Rehnquist's procedure of initially determining whether the sexes were similarly situated for all relevant purposes of the challenged statute. *See* Kahn v. Shevin, 416 U.S. 351, 358 (1974) (Brennan, J., dissenting).

cant governmental interests.[90] Finally, Justice Rehnquist restricts the examination of a challenged statute to the statute as drawn and not as the statute could have been drawn to achieve the same results.[91]

Rostker makes it clear that women will not be required to register for a draft in the near future. It also illustrates that a middle-tier level for evaluation of gender-based discrimination continues to gain acceptance. Although *Rostker* may be an indication of Justice Rehnquist's acquiescence to the middle-tier standard, there remain differences in application of the test among the members of the Court. Until those differences are reconciled, it is unlikely that results from the application of the middle-tier standard will be consistent.

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90. Justice Rehnquist finds great deference due state legislative enactments. "The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference." Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (plurality opinion) (citing Reitman v. Mulkey, 387 U.S. 369, 373-74 (1967)). In contrast, in an area in which the Court has accorded Congress greater deference than perhaps any other area (military affairs), Justice Marshall claims that "deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions." 101 S. Ct. at 2663 (Marshall, J., dissenting).

91. In *Michael M.*, Justice Rehnquist, writing for the plurality, said, "The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations." 450 U.S. at 473 (1981) (plurality opinion) (citing Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974)). In *Rostker*, referring to this language, Justice Rehnquist wrote, "[W]e rejected a similar argument because of action by the California Legislature considering and rejecting proposals to make a statute challenged on discrimination grounds gender-neutral. The cause for rejecting the argument is considerably stronger here." 101 S. Ct. at 2656. Justices Marshall and Brennan argue that the requirement that a statute be substantially related to the achievement of its objectives, the second leg of the *Craig* test, cannot be met unless the government proves a gender-neutral statute to be a less effective means of achieving that goal. *See, e.g.*, 101 S. Ct. at 2667 n.11 (Marshall, J., dissenting); *supra* note 52.