

WHEN SILENCE IS LOUDER THAN WORDS: THE UNCONSTITUTIONALITY OF THE SUPREME COURT'S CONTINUED AVOIDANCE OF GENDERED SELECTIVE SERVICE

BRITTANY TAYLOR†

On June 7, 2021, the Supreme Court denied certiorari for *National Coalition for Men v. Selective Service*, a case questioning the constitutionality of gendered selective service.¹ In doing so, the Supreme Court not only signaled its agreement with the male-exclusive soldier archetype and its disagreement with women in combat military occupational specialties but also avoided correctly concluding that gendered selective service is a Fifth Amendment Due Process Clause violation.

Federal equal protection is a fixture of the Fifth Amendment's Due Process Clause.² The Fifth Amendment's Due Process Clause "tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold."³ "Unlike the Fourteenth Amendment, the Fifth Amendment contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."⁴ Regardless, the equal protection analysis for the Fifth Amendment's Due Process Clause is typically the same as the Fourteenth Amendment's Equal Protection Clause.⁵

"The equal protection component of the Fifth Amendment's Due Process Clause . . . confers on [a] petitioner a federal constitutional

† Brittany Taylor, J.D. Candidate 2025 Wake Forest University School of Law. The author holds a B.S. in Economics and United States History from the United States Military Academy at West Point, 2018. She has served as an active duty combat arms officer in the United States Army since commissioning from West Point and is currently participating in the Army's Funded Legal Education Program, where upon graduation from law school she will continue her service as an Army JAG. Brittany is incredibly grateful for the support of her family, friends, professors, the Journal staff, and everyone else who supported her during the editorial process. Views and opinions presented in this article are those of the author and do not necessarily represent the views of DoD or its components.

1. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815, 1815–16 (2021).
2. *See* U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").
3. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921).
4. *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943).
5. *See* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 555 (1977).

right to be free from gender discrimination” that does not “serve important governmental objectives” or is not “substantially related to [the] achievement of those objectives.”⁶ Ironically, gendered selective service runs contrary to the Supreme Court’s precedent on the equal protection component of the Fifth Amendment’s Due Process Clause, as it not only withholds a “minimum of protection for every one’s right of life,”⁷ but it also “does not serve important government objectives or is not substantially related to the achievement of such objectives.”⁸

Currently, the selective service registration requirement is exclusive to men.⁹ The intent is to provide the country “with a structure and a system of guidelines which will provide the most prompt, efficient, and equitable draft possible, if the country should need it.”¹⁰ “America’s leaders” agree that “registration with Selective Service must continue as a key component of national security strategy.”¹¹ However, in order to keep this requirement gendered, the Fifth Amendment requires that gender classification serve an important governmental objective and is substantially related to the achievement of such object—it does not.¹²

As it stands, the existence of gendered selective service withholds “minimum protection” for the life of male service members in a war that utilizes selective service. By disallowing women to enter selective service, men will likely be selected, and potentially killed, at a much higher rate than if women were required to register for selective service, and men are deprived of the unique skill set female soldiers bring to the battlefield. Additionally, it disparages the perception and achievements of volunteer female service members because selective service and the Supreme Court’s denial of certiorari perpetuates the idea that America believes only men are worthy of battle. If America’s leaders view selective service as the most efficient system to maintain a key national security component, it’s not only illogical to exclude women but also unconstitutional.

This comment explores the glaring Fifth Amendment violation of gendered selective service and questions the Supreme Court’s true reasoning for denying certiorari in *National Coalition for Men v. Selective Service System*. To understand why gendered selective service is a Fifth Amendment violation, the history of selective service must first be examined along with the reasons why it was

6. *Davis v. Passman*, 442 U.S. 228, 234–5 (1979) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

7. *Truax*, 257 U.S. at 332.

8. *Davis*, 442 U.S. at 228.

9. *Why Aren’t Women Required to Register?*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/women> (last visited Sept. 20, 2024).

10. *Why is Selective Service Important?*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/why-is-selective-service-important> (last visited Sept. 20, 2024).

11. *Id.*

12. See U.S. CONST. amend. V.

constitutionally gendered. Furthermore, the Supreme Court's previous precedents on gender discrimination must be explored to truly grasp how denying certiorari for *National Coalition for Men v. Selective Service System* is incongruent with the Supreme Court's previous gender classification decisions and serves no purpose beyond perpetuating historic gender role stereotypes.

Part I of this comment provides a brief introduction to the question at hand and a relevant historical background of selective service. Part II explores the historic constitutionality of gendered selective service. Part III establishes the test for gender classifications under the Fifth Amendment Due Process Clause. Part IV applies this test to modern day gendered selective service, arguing its lack of constitutionality. Part V argues against the denial of certiorari in *The National Coalition for Men v. Selective Service System* and explains the inequitable implications of such denial. Part VI concludes this comment, stressing the detrimental effects of gendered selective service.

I. A BRIEF HISTORY OF SELECTIVE SERVICE

Although the "United States has a long tradition of relying on volunteers to defend it in times of conflict, beginning with colonial militias and continuing to today's all-volunteer force . . . conscription has been used to some degree since the colonial era."¹³ During the American Revolution, states used militia drafts to maintain the Continental Army.¹⁴ States continued to be charged with the maintenance of their standing state Army through whatever means they deemed necessary (volunteer, draft, bounties) until the Militia Act of 1862.¹⁵ The Militia Act of 1862 "provided for a draft of the militia if a state did not fill its quota of three year volunteers," becoming the first federal military draft policy.¹⁶

By 1863, recruitment and national conscription were in complete federal control with the Enrollment Act of 1863.¹⁷ "Enrollment was similar to draft registration in recent history, except that it was conducted as a census: individuals were sought out to be enrolled."¹⁸ It required "every white male citizen and every immigrant who had applied for citizenship who was between the ages of 20 and 45 to register for the draft."¹⁹ Notably, "free black men were not required to enroll in the draft because they were not

13. Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, THE ARMY LAW., DA PAM 27-50-431, at 2 (2009).

14. Timothy J. Perri, *The Evolution of Military Conscription in the United States*, 17 THE INDEP. REV. 429, 429 (2013).

15. *See id.* at 429-30.

16. *Id.* at 430.

17. *Id.*

18. *Id.*

19. *The United States Conscription Law or National Militia Act*, DUKE UNIV. LIBR., <https://exhibits.library.duke.edu/exhibits/show/lincoln/item/12253> (last visited Sept. 27, 2024).

considered citizens.”²⁰ The Enrollment Act of 1863 totally excluded women and non-citizens.²¹

Although the Enrollment Act was widely unsuccessful during the Civil War, accounting for only eight percent of the Union force, it indicated that soldiering was either a gift or a death sentence for a citizen.²² Some of America’s most famous (and infamous) leaders emerged from the Civil War—an opportunity denied to women and black Americans (both non-voting citizens).²³ Conversely, conscripted men died at a higher rate which may have been lessened if these non-voting citizens were included through the Enrollment Act, purely to increase body count and decrease chance of death.²⁴ This paradox is demonstrative of the power of war, a power which is highly unfair if withheld from one gender. However, at this point in history, there was a “compelling reason” to exclude women: they were not voting citizens.²⁵

“Less than six weeks after the United States entered World War I, Congress narrowly passed the Selective Service Act of 1917.”²⁶ The Selective Service Act of 1917 gave the president power “to draft men for war service.”²⁷ “The draft legislation contained no specific racial provisions,”²⁸ as African American men were granted voting citizenship with the 1870 ratification of the 15th Amendment.²⁹ Women, still without suffrage, were left unmentioned in the Selective Service Act of 1917.³⁰ “By the end of World War I, approximately 72% of American troops were draftees, a much higher percentage than in earlier US wars.”³¹ As a result, men were disproportionately forced

20. *Id.*

21. *See id.*

22. Peter R. Mansoor, *Women and the Draft*, HOOVER INST. (Feb. 17, 2016), <https://www.hoover.org/research/women-and-draft>.

23. *See The United States Conscription Law or National Militia Act, supra* note 20; *see also* Hans Peterson, *List of Presidents who were Veterans*, U.S. DEP’T. OF VETERANS AFF’S. (Feb. 16, 2015), <https://www.va.gov/health/newsfeatures/2015/february/list-of-presidents-who-were-veterans.asp>.

24. Craig Lambert, *The Deadliest War*, HARV. MAG., <https://www.harvardmagazine.com/2001/05/the-deadliest-war.html> (last visited Sept. 27, 2024).

25. *See* U.S. CONST. amends. XV, § 1, XIX § 1.

26. H.R. 3545, *An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States (Selective Service Act)*, April 28, 1917, U.S. CAPITOL VISITOR CTR., <https://www.visitthecapitol.gov/artifact/hr-3545-act-authorize-president-increase-temporarily-military-establishment-united-states> (last visited Sept. 22, 2024).

27. *Id.*

28. Paul T. Murray, *Blacks and the Draft: A History of Institutional Racism*, 2 J. BLACK STUD. 57, 58 (1971) (It is important to highlight the lack of racial provisions in the Selective Service Act of 1917 did not equate to the lack of racism. Rather, racism was pervasive in the draft process and black men were systematically and disproportionately inducted into service at higher rates than their white counterparts).

29. U.S. CONST. amend. XV, § 1.

30. *See* Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76, 76-80 (1917).

31. *World War I Draft: Topics in Chronicling America*, LIB. OF CONG., <https://guides.loc.gov/chronicling-america-wwi-draft> (last visited Sept. 27, 2024).

to die for their country and women were excluded from the benefits of military service.

Knowing they had to choose between this death sentence or draft dodging, conscripted men began to challenge the Selective Service Act of 1917.³² In a compilation of draft challenge cases from the Selective Service Act of 1917, the Supreme Court opined on the constitutionality of selective service in the landmark *Selective Draft Law Cases*.³³ In a unanimous decision, Chief Justice Edward White wrote for the court that:

Compelled military service is [not] repugnant to a free government and [not] in conflict with all the great guarantees of the Constitution as to individual liberty It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it.³⁴

The adoption of the Fourteenth Amendment completely "broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative," leaving "no possible support" for a draft challenge.³⁵

Delivered in 1918, the above opinion emphasizes "the duty of the citizen to render military service in case of need and the right of the government to compel it."³⁶ At the time of the opinion, women did not fall into this category of citizenship as they were still two years away from the right to vote.³⁷ In actuality, the right to vote is not what kept women out of these drafts. More likely, the image of a woman's fragility needed to be protected from the masculinity of war, as society believed "military service was not appropriate for women because it took them away from their homes" and "close association with male soldiers would lead women to have declining moral standards and to lose their femininity."³⁸ However, the voting rights of women was the only non-gender normative and compelling reason given for keeping women out of the draft. In theory, denying women from entering the draft when they were not citizens would not violate the Fifth Amendment because if they are not citizens with equal rights, there is nothing to violate.

32. See *Selective Draft Law Cases Hold Conscription is Constitutional*, CONST. L. REP. (Apr. 26, 2016), <https://constitutionallawreporter.com/2016/04/26/selective-draft-law-cases-hold-conscription-2>.

33. *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366, 390 (1918).

34. *Id.* at 378.

35. *Id.* at 389.

36. *Id.* at 379.

37. See U.S. CONST. amend. XIX, § 1.

38. LEISA D. MEYER, *CREATING GI JANE: SEXUALITY AND POWER IN THE WOMEN'S ARMY CORPS DURING WORLD WAR II* 40 (Columbia Univ. Press 1996).

By World War II, the Nineteenth Amendment was passed and women became voting citizens.³⁹ However, they were not included in the September 1940 draft, which only continued to expand after the United States entered World War II.⁴⁰ Women were not included in the Korean or Vietnam War drafts either, although men continued to serve in large numbers.⁴¹ The compelling reason of excluding non-citizens from the draft no longer existed, thus making it seem rational women would be included in the draft based on the precedent established in the *Selective Draft Law Cases*.

Exclusively examining the period when women were voting citizens—World War II, the Korean War, and the Vietnam War—an estimated total of 519,865 American soldiers died in war.⁴² In World War II alone, there were an estimated 405,399 American soldiers killed in relation to the war.⁴³ Of those 405,399 estimated soldier deaths, it is estimated 432 of them were women.⁴⁴ This means in World War II, 99.9% of service members who died were men.⁴⁵ This is a far cry from the required “minimum of protection for every one’s right of life, liberty, and property,” guaranteed by the Fifth Amendment.⁴⁶

The Vietnam War marked the last war where the military was not manned by an all-volunteer force.⁴⁷ The modern day military is staffed by men and women who freely elect to serve, and the United States’ draft has since remained inactive.⁴⁸ However, men are still required to register for selective service through the Military Selective Service Act.⁴⁹ The Military Selective Service Act, enacted in 1948, requires “men, but not women, to register for a potential military draft.”⁵⁰

In accordance with the modern-day Selective Service regulations, men must register for selective service to enable the government to keep a “list of names of men from which to draw in

39. U.S. CONST. amend. XIX, § 1.

40. See David Vergum, *First Peacetime Draft Enacted Just Before World War II*, U.S. DEP’T OF DEF. (Apr. 7, 2020), <https://www.defense.gov/News/Feature-Stories/story/article/2140942/first-peacetime-draft-enacted-just-before-world-war-ii.s>.

41. Dunn, *supra* note 13, at 4.

42. See *America’s Wars*, DEP’T OF VETERANS AFF., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Sept. 22, 2024) (indicating the total number of battle deaths from World War II, Korean War, and the Vietnam War).

43. *Id.*

44. Danielle DeSimone, *Over 200 Years of Service: The History of Women in the U.S. Military*, UNITED SERV. ORGS. (Feb. 28, 2023), <https://www.uso.org/stories/3005-over-200-years-of-service-the-history-of-women-in-the-us-military>.

45. See Beth Bailey, *Women & Gender*, THE AM. SOLDIER IN WORLD WAR II, <https://americansoldierww2.org/topics/women-and-gender> (last visited Sept. 22, 2024).

46. U.S. CONST. amend. V.

47. See *Vietnam Lotteries*, SELECTIVE SERV. SYS., <https://www.sss.gov/history-and-records/vietnam-lotteries> (last visited Sept. 27, 2024).

48. *Id.*

49. See Proclamation No. 4771, 45 Fed. Reg. 45247 (July 2, 1980).

50. Andrew J. Haile, *Redrafting the Selective Service Act: Women and the Military Draft*, 28 UCLA J. GENDER AND L. 121, 121 (2021).

case of a national emergency requiring rapid expansion of our Armed Forces.”⁵¹

If required to register with Selective Service, failure to register is a felony punishable by a fine of up to \$250,000 and/or 5 years imprisonment. Also, a person who knowingly counsels, aids, or abets another to fail to comply with the registration requirement is subject to the same penalties. Unless a man provides proof that he is exempt from the registration requirement, his failure to register will result in referral to the Department of Justice for possible investigation and prosecution.⁵²

This is today’s selective service system. Men are exclusively required to register or face a quarter-of-a-million-dollar fine, imprisonment, and federal prosecution—an extreme women are excluded from. Prior to the Nineteenth Amendment’s passage, gendered selective service may have been explainable, but now it remains an archaic reminder of outdated societal norms and forced gender identification. This systematic exclusion of women from selective service erodes equal opportunity, as it signals women are not worthy of war, and men are less worthy to live. As illogical as it seems to allow for a system where 99.9% of war casualties are men, the United States court system has repeatedly held that gender-based selective service does not violate constitutional Fifth Amendment protections.

II. THE HISTORIC EXCUSES FOR THE CONSTITUTIONALITY OF GENDER BASED SELECTIVE SERVICE

In 1968, the United States District Court for the Southern District of New York considered the constitutionality of the Military Selective Service Act in *United States v. St. Clair*.⁵³ Here, the defendant James St. Clair was charged with violating the Military Selective Service Act by failing to submit his selective service registration.⁵⁴ In his defense, St. Clair fought to dismiss his indictment on the grounds that “the Act [was] unconstitutional in that it [made] an invidious discrimination on the basis of sex in violation of the defendant’s right under the Fifth Amendment to due process of law.”⁵⁵ The Court vehemently disagreed, finding in the Military Selective Service Act, “Congress made a legislative judgment that men should be subject to

51. *Frequently Asked Questions*, SELECTIVE SERV. SYS., <https://www.sss.gov/faq> (last visited Sept. 27, 2024).

52. *Penalties for Failing to Register*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/benefits-and-penalties> (last visited Sept. 22, 2024).

53. *United States v. St. Clair*, 291 F. Supp. 122, 123 (S.D.N.Y. 1968).

54. *Id.*

55. *Id.*

involuntary induction but that women, presumably because they are 'still regarded as the center of home and family life, should not.'⁵⁶

In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning. Moreover, Congress recognized that in modern times there are certain duties in the Armed Forces which may be performed by women volunteers. For these reasons, the distinction between men and women with respect to service in the Armed Forces is not arbitrary, unreasonable or capricious.⁵⁷

Although more articulately stated, the Court held that keeping women in the kitchen was a compelling reason to maintain a gendered selective service. The idea of women in war presented a "disruption to these traditional stereotypes of women's proper roles as well as to traditional ways in which men [had] proven their masculinity."⁵⁸ "In view of these stereotypical images, it is not difficult to understand" that the Court in *United States v. St. Clair* could potentially "equate women's participation in" selective service "with the destruction of womanhood, manhood, and American society."⁵⁹ However, as St. Clair attempted to argue, this protection of womanhood and manhood comes at a steep cost, a cost male citizens would exclusively pay if the draft became active.⁶⁰

Nearly fifteen years later, the United States Supreme Court addressed this same Fifth Amendment challenge to the Military Selective Service Act in *Rostker v. Goldberg*.⁶¹ Rather than rely on the compelling reason of needing women in the kitchen, the Supreme Court held "men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."⁶²

Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration. The fact that congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop

56. *Id.* at 124.

57. *Id.* at 125.

58. Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLIN J. PUB. L. & POL'Y 199, 210 (1994).

59. *Id.* at 210-11.

60. *St. Clair*, 291 F. Supp. at 124.

61. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

62. *Id.* at 78.

a pool of potential combat troops. As was the case in *Schlesinger v. Ballard*,⁶³ . . . “the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated” in this case. The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.⁶⁴

Justice William Rehnquist argued that the purpose of registration through the Military Selective Service Act “is to provide a pool for the drafting of combat troops. Because only men are eligible for combat positions, men and women are not similarly situated. Drawing the inevitable gender classification line at registration.”⁶⁵ This “similarly situated” reasoning established by the Supreme Court allows for gender based selective service. Like the logic followed in the *Selective Draft Law Cases*: no citizenship, no draft; the Supreme Court now claimed no combat, no selective service.

The Supreme Court’s decision in *Rostker v. Goldberg* hinged upon the statutory ban of women in combat, which at the time was not only historic but also pervasive.⁶⁶ Seemingly, the Supreme Court’s decision in that case left room for the elimination of gender-based selective service if women were included in combat service. Women are now included in combat service, yet the Supreme Court refuses to revisit its decision in *Rostker v. Goldberg*.⁶⁷

On August 13, 2020, the National Coalition for Men argued in the United States Court of Appeals for the Fifth Circuit that gendered selective service violates the Fifth Amendment because women are

63. In *Schlesinger v. Ballard*, the Supreme Court held “the due process clause of the Fifth Amendment is not violated by the difference in treatment of men and women Navy officers” in officer, promotion discharges, because “male and female line officers in the Navy are not similarly situated with respect to professional service.” *Schlesinger v. Ballard*, 419 U.S. 498, 499 (1975).

64. *Goldberg*, 453 U.S. at 78–79 (citations omitted).

65. Gilbert L. Purcell, *Rostker v. Goldberg: A Step Backward in Equal Protection, or a Justifiable Affirmation of Congressional Power*, 9 PEPP. L. REV. 441, 469 (1981).

66. See Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL’Y 1011, 1024–25 (2007).

67. In December 2015, Secretary of Defense Ash Carter announced that the Department of Defense would open all combat arms positions to women, no exceptions. He commented:

As long as they qualify and meet the standards, women will now be able to contribute to our mission in ways they could not before. They’ll be allowed to drive tanks, fire mortars, and lead infantry soldiers into combat. They’ll be 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. And even more importantly, our military will be better able to harness the skills and perspectives that talented women have to offer.

Ash Carter, Sec’y of Def., Dep’t of Def., Remarks on the Women in Service Review (Dec. 3, 2015), <https://www.defense.gov/News/Speeches/Speech/Article/632495/remarks-on-the-women-in-service-review>.

now fully integrated into combat roles.⁶⁸ The United States Court of Appeals for the Fifth Circuit dismissed the case, concluding that it would not “disregard a Supreme Court decision as to the constitutionality of the exact statute at issue here because some key facts implicated in the Supreme Court’s decision have changed.”⁶⁹ Yet, when faced with these changes in key facts, the Supreme Court decided it was not time to change its previous holding in *Rostker v. Goldberg*—on June 7, 2021, the Supreme Court denied the petition for certiorari for *National Coalition for Men v. Selective Service System*.⁷⁰

In its denial for certiorari, the Supreme Court recognized the “role of women in the military has changed dramatically,” since *Rostker v. Goldberg*, but the “Court’s longstanding deference to Congress on matters of national defense and military affairs cautions against granting review while Congress actively weighs the issue”—a poor excuse to avoid a hard conversation.⁷¹ Congress has been actively weighing on selective service and women’s participation in the armed forces since the beginning of its inception—this has rarely stopped the Supreme Court from sharing its gender-normative beliefs.

The Supreme Court’s denial of certiorari reinforced that there is a discussion remaining about women’s worth in combat arms, even though women have now served in some of the most difficult combat arms professions.⁷² Moreover, the Supreme Court’s denial of certiorari indicates that the life of male citizens is worth less than that of a female citizen. The Supreme Court would rather double the chances of male conscripted soldier death, in the case of an active draft, than lessen those odds by increasing the selective service pool with women. Perhaps most importantly, the inequities that stem from gendered selective service, for both men and women, would not meet the equal protection standard required by the Supreme Court in their previous decisions. This is particularly true because the compelling reasons for the gendered draft requirement as proscribed in the *Selective Draft Law Cases* and *Rostker v. Goldberg* no longer exist to preclude women from selective service.

68. Nat’l Coal. For Men v. Selective Serv. Sys., 969 F. 3d 546, 548 (5th Cir. 2020) (per curiam).

69. *Id.* at 550.

70. Nat’l Coal. For Men v. Selective Serv. Sys., 141 S. Ct. 1815, 1815 (2021).

71. *Id.* at 1816.

72. See Tom Vanden Brook, *Just 10 Years Ago, Women were Banned from Combat. Now, they’re on the Front Lines, Climbing the Ranks*, USA TODAY (Apr. 18, 2023, 5:00 AM), <https://www.usatoday.com/story/news/politics/2023/04/16/women-in-combat-military-progress/11548931002>.

III. THE FIFTH AMENDMENT DUE PROCESS STANDARD FOR GENDER CLASSIFICATION QUESTIONS

“The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall ‘be deprived of life, liberty, or property, without due process of law,’”⁷³ prohibiting “arbitrary deprivation of . . . liberty.”⁷⁴ The Supreme “Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”⁷⁵

The decisions on sex discrimination . . . illustrate the Court’s consistent practice of treating the fifth and fourteenth amendments’ guarantees of equal protection as interchangeable, even when the challenged federal law has “nationwide impact.” In *Frontiero v. Richardson*,⁷⁶ where the issue was the validity of a federal statute defining a military “dependent” in sex-discriminatory terms, eight Justices agreed that the controlling precedent was *Reed v. Reed*,⁷⁷ a fourteenth amendment equal protection decision.⁷⁸

73. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3. (1975).

74. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

75. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

76. In the 1973 Supreme Court Case *Frontiero v. Richardson*, Sharron Frontiero, an Air Force lieutenant, sought as a member of the United States armed forces to gain dependency benefits for her husband. Her request was denied because she failed to prove that her husband depended on her for more than one-half of the family income. Frontiero appealed the decision to the Court, arguing that the fact that male lieutenants were granted automatic dependency rights for their wives without the need to prove “true” dependency, whereas females were not, violated the Due Process Clause of the Fifth Amendment . . . In an 8-1 decision, the majority argued that the nature of the government’s classification was without purpose and served to do nothing more than relegate women to a lower sphere of the social order.

Jeremy Bressman, *A New Standard of Review: Craig v. Boren and Brennan’s “Heightened Scrutiny” Test in Historical Perspective*, 32 J. SUP. CT. HIST. 85, 89 (2007) (*Frontiero v. Richardson* was decided prior to *Craig v. Boren*, and the Supreme Court seemingly applied “close judicial scrutiny” as its standard of review).

77. In the 1971 Supreme Court Case *Reed v. Reed*,

Sally Reed challenged the constitutionality of an Idaho law that granted her husband, from whom she had separated, preference over her with regard to the administration of her deceased son’s estate. The statute, Reed felt, was a clear violation of the intentions of the Equal Protection Clause; by contrast, the Idaho Supreme Court found the statute to be merely an attempt to eliminate controversy and promote administrative convenience when multiple parties were involved. Holding for a unanimous Court, Chief Justice Warren Burger accepted Reed’s argument and overturned the Idaho statute. Burger . . . noted that “[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.

Bressman, *supra* note 76, at 88–89 (this case was decided prior to *Craig v. Boren*, and the Supreme Court “relied on the reasoning of the rational basis test.”).

78. *Karst*, *supra* note 5.

The consistent mirror analysis of the Fifth and Fourteenth Amendments' guarantees of equal protection allows for the logical application of the standard of review developed for gender equal protection claims in *Craig v. Boren*.⁷⁹

In the 1976 case *Craig v. Boren*, the Supreme Court redefined "the legal standard for equal protection in gender-discrimination cases."⁸⁰ There, the Supreme Court questioned the constitutionality of an Oklahoma statute that sold beer to women at a younger age than men.⁸¹ Oklahoma justified the statute by claiming men were statistically more likely to be arrested for driving while under the influence of alcohol between ages of eighteen and twenty years old (0.18% of women and 2% of men in that age group).⁸² The Supreme Court was unconvinced.⁸³ Rather, the Supreme Court "redefined the legal standard for equal protection in gender-discrimination cases," rejecting Oklahoma's statute.⁸⁴

Writing for the majority, Justice William Brennan Jr. synthesized "decades' worth of development and decisions under the Equal Protection Clause of the Fourteenth Amendment."⁸⁵ Justice Brennan established "what is now referred to as heightened scrutiny,"⁸⁶ holding, "to withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁸⁷

Justice John Stevens illustrated in his concurring opinion that gender classifications were "objectionable because it is based on an accident of birth, because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket, and because, to the extent it reflects any physical difference between males and females, it is actually perverse."⁸⁸ Thus, the question left for the court to answer was "whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable."⁸⁹ Here, the justification did not surmount the standard established by the Supreme Court, because even if the gender classifying law brought forth a minute benefit, it was not enough to rationalize insulting "all of the young men of the State."⁹⁰ Justice Steven's application of Justice Brennan's heightened scrutiny standard alone demonstrates the high standard set when proving a compelling reason for gender

79. See *Craig v. Boren*, 429 U.S. 190, 218 (1976).

80. Bressman, *supra* note 76, at 85.

81. *Craig*, 429 U.S. at 191-92.

82. *Id.* at 201.

83. *Id.* at 192.

84. Bressman, *supra* note 76, at 85.

85. *Id.*

86. *Id.*

87. *Craig*, 429 U.S. at 197.

88. *Id.* at 212-13 (Stevens, J., concurring).

89. *Id.* at 213.

90. *Id.* at 214.

classification. The state must show “important governmental objectives” and the means to reach the objective must be “substantially related” as expounded upon in *United States v. Virginia*.⁹¹

In the 1996 case *United States v. Virginia*, the Supreme Court applied *Craig v. Boren*’s heightened scrutiny to a sex-based admissions policy.⁹² Here, the Virginia Military Institute (“VMI”) excluded women from admission and attempted to ameliorate the exclusion by creating a separate women’s only institution.⁹³ Writing for the majority, Justice Ruth Ginsburg opined that there was no “exceedingly persuasive justification,” as required by *Craig v. Boren*, to bar admission of women.⁹⁴ The Court decided “that Virginia ha[d] shown no ‘exceedingly persuasive justification’ for excluding all women from the citizen-soldier training afforded by VMI.”⁹⁵ Instead, its justifications were merely “fixed notions concerning the roles and abilities of males and females.”⁹⁶ “The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophec[ies],’ once routinely used to deny rights or opportunities.”⁹⁷

“Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”⁹⁸ To meet the burden of justification, a State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”⁹⁹

The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females . . . ‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.¹⁰⁰

91. See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

92. See *id.* at 555.

93. *Id.* at 526.

94. *Id.* at 556

95. *Id.* at 534; see also *id.* at 517 (Virginia argued that VMI’s distinct training system had to be fundamentally modified in order to include women).

96. *Id.* at 541 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

97. *Virginia*, 518 U.S. at 542–43 (citations omitted).

98. *Id.* at 532.

99. *Id.* at 524

100. *Id.* at 533.

The heightened review standard applicable to gender classifications means that classifications, based upon sex, "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."¹⁰¹

Applying this equal protection analysis, the Supreme Court further held, even if Virginia were to create a separate military institution for women, it would be impossible "in myriad respects" for it to provide equal benefits to VMI.¹⁰² The benefits derived from attending the Virginia Military Institute were inimitable, and there was no substitute to inclusion.¹⁰³ This assessment of the women's institute suggested in *Virginia* unintentionally added an additional step to the *Craig v. Boren* heightened scrutiny analysis. To meet the standard of heightened scrutiny, not only would a gender classification need to have sufficient justification, but it must also not operate "to create or perpetuate the legal, social, and economic inferiority of women."¹⁰⁴

IV. THE ACCURATE APPLICATION OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE TO MODERN-DAY SELECTIVE SERVICE

In decisions of sex discrimination, the Supreme Court has consistently applied the same analysis to the Fifth Amendment's Due Process Clause, as it employs in a Fourteenth Amendment's Equal Protection Clause analysis.¹⁰⁵ Thus, the compounding test established in *Craig v. Boren* and *United States v. Virginia* is used to question whether a gender classification is constitutional under the Fifth Amendment's Due Process Clause.¹⁰⁶ Resultantly, to be constitutional under the Fifth Amendment's Due Process Clause, a gender classification "must serve important governmental objectives and must be substantially related to achievement of those objectives,"¹⁰⁷ and the objective within itself must be "exceedingly persuasive" enough to outweigh the inequities that result from the classification—gendered selective service does not pass this test.¹⁰⁸

When asked "why do we need selective service if there may never be another draft," the United States government continues to respond:¹⁰⁹

101. *Id.* at 534.

102. *Id.* at 551.

103. *See id.*

104. *See id.* at 534.

105. *See* Karst, *supra* note 5.

106. *See* Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135, 137 (2003).

107. *Craig*, 429 U.S. at 197.

108. *Virginia*, 518 U.S. at 531.

109. *Frequently Asked Questions*, SELECTIVE SERV. SYS., <https://www.sss.gov/faq> (last visited Sept. 28, 2024).

America's leaders agree that despite the success of the All-Volunteer Force, registration with Selective Service must continue as a key component of national security strategy. As President Clinton informed Congress in 1994, "Maintaining the Selective Service System and draft registration provides a hedge against unforeseen threats and a relatively low-cost 'insurance policy' against our underestimating the maximum level of threat we expect our Armed Forces to face."¹¹⁰

When asked, "why aren't women required to register," the United States government's response is: "The Military Selective Service Act, as it is written, only authorizes the registration of 'male persons.' In order for the Selective Service to be authorized to register women, Congress would have to pass legislation amending the current law."¹¹¹ There is a blatant disconnect here between the government's objective, the need to achieve the above professed goal, and the current gender classification. It seems the response to, "why aren't women required to register?" is the government saying, "just because"—which is far from the "substantially related" reason needed to achieve the national security objective of selective service.

Historically, there were two predominate "substantially related" reasons women were not included in the draft or modern-day selective service: women were not true voting citizens,¹¹² and women were not allowed to serve in military combat occupational specialties.¹¹³ Now that these hurdles no longer exist, there is no legitimate reason to bar women from selective service. If citizenship is defined by service, which a strict constitutionalist would find persuasive through examining the history and drafting of the Constitution, it follows that modern-day gender-selective service makes women second-class citizens.¹¹⁴ "Male-only registration excludes women from what many consider the most basic of civic obligations; subtly stigmatizes women as to subsequent public service, political power, and prestige; and inevitably perpetuates anachronistic, stereotypical male and female roles."¹¹⁵ This inequity would be impossible to overcome by the standard established in the *United States v. Virginia*.

The disconnect between the government objective of national security and the gender classification is so large, it works against the achievement of the objectives of selective service.

110. *Id.*

111. *Id.*

112. See *Selective Draft Law Cases*, 245 U.S. at 366; see also U.S. CONST. amend. XIX, § 1.

113. See *Goldberg*, 453 U.S. at 67.

114. Linda R. Chait, *Women, War & Equality since Rostker v. Goldberg*, 7 WOMEN'S RTS. L. REP. 143, 146 (1982).

115. Sara MacDwyer, *Rostker v. Goldberg: The Uneven Development of the Equal Protection Doctrine in Military Affairs*, 12 GOLDEN GATE UNIV. L. REV. 661, 661–62 (1982).

By systematically excluding women from registration, the military disregards a large pool of citizens who would be eligible to serve in both combat and non-combat-related roles. Including women in the registration would further advance the MSSA's goals of providing an adequate military force in the event of a national crisis and of providing the military with a broader range of individuals.¹¹⁶

Integrating females into Selective Service creates a more diverse military service. Women are more likely to complete higher education than men and utilize a distinctive problem-solving skill set.¹¹⁷ Women increase the lethality and effectiveness of the military,¹¹⁸ yet are unwanted if there were a need for selective service to become activated.

Rather, disdain for women in selective service is so great, the government would rather increase the risk of men being killed at war, not only by withholding the talent of women, but the sheer statistical likelihood of death when less bodies are included in war.

[Selective Service] assigns exclusively to men the obligations to involuntarily leave one's home, family, and employment if called up to serve and to 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.¹¹⁹

The cost to men of evading Selective Service is immense—it is inequitable.

Gendered selective service must be exceedingly persuasive to overcome the astronomical loss of opportunity gendered selective service creates. Women are treated as second-class citizens, gender

116. Katie McGuire, *Equal Protection Under the Military Selective Service Act: Revisiting Rostker and the Exclusion of Women from the MSSA's Mandate*, 66 ALA. L. REV. 691, 695 (2015).

117. Erin R. Goldberg, *A Sisterhood of Arms: Envisioning Conscription and Selective Service Post-Gender Integration of Combat Arms*, 64 BUFF. L. REV. 1135, 1164 (2016).

118. See David Vergun, *Women Leaders Discuss Benefits of Military Service*, U.S. DEP'T OF DEF. (Mar. 6, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3320600/women-leaders-discuss-benefits-of-military-service>.

119. Tom James, *Overruling Rostker v. Goldberg: Toward an Equal Obligation to Register for Selective Service*, NEB. L. REV. (May 21, 2021).

stereotypes are perpetuated,¹²⁰ and men are asked to risk their lives at higher rates or break the law. Ameliorating this inequity is impossible and as expounded upon above, the gender classification in no way relates to achieving the goal of selective service. Per the Supreme Court's established standard for gender classification questions, today's gender based selective service fails in every way. Thus, the question remains: why did the Supreme Court deny *The National Coalition for Men v. Selective Service* petition for certiorari, when it is evident that gendered selective service is a Fifth Amendment Due Process Violation?

V. THE NATIONAL COALITION FOR MEN V. SELECTIVE SERVICE: AN EXCUSE FOR SYSTEMATIC SEXISM

On June 7, 2021, writing for the Court, Justice Sonia Sotomayor denied the writ of certiorari for *The National Coalition for Men v. Selective Service*.¹²¹

The petition for certiorari was filed on behalf of the National Coalition For Men (NCFM) and two individual young men. NCFM brought this case in the lower courts, where the district court agreed that the Military Selective Service Act is unconstitutional sex discrimination. However, the Fifth Circuit reversed the ruling based on the Supreme Court's 1981 decision in *Rostker v. Goldberg*.¹²²

The Fifth Circuit held, "only the Supreme Court may revise its precedent" in *Rostker v. Goldberg*.¹²³

In her opinion, Justice Sotomayor recognized, "the Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating on the basis of sex absent an 'exceedingly persuasive justification.'"¹²⁴ She further recognized that the "exceedingly persuasive justification" held in *Rostker v. Goldberg* no longer exists.¹²⁵ Yet, this change in law did not convince the Supreme Court to review its prior decision in *Rostker v. Goldberg*. Rather, Justice Sotomayor opined the "Court's longstanding deference to Congress on matters of national defense and military

120. See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 UNIV. CHI. LEGAL F. 9, 11 (1989) (describing how "the law's differential treatment of men and women, typically rationalized as reflecting 'natural' difference between the sexes, historically had tended to contribute to women subordination—their confined 'place' in man's world—even when conceived as protective of the fairer, but weaker and dependent-prone sex.").

121. *Nat'l Coal. for Men*, 141 S. Ct. at 1815.

122. *National Coalition for Men, et al. v. Selective Service System, et al.*, ACLU (Dec. 7, 2021), <https://www.aclu.org/cases/national-coalition-men-et-al-v-selective-service-system-et-al>.

123. *Nat'l Coal. for Men*, 969 F.3d at 547.

124. *Nat'l Coal. for Men*, 141 S. Ct. at 1815 (citations omitted).

125. See *id.* at 1816.

affairs cautions against granting review while Congress actively weighs the issue.”¹²⁶

Justice Sotomayor’s opinion alludes to an understanding that gendered selective service is a Fifth Amendment Due Process Violation, as there is no longer an “exceedingly persuasive justification” to maintain it. However, by failing to reverse the outdated opinion held in *Rostker v. Goldberg*, the Supreme Court put the ball in Congress’s court and sidestepped a hard discussion about women in combat arms. The Supreme Court’s denial of certiorari indicates that it is also unsure about women’s worth in combat arms and wants to give Congress a chance to make some arbitrary and persuasive justification for why selective service should remain gendered.

All combat arms military occupational specialties and schools opened to women in 2015, meaning at the time of this denial of certiorari, Congress had six years to decide on women in selective service.¹²⁷ Almost ten years has passed since the unconditional opening of combat arms, and women are still excluded from selective service.¹²⁸ The Supreme Court’s discomfort with women in combat is not a reason to remain oblivious to the Fifth Amendment Due Process violation of gendered selective service. The Supreme Court’s denial of certiorari is an indicator of pervasive sexism at the highest levels of government and legitimizes the couch quarterbacks who believe combat arms integration was a “misguided social experiment that threatens military readiness and wastes resources in the service of a political agenda.”¹²⁹

The Supreme Court needs to reverse its decision in *Rostker v. Goldberg*, then allow for Congress to adjust and legislate. Waiting for Congress to weigh the issues solidifies that there is an issue to weigh. Women are allowed in every facet of the military. Unless the Supreme Court believes that women are indeed second-class citizens and have no standing to serve, the Supreme Court is setting a dangerous precedent by allowing this blatant Fifth Amendment Due Process violation to continue. Gendered selective service devalues both the lives of men and women and the only remedy is its elimination.

VI. CONCLUSION: GENDERED SELECTIVE SERVICE, MAKING WAR HEROES AND HOUSEWIVES

In their opinions, Justice Stevens and Justice Ginsberg made clear the threshold for gender classifications. In doing so, they laid a foundation for relevant laws to withstand a Fifth Amendment Due

126. *Id.*

127. See Carter, *supra* note 67.

128. See *Why Aren’t Women Required to Register*, *supra* note 9.

129. Heather Mac Donald, *Women Don’t Belong in Combat Units*, WALL ST. J. (Jan. 16, 2019, 1:38 PM), <https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638>.

Process challenge—modern day gendered selective service does not withstand this challenge. By examining the history of the draft and selective service, its governmental objective is clear: selective service is an important strategy for national security in times of war.¹³⁰ History also explains the substantially related reasoning for gendered selective service, second-class citizenship and combat exclusion, but these reasonings now no longer exist.

Today, after decades of experience in the Global War on Terror, the military itself no longer defends the rationale of the combat-exclusion policy for women, nor does it defend men-only registration. For good reason: the changing nature of modern warfare and the proven contributions of servicewomen in recent conflicts have persuaded senior military leaders and civilian defense experts that women are essential to all aspects of American military operations. In the face of this evidence, Congress has nonetheless elected to preserve men-only registration, perpetuating prejudices about women's role in society and denigrating the reality of their role in defending the nation's security.¹³¹

Moreover, by allowing gendered selective service to continue, men are subject to harsh punishment, and their lives are devalued when faced with war. Because of the "accident of birth,"¹³² men alone are forced to face the grave consequences of selective service—without constitutional reason.

The denial of certiorari in *National Coalition for Men v. Selective Service* affirms there is no longer a constitutional justification for maintaining gendered selective service—gendered selective service is a Fifth Amendment Due Process violation. This denial confirms that the government continues to question the existence of women in combat and devalue the lives of men in war. With its denial, the Supreme Court illustrated disrespect for the holdings in *Craig v. Boren* and *United States v. Virginia* and devalued heightened scrutiny. The Supreme Court's deference to Congress was an excuse, as it deferred correcting an institutional wrong. The Supreme Court's silence on gendered selective service is deafening. It perpetuates the anachronistic, stereotypical belief that "if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."¹³³ In a world of gendered selective service, women belong in the kitchen, while men are disposable at war.

130. *Why is Selective Service Important*, *supra* note 10.

131. Brief of the Modern Military Association of America, Service Women's Action Network, Protect Our Defenders, Reserve Organization of America, and Enlisted Association of the National Guard of the United States as Amici Curiae Supporting Petitioners at 3, Nat'l Coal. for Men v. Selective Serv. Sys, No. 20-928, 2021 WL 637244, at *3 (5th Cir. Feb. 11, 2021).

132. *Craig*, 429 U.S. at 212–13 (Stevens, J., concurring).

133. *St. Clair*, 291 F. Supp. at 125.