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Sharing the Burden of Citizenship: It's Time for America's Daughters to Register for the Draft

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SHARING THE BURDEN OF CITIZENSHIP: IT'S TIME FOR AMERICA'S DAUGHTERS TO REGISTER FOR THE DRAFT

*Kylie Hanlon**

ABSTRACT

In December of 2015, the Department of Defense announced its decision to allow women into combat roles. Many applauded this decision as a huge victory for gender equality in the United States. However, there still remains one formal barrier to gender equality in the U.S. military, the bar on female registration for the draft. This comment will argue that in order for American women to share the burdens of citizenship with their male peers, they must also be required to register for the draft. However, this comment will also argue that in order to protect the important State interest in the wellbeing of children and families, a parenthood exception should be added to allow both mothers and fathers to opt out of registering with the Selective Service System. To do so would respect the mandates of the Equal Protection clause, allow women to share the burden of citizenship, and protect children and families.

This comment will compare the United States and Israeli militaries, and will engage in a comparative analysis of equality principles in each nation's legal system. In making these comparisons, the comment will highlight how the Israeli system of conscription and legal principles of equality do little to further equality for Israeli women in the military. This will show why the U.S. should not distinguish between men and women when it comes to the draft. It will also show why the Equal Protection clause mandates registration requirements for both men and women.

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I. INTRODUCTION

Women's service in the military has always been a point of contention in American society. Most recently, the debate flared over whether women should be allowed into the military's combat arms positions. Those in favor saw it as another major step towards women's equality in the United States and a way to recognize the hundreds of women who have served in such roles informally since the wars in Iraq and Afghanistan.¹ That debate largely ended in December of 2015 when the Department of Defense announced its decision to fully integrate the United States military and allow women into combat roles.² However, the Selective Service System still remains a formal barrier to gender equality in the United States military.

The Selective Service System has undergone many changes throughout U.S. history.³ However, the Selective Service System, as it is known today, was formed in 1980 under the Military Selective Service Act ("MSSA").⁴ The Act requires all male citizens, and residents of the United States, between the ages of eighteen and twenty-six to register with the Selective Service System—an independent agency that oversees registration and implementation of the draft.⁵ However, the United States has not drafted a man into

¹ Erin R. Goldberg, *A Sisterhood of Arms: Envisioning Conscription and Selective Service Post-Gender Integration of Combat Arms*, 64 BUFFALO L. REV. 1135 (2016). See also Gabrielle Fromer, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, GEO. J. GENDER & L. 173, 194 (2017). (discussing women's roles in combat during the wars in Iraq and Afghanistan).

² Goldberg, *supra* note 1, at 1137.

³ Fromer, *supra* note 1, at 180-82.

⁴ Military Selective Service Act, 50 U.S.C. § 3801 (2016) (West, Westlaw through Pub. 114-254), Formerly cited as 50 App. USC § 451. See also Goldberg, *supra* note 1, at 1143.

⁵ Fromer, *supra* note 1, at 182.

military service since 1972,⁶ making the Selective Service System largely a symbolic requirement of full citizenship.⁷

In theory, the purpose of the Selective Service System is to “provide military manpower in a manner that is administratively manageable.”⁸ But the Selective Service System and the draft also serve two further purposes. First, the draft is supposed to instill a civic responsibility in American men and is a means for men to fulfill their “moral responsibility” to serve their country.⁹ Second, the Selective Service System is a way to connect the civilian world to the military, grounding the military institution to make it more tangible for the average American male.¹⁰ As General George S. Patton put it, “[t]he soldier is the Army. No army is better than its soldiers. The soldier is also a citizen. In fact, the highest obligation and privilege of citizenship is that of bearing arms for one’s country.”¹¹ By excluding women from draft availability and Selective Service registration, the government is

⁶ Elizabeth Farrington, *Gender-Selective Service: The History and Future of Women and the Draft*, 39 U. ARK. LITTLE ROCK L. REV. 279 (2017). See also William A. Kamens, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U. L. REV. 703, 705, 707 (2003), discussing the unlikelihood of the United States reinstating a draft since no draft has been declared since Selective Service registration began again in 1981.

⁷ Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104 (2008). See also Dunn, *The Military’s Selective Service Act’s Exemption of Women*, at 10, (quoting Memorandum from General David C. Jones, Chairman of the Joint Chiefs of Staff, to the Secretary of Defense (Dec. 4, 1981)) (“the act of registration has tended to remind [young men] . . . of the obligation of citizenship and helps to rekindle pride in service and country.”).

⁸ Maj. Scott E. Dunn, *The Military Selective Service Act’s Exemption of Women: It is Time to End it*, 2009-APR ARMLAW 1, 9 (2009).

⁹ *Id.* at 12.

¹⁰ *Id.* See also Leah Kaufman, *We Want You: Constitutionality of Conscripting in the United States and Israel*, 37 WHITTIER L. REV. 193, 202 (2016) (discussing how the volunteer-based military has created a disconnect between those who serve and the American public and how some form of compulsory service may remedy this disconnect).

¹¹ Renee Just, *GI Jane: A Comparison of the Legal Framework for Women’s Military Service in Israel and the United States*, 8 CREIGHTON INT’L & COMP. L. J. 165 (2017) (quoting General George S. Patton).

signaling to women that their moral obligation to public service is not as important as that of their male counterparts.¹²

Furthermore, the Department of Defense has acknowledged that there is no military reason for not registering women for the draft.¹³ At the time the Supreme Court first examined women's draft exclusion in *Rostker v. Goldberg*,¹⁴ "the Department of Defense already recognized the need for draft-eligible support personnel and had recognized women's ability to fill these roles."¹⁵ Yet despite this support, paternalistic views that women were the weaker sex, best suited for domestic life prevailed and the challenge to women's draft exclusion was rejected.¹⁶

In contrast to women's draft exclusion in the American military, Israel's service requirements and exemptions provide a strong example of why American service laws should not distinguish between men and women. "From an international perspective, Israel presents an iconic view of women soldiers and the progressive inclusion of women in the military."¹⁷ Like the United States, Israel allows women into most combat positions, and more significantly, has a longstanding practice of conscripting both men and women into armed service.¹⁸ However, due to how the service laws in Israel distinguish between men and women, as of 2011, only thirty-three percent of the Israel

¹² See Fromer, *supra* note 1, at 193 (arguing that exclusion from Selective Service registration sends the message that women are subordinate to men due to their gender).

¹³ Goldberg, *supra* note 1, at 1156.

¹⁴ 453 U.S. 57 (1981).

¹⁵ *Id.* at 1155.

¹⁶ See *id.* at 1147.

¹⁷ Pamela Laufer-Ukeles, *Cross-Dressers with Benefits: Female Combat Soldiers in the United States and Israel*, 41 U. BALT. L. REV. 321, 323-24 (2012).

¹⁸ Catherine Powell, *Another Barrier Falls: United States Joins Group of Countries That Open Doors to Women in Combat*, COUNCIL ON FOREIGN RELATIONS (Dec. 17, 2015), <https://www.cfr.org/blog/another-barrier-falls-united-states-joins-group-countries-open-doors-women-combat>. Some commentators have even described the conscription of women into the IDF as a social anomaly in Israel. Guy I. Seidman & Eyal A. Nun, *Women, The Military and the Court: Israel at 2001*, 11 S. CAL. REV. L. & WOMEN'S STUD. 91, 94 (2001).

Defense Force (“IDF”) is female.¹⁹ This disparity between female and male service in the IDF, despite service obligations for both, is due to the shorter service obligations for women and the many exemptions available to them to avoid mandatory service.²⁰ Such exemptions are in place to protect women’s roles as mothers, but instead of protecting women, such exemptions work to their detriment.

Therefore, this comment will argue that in order for American women to achieve full citizenship they must be required to register with Selective Service System and be subject to the draft, like their male peers. However, in order to protect the important State interest in the wellbeing of children and families, this comment will also argue that a parenthood exception should be added to allow both mothers and fathers to opt out of registering with the Selective Service System. To do so will give full weight to the Equal Protection Clause, allow women to share the burden of citizenship, and protect children and families.

In Part II, I will discuss the respective militaries of Israel and the United States. I will examine the histories of each nation’s military, the role of women in the militaries, seminal cases regarding women’s roles in the military, and the aftermath of such cases. In Part III, I will examine the principles of equality that can be found in both U.S. and Israeli law and how interpretations of equality developed in each nation. In Part IV, I will argue why the Equal Protection Clause mandates that women register with the Selective Service System and why a parenthood exemption would be in the best interest of the State, as well as why such an exemption must be applied to both mothers and fathers in order to avoid discriminatory results, like the ones seen in Israel.

¹⁹ Powell, *supra* note 18. *See also* Ukeles, *supra* note 17, at 324 (“Although legally permitted to engage in even direct combat roles, Israeli women very rarely engage in combat support roles, are completely absent as infantry, and have advanced insignificantly in military leadership.”),

²⁰ Powell, *supra* note 18. *See also* Daphne Barak-Erez, *The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection*, 13 *CARDOZO J. L. & GENDER* 531, 533 (2007).

II. ISRAEL'S AND THE UNITED STATES' MILITARIES

A. The Israeli Military

1. History of the Israeli Defense Force

Two weeks after Israel declared its independence, and in the height of the War of Independence, the Israeli Defense Force (“IDF”) was created on May 26, 1948.²¹ The founding document declared that the IDF would be Israel’s military force and required that all IDF soldiers pledge their allegiance to the protection of Israel, similar to the oath given to American soldiers when enlisting.²² The founding document of the IDF is significant because until that time, the War of Independence was being fought by various paramilitary groups without a clear organizing structure.²³ The creation of the founding document therefore dissolved those groups and united them all under the direction and coordination of the IDF.²⁴

It was not until the War of Independence was won that the Defense Service Law was passed, which detailed the recruitment protocols and service exemptions for the IDF.²⁵ At the time, the Defense Service Law was seen as revolutionary because it made military service mandatory for both men and women.²⁶ However, the law was not a complete commitment to gender equality due to the special exemptions and shorter service requirements provided for women.²⁷ In essence, the Defense Service Law has remained largely the same since its enactment with several amendments throughout the years, with the current version of the law seeing its last revision in 1986.²⁸

²¹ Kaufman, *supra* note 10, at 203.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 203-04.

²⁶ Barak-Erez, *supra* note 20, 534.

²⁷ *Id.* at 534-35.

²⁸ Kaufman, *supra* note 10, at 204.

In practice, there are three different categories of military service under the Defense Service Law: entry level or compulsory service, the reserves, and professional or technical service.²⁹ At the entry level, service is set by statute, mandating three years of service for men and two years for women,³⁰ beginning once the individual turns 18.³¹ However, mandatory service is not universal because the statute only conscripts Jewish men and women.³² Further, men comprise most of the conscripts, constituting about two-thirds of those who are conscripted.³³

After this initial entry level, soldiers can be discharged from the IDF having completed their military service.³⁴ Most men, however, are given the opportunity to be moved to reserve units and to be called upon periodically based on the needs of the IDF—an opportunity not typically afforded to women.³⁵ In addition to the option to serve in the reserve forces, some soldiers, based on their perceived usefulness to the IDF, are asked to continue their service in the professional or technical area of the IDF.³⁶

The significance of the professional or technical area of the military for women is twofold. First, it can act as an equalizer between men and women in reducing the effects of the unequal terms of service. Second, service in the professional army is typically for full pay; meaning women can make more money than they would in the civilian sector and begin earning it before their male peers.³⁷

It is also important to note the significance of the IDF in Israeli society. The IDF is central to Israeli society because, since its inception, Israel has been surrounded by countries that pose serious and consistent military threats.³⁸ Given this security situation, Israel

²⁹ Seidman & Nun, *supra* note 18, at 95.

³⁰ *Id.*

³¹ Just, *supra* note 11, at 177.

³² Seidman & Nun, *supra* note 18, at 97-98.

³³ Just, *supra* note 11, at 177.

³⁴ Seidman & Nun, *supra* note 18, at 99.

³⁵ *Id.*

³⁶ *Id.* at 100.

³⁷ *Id.*

³⁸ Kaufman, *supra* note 10, at 205.

will likely always be heavily reliant on a large number of soldiers.³⁹ Therefore, it is essential to integrate Israeli youths into society through military service because “without each and every one of them, Israel would not be able to defend itself successfully against attacks.”⁴⁰ Further, “[t]he close identification of the military with the State gives the military the kind of influence and privilege rarely enjoyed by other social institutions.”⁴¹ For many draftees military service, in particular, service in combat units, helps to further their political and private careers and is often a ticket “to elite status in Israeli political, public, and business circles.”⁴² Therefore, the different terms of service between men and women can have ramifications that reach beyond their military service.⁴³

2. The Role of Women in the Israeli Military

a. *The History of Women’s Service in the IDF*

Whether formally or informally, Israeli women have served in the armed forces since before the inception of the Israeli State, most notably during the War of Independence.⁴⁴ Yet despite this tradition of service, at the end of the War of Independence, a debate waged on whether there was a place for women in the IDF.⁴⁵ The debate resulted in a compromise. In 1949 it was determined that women would be conscripted along with their male peers,⁴⁶ but there would be a number

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Seidman & Nun, *supra* note 18, at 113.

⁴² *Id.* at 113-114.

⁴³ “Many [soldiers] establish contacts or networks in the army that lead to jobs and careers. . . . As a result, military service has taken on enormous importance in the professional lives of Israeli citizens who essentially begin their careers in the military institution.” Leora F. Eisenstadt, *Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 Vand. J. Transnat’l L. 357, 377 (2007).

⁴⁴ Seidman & Nun, *supra* note 18, at 111.

⁴⁵ *Id.* at 111-12.

⁴⁶ *Id.* at 112 (“[T]he main reason for the somewhat surprising decision to integrate women in most units of the military . . . was the extreme manpower shortage during the War of Independence.”).

of exemptions available to women to opt out of service so that their place as wives and mothers could be protected.⁴⁷

While women could not be conscripted into combat roles, theoretically women could volunteer for such positions.⁴⁸ However, such an option was not seen in practice.⁴⁹ In reality, women were placed to auxiliary roles, like clerical staff, with a few positions in technical and professional roles.⁵⁰ The shorter service terms—the special limitations placed on women’s service—”affect[ed] their chances of inclusion and promotion in the standing army.”⁵¹ While the special exemptions were put in place to protect women’s essential roles as mothers, in reality, those privileges worked to the detriment of women’s inclusion in the military.⁵²

In the 1970s and 1980s, some progress was made towards equalizing women’s status in the military.⁵³ The IDF began placing women into instructor positions where they would teach classes of male combat soldiers, in particular classes involving technical duties that typically dealt with missiles, artillery, and armor.⁵⁴ Women were also placed as simulator instructors, where they were given the opportunity to teach air and naval combat soldiers.⁵⁵ However, these changes were made with the intention to free up more men to fill combat roles.⁵⁶ In essence, up until the 1990s, women’s service in the IDF was dictated by practical considerations; when women were

⁴⁷ *Id.* In order to protect women’s primary duty to serve as wives and mothers, women are exempted from mandatory service if they are married, mothers, or pregnant, as well as exemptions from service for conscientious objection. Eisenstadt, *supra* note 43, at 378.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Barak-Erez, *supra* note 20, at 540.

⁵¹ *Id.*

⁵² Eisenstadt, *supra* note 43, at 378-79.

⁵³ Seidman & Nun, *supra* note 18, at 114.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

needed, they were called up, and when not needed, women were largely sheltered from the burdens of service.⁵⁷

b. Miller v. Minister of Defense

The first major challenge to women's exclusion from combat roles in the Israeli armed forces came in *Miller v. Minister of Defense*.⁵⁸ Up until *Miller*, women soldiers typically served in clerical roles and occasionally in technical and professional roles.⁵⁹ In particular, it had been the IDF's policy to not allow women into combat roles, like the prestigious pilots course for the Israeli Air Force, regardless of their qualifications.⁶⁰ In 1993, despite this policy, Alice Miller hoped to volunteer for the pilots course.⁶¹ At that time, Miller already possessed a South African pilot's license and was studying aerospace engineering at Israeli Institute for Technology. This arguably made her qualified to serve in the Israeli Air Force.⁶² However, the IDF denied Miller's application, stating that fighter-pilots fell under the category of combat positions forbidden to women.⁶³

In response, Miller appealed to the High Court of Justice, the Israeli equivalent of the Supreme Court. Miller sought an injunction that would require the military authorities to allow her to take the tests necessary to enter the pilots course, and upon passage, enter the course.⁶⁴ Essentially, Miller was not attacking any fundamental legislation, simply the military policy of exclusion.⁶⁵ The military,

⁵⁷ *Id.*

⁵⁸ HCJ 4541/94, *Miller v. Minister of Defense*, 49(4) PD 94 [1995] (Isr.).

⁵⁹ Barak-Erez, *supra* note 20, at 540.

⁶⁰ Ukeles, *supra* note 17, at 328.

⁶¹ Seidman & Nun, *supra* note 18, at 115.

⁶² *Id.*

⁶³ *Id.* at 116.

⁶⁴ *Id.*

⁶⁵ Ukeles, *supra* note 17, at 328. "[Miller's] petition did not question the statutory arrangements applying to women's service and, in fact, could not challenge their binding validity due to the constitutional tradition of the legislature's sovereignty. It was confined to attacking the policy of the army, which rejected the possibility of volunteering for duties that had not been defined as open to women." Barak-Erez, *supra* note 20, at 541-42.

however, argued that the ban on women in the fighter pilot's course was not a matter of discrimination for two reasons.⁶⁶

First, the prohibition was the result of the applicable legal standards and necessity.⁶⁷ At the time, service in the Israeli Air Force required a voluntary extension of service and frequent and extensive reserve duty.⁶⁸ Therefore, the military argued that due to women's shortened compulsory service, the age-cap on recruitment into the reserves, and the prohibition from requiring mothers to serve in the reserves; women could not be counted on to complete the reserve time they initially volunteered for.⁶⁹ As a result, the military would then have to train a higher number of fighter-pilots in order to maintain the needed number of pilots at all times; which would be cost-prohibitive due to the exorbitant cost of training.⁷⁰ Second, the military argued, even if the court were to disagree with the military's arguments, this was a matter best left for the legislature to decide, not the military or the courts.⁷¹

Ultimately, in a decision three to two, the court ruled that the policy barring women from fighter-pilot training was discriminatory, declared the policy void, and ordered the military to integrate women into fighter-pilot training.⁷² In regards to the Defense Service Law,⁷³ the court acknowledged that the statute did make distinctions between men and women, however, the court found that the statute did not encourage or justify discrimination against women.⁷⁴ One Justice even argued that sex-based discrimination of the type, in this case, affronted

⁶⁶ Seidman & Nun, *supra* note 18, at 117.

⁶⁷ *Id.*

⁶⁸ Ukeles, *supra* note 17, at 329-30.

⁶⁹ Seidman & Nun, *supra* note 18, at 116-17.

⁷⁰ *Id.* at 117. At the time of *Miller*, the over-all cost of training a single fighter-pilot was estimated to be over one million US dollars.

⁷¹ *Id.* at 117-18.

⁷² *Id.* at 118.

⁷³ Defense Service Law, 1949, 1 L.S.I. 112, (1949).

⁷⁴ Seidman & Nun, *supra* note 18, at 118.

human dignity.⁷⁵ Therefore, the military policy should work towards greater gender equality where possible.⁷⁶

The court also rejected the military's arguments concerning logistics and budgetary concerns.⁷⁷ In rejecting these arguments, the court determined that the military's position rested only on hypothetical concerns about the cost of retaining women without any evidence.⁷⁸ Even if integrating women into the fighter-pilot course proved to be expensive, the court found that in a democratic society such as Israel's the society must be prepared to bear the burden of gender equality.⁷⁹

Even though the ultimate holding of the case was to allow Miller entry into the fighter-pilot's course, Miller subsequently did not pass the entry process requirements and was disqualified.⁸⁰ Yet despite Miller's failure to achieve her own aspirations, the ruling has been hailed as a feminist achievement.⁸¹ First, the ruling removed a form of gender discrimination in an arena that has significant symbolic importance in Israel.⁸² Second, the ruling encouraged the military to begin opening more positions to women and broaden the assignment of women in reserve forces as well.⁸³ Third, the Miller ruling influenced the legislature to include an amendment to the Equal Rights for Women Law regarding equal rights in the army, as well as a similar provision in the Defense Service Law.⁸⁴

⁷⁵ Ukeles, *supra* note 17, at 336.

⁷⁶ Seidman & Nun, *supra* note 18, at 118.

⁷⁷ *Id.*

⁷⁸ Barak-Erez, *supra* note 20, at 543.

⁷⁹ Seidman & Nun, *supra* note 18, at 119.

⁸⁰ *Id.* at 120.

⁸¹ Barak-Erez, *supra* note 20, at 543.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 544. "The [Equal Rights for Women Law] was amended in January 2000 to state that women-soldiers have rights equal to that of any male-soldier in carrying out any task in their military service except, where the essence and character of the role preclude women from carrying out its essential tasks." Seidman & Nun, *supra* note 14, at 128. The Defense Service Law was amended to include Amendment 11, "Equality in Service," which "grants full equality to women in fulfilling their military service, with one qualification: the military is permitted to refuse to appoint

B. The United States' Military

1. From Minute Men to an All-Volunteer Force

While the United States' military is an all-volunteer force today, that has not always been the case. During the colonial period, the colonies adopted a militia system similar to the one used in England.⁸⁵ The militia system required all men, between the ages of sixteen and sixty, to be armed and ready to serve at any moment.⁸⁶ Typically, the colonial governments would set quotas for each military district, with militiamen serving within their respective colonies for up to three months.⁸⁷ If a campaign was expected to last longer than three months, volunteers would be taken.⁸⁸

During the Revolutionary War, the old colonial militia system became more stringent. Due to the need for more soldiers, the Continental Congress increased training days, limited exemptions, implemented more fines, and increased the terms of service to a maximum of three years.⁸⁹ The Continental Congress then assigned quotas to each state and it was up to the states to meet the quotas.⁹⁰

The Civil War was the first time a successful national draft was implemented.⁹¹ Even then the draft's reach was minimal.⁹² Draftees made up only about 50,000 to 100,000 men of the 2.5 million Union Force.⁹³ It was not until 1916, when Congress enacted the National

a woman to a military role if demanded by the nature and characteristics of that particular role." Karin Tamar Schafferman, *Milestones in Legislation and Judgements*, THE ISRAEL DEMOCRACY INSTITUTE, (Mar. 5, 2008), <https://en.idi.org.il/articles/9786>.

⁸⁵ Kaufman, *supra* note 10, at 195.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 197.

⁹⁰ *Id.*

⁹¹ Kamens, *supra* note 6, at 710.

⁹² *Id.* at 711 ("Although conscription during the civil war was an emotionally charged issue, in actuality, the number of drafted men who served was relatively negligible").

⁹³ *Id.*

Defense Act, that a comprehensive draft policy was created.⁹⁴ The National Defense Act allowed for an expansion of the army and also enabled the President to draft soldiers if the recruitment system failed to attract sufficient volunteers.⁹⁵

Later, in response to the growing threat posed by Germany, the federal government again enacted the draft in 1940,⁹⁶ which existed for the next thirty years.⁹⁷ Unlike previous drafts however, this draft allowed the President to provide exemptions for public health and safety, which tended to favor married men and farm workers.⁹⁸ As a result, ten million men were drafted between 1940 and 1946.⁹⁹ In 1948, facing the growing threat of communism, Congress passed the Military Selective Service Act (“MSSA”) to begin a peacetime draft.¹⁰⁰ The draft was in effect until 1950, when the Korean War started. However, the act was not substantially changed during that time, it was only amended in 1951 to meet the needs of the war effort.¹⁰¹ The amended act continued many of the same exemptions used during World War II,¹⁰² and drafted over 1.5 million men into service.¹⁰³

It was not until the Vietnam War that the draft became a focal point of public discourse. At that time, sixteen percent of the military was draftees, and of the men sent to Vietnam, eighty-eight percent came from the sixteen percent draft group.¹⁰⁴ Further, it became increasingly clear to the public that wealthy and well-connected young men were able to take advantage of more draft deferments than their

⁹⁴ Kaufman, *supra* note 10, at 198 (discussing comments made by Army Colonel Oliver Spaulding, applauding the passage of the Act for creating a more organized and comprehensive draft policy).

⁹⁵ *Id.*

⁹⁶ *Id.* at 199.

⁹⁷ Goldberg, *supra* note 1, at 1141.

⁹⁸ Kaufman, *supra* note 10, at 199.

⁹⁹ Goldberg, *supra* note 1, at 1142.

¹⁰⁰ Dunn, *supra* note 8, at 8.

¹⁰¹ *Id.*

¹⁰² Kaufman, *supra* note 10, at 199.

¹⁰³ Goldberg, *supra* note 1, at 1142.

¹⁰⁴ Kaufman, *supra* note 10, at 199.

poor, working-class peers.¹⁰⁵ This resulted in heightened resistance to the draft. Due to the growing resistance, the last draft lottery was held in December 1972, with the draft law expiring in 1973.¹⁰⁶

In 1980, despite only a brief five-year hiatus, draft registration resumed¹⁰⁷ in response to the Soviet Union's invasion of Afghanistan.¹⁰⁸ President Carter believed that in resuming the MSSA, "[r]egistration . . . will improve our capacity . . . to increase the size and strength of our Armed Forces—and that capacity will itself help to maintain peace and to prevent conflict."¹⁰⁹ While President Carter requested that the MSSA be amended to include a registration requirement for women, Congress ultimately provided for a male-only Selective Service System.¹¹⁰ Congress chose to reject President Carter's request out of fears of the cost of including women, women's exclusion from combat, and the societal impact of including women.¹¹¹ Since that time Congress' concerns have remained largely unchallenged resulting in a largely unchanged male-only registration requirement.¹¹²

Now with threats of the draft falling farther into the past, the United States' All Volunteer Force ("AVF") has grown into a highly respected institution,¹¹³ totaling around 1.4 million servicemembers.¹¹⁴ The AVF's focus has evolved from merely obtaining as many able-bodied personnel as possible to focusing on "attracting and retaining talented people to fill increasingly specialized roles in a smaller and more efficient military."¹¹⁵ In order to better respond to disturbances around the world, AVF planning emphasizes rapid deployment of

¹⁰⁵ *Id.* See also Goldberg, *supra* note 1, at 1142 (discussing how young, wealthy white men became the voices of draft resistance, largely excluding the voices of their poor and minority peers).

¹⁰⁶ *Id.* at 1143.

¹⁰⁷ *Id.*

¹⁰⁸ Dunn, *supra* note 8, at 9.

¹⁰⁹ Farrington, *supra* note 6, at 290.

¹¹⁰ Dunn, *supra* note 8, at 8.

¹¹¹ Fromer, *supra* note 1, at 184.

¹¹² Dunn, *supra* note 8, at 10.

¹¹³ Kamens, *supra* note 6, at 722 (discussing how the military has improved its image since the late 1970s and early 1980s).

¹¹⁴ *Id.* at 729.

¹¹⁵ *Id.* at 723.

smaller forces in strategic places,¹¹⁶ with an emphasis on “rapid strategic response, containment, coalition building and setting limited goals.”¹¹⁷ These developments have created drastically different armed forces in the United States than the armed forces of the past.¹¹⁸ As the form and function of the U.S. military evolve, so too should the role of women in the military.

2. The Role of Women

a. *The History of Women’s Role in the Military*

While women have played a role in the United States military throughout history, the first permanent position for women in the armed forces was not created until 1901 when Congress created the Army Nurse Corps.¹¹⁹ During World War II, Congress also created a temporary Women’s Army Corps (“WAC”).¹²⁰ After World War II, the passage of the Women’s Armed Services Integration Act of 1948 brought the first significant integration of women into the military.¹²¹

However, the act placed significant limitations on women’s service. The act specified that women could comprise only two percent of the military; excluded women from draft registration, the draft, upper-level officer ranks, as well as combat positions; and allowed for involuntary discharge for motherhood and pregnancy.¹²² In 1967, Congress removed some of the limitations on women’s service by removing the two percent cap and opening all upper-level officer ranks to women.¹²³

¹¹⁶ *Id.* at 729.

¹¹⁷ *Id.* at 728.

¹¹⁸ *Id.* at 722 (discussing a number of forces that have shaped the development of the United States military).

¹¹⁹ Major Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal Protection Analysis of the U.S. Military’s Direct Ground Combat Exclusion of Women*, 207 Mil. L. Rev. 86, 93 (2011).

¹²⁰ *Id.*

¹²¹ *Id.* at 94.

¹²² Hasday, *supra* note 7, at 105-06.

¹²³ Dietz, *supra* note 119, at 94.

The greatest change to women's role in the armed services came during the 1970s thanks in part to the growing women's rights movement and the elimination of the draft.¹²⁴ During that time, while the number of overall enlistment had decreased, the number of active-duty women increased to over 120,000.¹²⁵ By 1972, women could participate in the Air Force, Army, and Navy Reserve Officer Training Corps ("ROTC")¹²⁶ and in 1976, women were allowed into the military academies.¹²⁷ Women were also qualified for noncombat aviation in the next year.¹²⁸

b. Rostker v. Goldberg — The Court's Rejection of Drafting Women

In 1980, the role of women in the military came to the forefront of American politics when President Carter requested that the MSSA be amended to include women.¹²⁹ While Congress rejected President Carter's request to include women in the amended MSSA, the Supreme Court added its voice to the debate in 1981. In its opinion in *Rostker v. Goldberg*,¹³⁰ the Court discussed the issue of whether the MSSA violated the Fifth Amendment by authorizing the President to require the registration of males but not females.¹³¹ The majority opinion, written by Justice Rehnquist, relied heavily on judicial deference to Congress in matters of national security and a limited application of the intermediate scrutiny standard to uphold the constitutionality of the MSSA.¹³²

Justice Rehnquist began by discussing the great deference the Court typically gives to Congress as a coequal branch of government, when it rules on the constitutionality of a congressional act.¹³³ He

¹²⁴ Hasday, *supra* note 7, at 108 ("[T]he end of the draft in 1973 made the military more eager to attract women . . . [because of] the need for more military volunteers.").

¹²⁵ Just, *supra* note 11, at 175.

¹²⁶ Dietz, *supra* note 119, at 95.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Dunn, *supra* note 8, at 8.

¹³⁰ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

¹³¹ *Goldberg*, *supra* note 1, at 1149.

¹³² Farrington, *supra* note 6, at 292.

¹³³ *Rostker*, 453 U.S. 57 at 64.

further noted that, not only is the Court ruling on the constitutionality of a congressional act, but that the case arises in the context of national defense and military matters, “and perhaps in no other area has the Court accorded Congress greater deference.”¹³⁴ While Justice Rehnquist did concede that national defense and military matters did not automatically give Congress deference, he still found that the broad deference given to Congress in regards to the MSSA was not overreached.¹³⁵

In upholding the constitutionality of the act, the majority gave great weight to the congressional record.¹³⁶ The majority noted that Congress’ focus was not on the traditional roles of females, but rather, the draft’s purpose.¹³⁷ Congress found that registration with the Selective Service system was to provide a pool of able-bodied men for the draft, and the purpose of the draft was to resupply ground troops for combat.¹³⁸

Therefore, since women were barred from serving in combat roles, the majority agreed that only requiring men to register with the Selective Service System was “substantially related” to the important military interest in the draft.¹³⁹ The majority found,

[t]he reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups. . . . 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.¹⁴⁰

The Court concluded that, “Congress was certainly entitled, in the exercise of its constitutional powers, to raise and regulate armies

¹³⁴ *Id.* at 64-65.

¹³⁵ *Id.* at 70-72.

¹³⁶ Goldberg, *supra* note 1, at 1151-52. *See also* Kamens, *supra* note 6, at 716.

¹³⁷ *Rostker*, 453 U.S. 57 at 76.

¹³⁸ Goldberg, *supra* note 1, at 1152-53.

¹³⁹ *Rostker*, 453 U.S. 57 at 76-77.

¹⁴⁰ *Id.* at 78.

and navies, to focus on the question of military need rather than ‘equity.’”¹⁴¹ Additionally, the majority went on to reject the idea that women could instead be drafted to fill non-combat roles because it was not worth the added burden.¹⁴² Volunteers could fill any non-combat roles, and staffing non-combat roles with only women would be harmful to military’s need to remain flexible.¹⁴³

However, the dissent argued that because the MSSA was founded on sex-based stereotypes only requiring men to register, the Selective Service system was unconstitutional.¹⁴⁴ Justice Marshall, in particular, noted that in excluding women from the registration requirements, the majority, “categorically exclude[d] women from a fundamental civic obligation.”¹⁴⁵ He argued that even if the Court were to accept the combat limitation placed on women, there was no reason to assume that all fillable positions in the event of a draft would be combat positions.¹⁴⁶

Justice Marshall also pointed out that the Department of Defense had already recognized that in the event of a draft, there would be a need for support personnel and that women would be suited to filling those roles.¹⁴⁷ Therefore, “there is simply no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense.”¹⁴⁸ Even though the opinion appeared to be a set-back to women’s equality in the military, the military continued its slow integration of women as full service members.¹⁴⁹

¹⁴¹ *Id.* at 80.

¹⁴² *Rostker* at 80-81

¹⁴³ *Rostker* at 80-81.

¹⁴⁴ *Rostker* at 94-95, 100.

¹⁴⁵ *Rostker* at 86.

¹⁴⁶ *Rostker v. Goldberg*, 453 U.S. 57, 97-98 (1981).

¹⁴⁷ *Rostker*, 453 U.S. 57 at 98.

¹⁴⁸ *Id.* at 90.

¹⁴⁹ *Goldberg*, *supra* note 1, at 1156.

C. The Slow Evolution to Opening Combat Positions to Women

Despite the setback of *Rostker*, women's roles in the military continued to grow in the following years. Women led units in combat in 1989 in Panama, commanded Navy ships in 1990, and entered combat zones in Operations Desert Shield and Desert Storm.¹⁵⁰ Over 40,000 women served during those operations, with thirteen women being killed and two taken as prisoners of war.¹⁵¹ These contributions slowly pushed the national conversation about women's role in the military, forcing Congress to begin reconsidering its combat exclusion policies.

In December 1991, Congress began its slow repeal of its combat exclusion policies by removing the prohibition on assigning women to combat aircrafts in all of the branches of the military, as well as creating the "Commission on the Assignment of Women in the Armed Forces."¹⁵² The Commission was primarily created to "assess the laws and policies restricting the assignment of female service members."¹⁵³ Following the creation of the Commission, in 1993, Congress also removed the separate personnel systems for men and women and removed the combat ship exclusion.¹⁵⁴ However, it was not a total removal because submarines and many other smaller combat ships remained closed to women.¹⁵⁵

In 1994, the Secretary of Defense Les Aspin issued the Direct Ground Combat and Assignment Rule memorandum ("Aspin Memo"), ending the "Risk Rule."¹⁵⁶ In its place, the Aspin Memo put

¹⁵⁰ Dietz, *supra* note 119, at 96.

¹⁵¹ *Id.* at 96-97.

¹⁵² Hasday, *supra* note 7, at 137.

¹⁵³ National Defense Authorization Act for Fiscal Years 1992 and 1993 §§541(a), 542(a).

¹⁵⁴ Dietz, *supra* note 119, at 97.

¹⁵⁵ *Id.* at 97.

¹⁵⁶ *Id.* at 97, 98 (the "Risk Rule" prohibited women from entering any units or positions "if their risks of exposure to direct combat, hostile fire, or capture are equal to or greater than the risks for land, air, or sea combat units which they are associated in a theater of operations.") (quoting Robert T. Herres et al., The Presidential Commission on the Assignment of Women in the Armed Forces, Report to the President 36 (1992)).

forth a new rule, the “direct ground combat assignment rule” to begin that October.¹⁵⁷ The rule provided that “service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct ground combat on the ground.”¹⁵⁸ The new rule defined “direct ground combat” as

Engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.¹⁵⁹

The policy sought to find a balance between excluding women from roles with exposure to the enemy while still allowing military commanders to deploy soldiers in the most effective manner.¹⁶⁰ However, Aspin advised that the military services should “use this guidance to expand opportunities for women” and that “no units or positions previously open to women [would] be closed under these instructions.”¹⁶¹

While the “direct ground combat assignment rule” was meant to keep women from the front lines, the wars in Iraq and Afghanistan made it clear that women too were fighting and dying in combat.¹⁶² As a result of these service women’s efforts, the Department of Defense began conducting a review of its policies in regards to the direct ground

¹⁵⁷ Hasday, *supra* note 7, at 142.

¹⁵⁸ *Id.* (quoting Memorandum from Les Aspin, Sec’y of Def., to the Sec’y of the Army; Sec’y of the Navy; Sec’y of the Air Force; Chairman Joint Chiefs of Staff; Assistant Sec’y of Def. (Pers. & Readiness); Assistant Sec’y of Def. (Reserve Affairs) 1 (Jan. 13, 1994)). (hereinafter Aspin Memo)

¹⁵⁹ Dietz, *supra* note 119, at 98.

¹⁶⁰ *Id.* at 100, 101.

¹⁶¹ Hasday, *supra* note 7, at 142 (quoting Aspin Memo at 2).

¹⁶² See Dietz, *supra* note 119, at 102 (discussing how the insurgencies in Iraq and Afghanistan “non-contiguous nature” meant that all units faced the possibility of direct ground combat).

combat exclusion of women.¹⁶³ It was not until 2013, however, that Secretary of Defense Leon Panetta announced that the ban on women serving in direct ground combat roles would be lifted and began a study period for full integration into combat units.¹⁶⁴ But the announcement did come with a caveat, it gave senior military officials until 2016 to request any exemptions to the new policy.¹⁶⁵ After almost three years of study, the new Secretary of Defense Ash Carter announced that all combat jobs would officially be open to women with no exceptions.¹⁶⁶ Integration plans therefore had to begin by April 1, 2016.¹⁶⁷

d. The Aftermath and Resulting Debate

In the three years since the “direct ground combat assignment rule” was lifted, women have already begun to make inroads into roles that have traditionally been left to men. Overall, the Army has begun to make gradual progress towards full gender integration. In April 2015, the first gender integrated Army Ranger School class began training and by August 2015, Captains Kristen Griest and Shaye Haver became the first two women to graduate Ranger School.¹⁶⁸ As of April 2018, more than 600 women have been recruited for or transferred into combat positions, 12 women have graduated Ranger School, and

¹⁶³ Just, *supra* note 11, at 175 (discussing how during the War on Terror in Iraq and Afghanistan over 200,000 women served in combat roles leading to the DoD’s reconsideration of its policies). See also Goldberg, *supra* note 1, at 1157 (discussing how over 150 women died, and over 1,000 women were wounded, during the wars).

¹⁶⁴ *Id.* at 1158.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1161-62. During the study period, both the Army and the Marine Corps conducted studies on the success of gender inclusive units. The Army study found that women were twice as likely to become injured during combat training than their male peers. *Id.* at 1158. The Marine study was a nine month long test of 400 male and 100 female Marines and also found that women were twice as likely to become injured; as well as the fact that all male infantry squads consistently outperformed gender inclusive squads. *Id.* at 1158-59. Due to these findings, the Marine Corps was the one service branch to request an exemption from integrating females into direct ground combat units, their request was denied. *Id.* at 1162.

¹⁶⁷ *Id.*

¹⁶⁸ Andrew Swick & Emma Moore, *The (Mostly) Good News on Women in Combat*, CNAS (Apr. 19, 2018), <https://www.cnas.org/publications/reports/update-on-the-status-of-women-in-combat>.

over 70 female officers have graduated the infantry or armor officer courses.¹⁶⁹

In contrast, the Marine Corps has not seen as much success with integration. As of April 2018, women only comprised about eight percent of the Marine Corps with only ninety-two women serving in combat arms positions, eleven of which are actually in infantry roles.¹⁷⁰ Further, women have struggled to pass the Marine Infantry Officer Course, with the first woman passing in only September of 2017.¹⁷¹ While the Marines have retained segregated basic training, in March 2018, the first group of women arrived at the Marine Combat Training Course after basic training for the first fully integrated unit and graduated that April.¹⁷²

Another area where women have struggled to meet the qualifications for entry has been in Special Operations Forces (“SOF”). While women have always served in units supporting SOF units, due to the extreme physical demands women are struggling to qualify for the SOF units themselves.¹⁷³ However, there has been some progress and there remains the possibility of a woman someday serving in a SOF unit. While no woman has graduated SEAL training, two women were recruited for the training in 2017,¹⁷⁴ and five women have been selected to begin the pipeline to become Tactical Air Control Party (“TACP”) specialists in the Air Force. Finally, one female Army officer has passed the selection process to join the 75th Ranger Regiment, becoming the first woman to join a special operations unit.¹⁷⁵

Despite these inroads, there are many that still argue that women should not be allowed to register with the Selective Service System, let alone serve in direct ground combat units. On February 4, 2016, Representatives Duncan Hunter (R-Calif.) and Ryan Zinke (R-Mont.), both former service members, introduced the Draft America’s

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Daughters Act of 2016 (“DADA”).¹⁷⁶ The Act would have amended the MSSA to require women, like their male peers, to register with the Selective Service System upon turning eighteen.¹⁷⁷ Congressmen Hunter and Zinke, however, did not support drafting women and opposed opening direct combat positions to women.¹⁷⁸ They proposed this bill with the hope that it would trigger a debate in both Congress and the American public to reconsider women’s inclusion in combat arms.¹⁷⁹ While some discussion in both the House and Senate occurred on the matter,¹⁸⁰ the act was rejected and any policies requiring women to register with the Selective Service System were removed from the final version of the 2017 National Defense Authorization Act.¹⁸¹

While Congress has chosen not to address whether women should be required to register, support for requiring women to register with the Selective Service System has grown. At the end of his last term, former President Obama announced his support for requiring women to register with the Selective Service System as the “next logical step” for women’s equality in the military.¹⁸² Even Secretary of the Army, John McHugh, General Mark A. Milley, Chief of Staff of the Army, and General Robert B. Neller, Marine Corps Commandant, have acknowledged that the last step to formal equality in the military is women registering for the draft.¹⁸³ According to General Neller,

¹⁷⁶ Fromer, *supra* note 1, at 175.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ The Senate version of the Fiscal Year 2017 National Defense Authorization Act, which in part funds the Selective Service System, even had an amendment that required women to register. *Id.*

¹⁸¹ *Id.* at 176. While Congress has chosen not to address this issue, since this comment has been submitted for publication, Judge Gray Miller for the District Court for the Southern District of Texas, Huston Division, has ruled that an all-male military draft is unconstitutional. See *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568 (S.D. Tex. 2019).

¹⁸² Gregory Korte & Tom Vanden Brook, *White House: Obama Supports Registering Women for Military Draft*, USA TODAY (Dec. 1, 2016), <https://www.usatoday.com/story/news/politics/2016/12/01/obama-supports-registering-women-military-draft/90449708/>.

¹⁸³ Goldberg, *supra* note 1, at 1165-66. As John McHugh stated in regards to women in the military, “if your objective is true and pure equality then you have to look at all aspects.” In the time since this comment was submitted for publication,

“[n]ow that the restrictions that exempted women from [direct ground combat] don’t exist, then you’re a citizen of a United States . . . It doesn’t mean you’re going to serve, but you go register.”¹⁸⁴

III. PRINCIPLES OF EQUALITY IN ISRAELI AND AMERICAN LAW

When examining the right to equality, one must assess two different approaches. The first is the formal equality approach, which defines equality as equal treatment of people that are categorically alike.¹⁸⁵ Second, the essential equality approach relies on the premise that formal equality is not sufficient to achieve complete equality. This view surmises formal equality is not sufficient because it does not account for the fact that life imposes different conditions on individuals affecting their ability to achieve success.¹⁸⁶ Therefore, essential equality seeks to equalize disparate conditions so that each individual has a chance at social mobility.¹⁸⁷ While both American and Israeli approaches to sex equality rely on formal equality, Israeli law also relies on essential equality through affirmative action in both economic and social spheres.¹⁸⁸

A. Principles of Equality in Israeli Law

Since Israel’s independence, the state has taken steps towards implementing gender equality through both legislation and regulatory actions covering both the public and private realms of Israeli society.¹⁸⁹ The first document to acknowledge women as legal persons who deserve equal treatment was the 1948 Declaration of Independence.¹⁹⁰ The Declaration states that Israel, “will ensure the complete equality of social and political rights to all its inhabitants irrespective of religion,

General Neller retired and General Milley assumed the duties of the Chairman of the Joint Chiefs of Staff.

¹⁸⁴ *Id.*

¹⁸⁵ Schafferman, *supra* note 84.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Eisenstadt, *supra* note 43, at 365.

race or sex.”¹⁹¹ However, this was merely a symbolic step towards gender equality because the Declaration of Independence bears no constitutional weight.¹⁹² Therefore, the statement is only a guiding principle of Israeli law rather than a legal mandate.

But the Israeli government has passed other legislation in support of gender equality. In addition to the Declaration of Independence’s commitment to gender equality, Israel has passed the Women’s Equal Rights Law of 1951, “to ensure women’s equality in the legal system, ‘in the spirit of principles states in the Declaration of Independence.’”¹⁹³ The goal of this law is to ensure that every woman has a dignified existence through guaranteeing access to “equality in employment, basic and higher education, health, housing,” as well as a woman’s right over her body and to be protected from violence and sexual abuse.¹⁹⁴ However, the law is flawed in that it does not protect rights within families, it does not specify how equal pay or social rights will be achieved, and, because it is not a Basic Law (the Israeli equivalent to the Constitution), it does not have superior status in the law.¹⁹⁵

In practice, the legal system seeks to achieve equality through an “equality through difference” approach that purports to “appreciat[e] and accomodat[e] differences” between the sexes.¹⁹⁶ This plays out through provisions in the law aimed at protecting women through creating privileges and exemptions, like legally mandated maternity leave and exemptions from military service.¹⁹⁷ This special treatment of women is seen as equalizing socially unequal situations, while still protecting the societal need for women as mothers and caregivers.¹⁹⁸

¹⁹¹ Schafferman, *supra* note 84.

¹⁹² Eisenstadt, *supra* note 43, at 366.

¹⁹³ Schafferman, *supra* note 84.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Eisenstadt, *supra* note 43, at 363

¹⁹⁷ *Id.* at 367-68.

¹⁹⁸ *Id.* at 368.

A woman's ability to contribute as a mother and caregiver is central to the law because Israeli society was formed around a collectivist ideology where an individual attains status, rights, and privileges through their contribution to the society.¹⁹⁹ The law did not develop around individual rights, but rather on how each individual could best contribute to society.²⁰⁰ A woman's ability to reproduce was seen as a woman's "incomparable and unique contribution as citizens of their state."²⁰¹ Therefore, the legal system was shaped around allowing women's opportunities in the workplace while still "encouraging service to the state through motherhood."²⁰²

Women's mandatory military service is a good illustration of the seemingly contradictory commitment to gender equality through preserving the woman's place as a mother. In mandating mandatory military services for both men and women the state of Israel took a revolutionary step towards gender equality. But by providing exemptions to service for women centered around their familial role, the state also made it clear that the priority for all Israeli women should be motherhood.²⁰³ "This exemption from military service, . . . [is] justified by the acknowledgement that women have a role in Israeli society that is, at times, considered more important than that of a worker—women as wives and mothers."²⁰⁴

This is why Israel has developed a legal system combining both formal and essential equality. If Israel had adopted a purely formal equality regime, special treatment of women through privileges and

¹⁹⁹ *Id.* at 397.

²⁰⁰ *Id.* at 399.

²⁰¹ *Id.* at 404.

²⁰² *Id.* at 404-05.

²⁰³ *Id.* at 378-79.

²⁰⁴ Leora F. Eisenstadt, *Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 *Vand. J. Transnat'l L.* 357, 379 (2007). It should also be stated that while many in the United States would find such treatment of women as highly discriminatory; women as a wives and mothers are often highly revered in Israeli society. "Indeed women's roles in reproduction have been compared with and seen as complementary to the male role in the military." Ukeles, *supra* note 17, at 342. Therefore presenting Israeli women as less-than in Israeli society would not be portraying a completely accurate picture of the societal dynamics there.

exemptions would fail to protect women's primary roles as mothers.²⁰⁵ Thus, gender equality in Israel will only go so far as maintaining women's place as mothers because "[t]he notion of equality itself is a social product, constructed out of already existing ideologies, practices and structures. The laws and legal theories that enforce a notion of equality tend to both reflect these already existing social norms and reproduce them."²⁰⁶ However, in light of women's status in the IDF, it's questionable whether these privileges and exemptions actually operate to a woman's benefit.

B. Equality in American Law

In contrast to Israel, American conceptions of gender equality focus on a theory of "sameness" between the sexes. This theory seeks to remove gender discrimination through "the removal of barriers to equal achievement and the eradication of discrimination."²⁰⁷ This is achieved through the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

When examining Equal Protection challenges, the Supreme Court has used three standards of review. The highest standard is the strict scrutiny standard, where if a piece of "legislation implicates a fundamental right or a suspect class of persons, courts will strike down the law unless it is narrowly tailored to serve a compelling government interest."²⁰⁸ A much lower standard is rational basis review. Under rational basis review, if legislation "does not implicate a fundamental right or a suspect class of "discrete and insular minorities, courts will uphold the law so long as there is a rational basis for it."²⁰⁹

The third standard, which falls in between strict scrutiny and rational basis, is called intermediate scrutiny and is used to evaluate laws that have gender classifications.²¹⁰ Intermediate scrutiny developed out of the recognition that "sex, as an unalterable trait,

²⁰⁵ Eisenstadt, *supra* note 43, at 405.

²⁰⁶ *Id.* at 394.

²⁰⁷ *Id.* at 362.

²⁰⁸ Farrington, *supra* note 6, at 284 (internal quotations omitted).

²⁰⁹ *Id.* (internal quotations omitted).

²¹⁰ Fromer, *supra* note 1, at 183.

should be considered a suspect classification under the Equal Protection Clause.”²¹¹ Under the intermediate scrutiny standard, “a law that distinguishes between individuals on the basis of sex must be substantially related to an important government objective,”²¹² and the court must also determine “whether there is a way to further the State’s interest in a sex neutral way.”²¹³

While *Craig v. Boren*²¹⁴ was the first Supreme Court case to apply the intermediate scrutiny standard to a gender-based classification,²¹⁵ arguably *United States v. Virginia*²¹⁶ is the most famous, and for this comment, the most useful case to apply the intermediate scrutiny standard. In *United States v. Virginia*, the Supreme Court held that the State of Virginia and the Virginia Military Institute’s (“VMI”) exclusion of women violated the Equal Protection Clause and mandated that the school open its doors to women.²¹⁷ At the time, VMI was the only single-sex university of Virginia’s fifteen public colleges and universities.²¹⁸ VMI’s curriculum focused on creating “citizen soldiers” through an “adversative” method of education.²¹⁹ VMI did not accept female applicants because “coeducation would materially affect at least three aspects of VMI’s program—physical training, the absence of privacy, and the adversative approach.”²²⁰ However, the court found that while in certain circumstances physical differences between men

²¹¹ Farrington, *supra* note 6, at 285 (internal quotations omitted). *See generally* *Id.* at 283-86 (explaining the history behind the development of the intermediate scrutiny standard).

²¹² *Id.* at 286. The intermediate scrutiny test therefore is a middle group between strict scrutiny and rational basis. Fromer, *supra* note 1, at 183.

²¹³ Fromer, *supra* note 1, at 184.

²¹⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

²¹⁵ Farrington, *supra* note 6, at 286.

²¹⁶ *United States v. Virginia*, 518 U.S. 515 (1996).

²¹⁷ Fromer, *supra* note 1, at 185. Although not discussed for purposes of this comment, the Supreme Court also held that Virginia’s proffered program for women at Mary Baldwin College did not cure the constitutional violation. *Virginia*, 518 U.S. at 517.

²¹⁸ *Virginia*, 518 U.S. at 520.

²¹⁹ *Id.* at 521-22.

²²⁰ *Id.* at 540 (“VMI’s adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be radical . . . as to transform, indeed destroy, VMI’s program.”) (internal quotations omitted).

and women may justify differential treatment, such differential treatment “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²²¹ Therefore, in rejecting Virginia’s argument that VMI’s methodology would be unsuitable for *most* women, the court found:

Generalizations about “the way women are,” estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI’s method of education suits *most men*. . . . In contrast to the generalizations about women on which Virginia rests, we note again . . . VMI’s “implementing methodology” is not “inherently unsuitable to women.”²²²

The Court’s opinion clarified that generalizations about most men and most women would no longer be sufficient to justify differential treatment and made it clear that gender based classifications would have difficulty carrying any legal weight.

In addition to opening the doors of VMI to women, *United States v. Virginia* also further clarified the legal analysis required under the intermediate scrutiny test. The Court ruled that under the intermediate scrutiny standard, “[p]arties that seek to defend gender-based governmental action must demonstrate an ‘exceedingly persuasive justification’ for that action.”²²³ Further, the court ruled that an “exceedingly persuasive” justification is a high standard that rests solely with the proponent of the classification to demonstrate.²²⁴ For the proponent to meet this burden, it must show that “at least the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”²²⁵ Additionally, those justifications “must not rely on overbroad generalizations about the different talents,

²²¹ *Id.* at 533.

²²² *Id.* at 550.

²²³ *United States v. Virginia*, 518 U.S. 515, 531 (1996).

²²⁴ *Id.* at 533.

²²⁵ *Id.* (internal quotations omitted).

capacities, or preferences of males and females.”²²⁶ In light of this standard, *Rostker*, and its “fixed notions” about women, should be called into question.

IV. THE REQUIREMENT TO REGISTER FOR THE DRAFT SHOULD APPLY TO BOTH MEN AND WOMEN IN ORDER TO ACHIEVE EQUALITY IN THE LAW

A. Women’s Selective Service Registration and a Parental Exemption Would be Consistent with the Equal Protection Clause

With the above principles in mind, in order for American women to achieve full equality and share the burden of citizenship they should be required to register with Selective Service System. However, in order to protect the important State interest in the wellbeing of children and families, a parental exception should be added to allow both mothers and fathers to opt out of registering with the Selective Service System. To do so will give full weight to the Equal Protection Clause, allow women to share the burden of citizenship, and protect children and families.

Should women’s draft exclusion be challenged, it does not appear the government would be able to present an “exceedingly persuasive justification” for such disparate treatment of men and women. In regards to women’s draft exclusion there no longer remains an “important government objective” in which the “discriminatory means employed are substantially related to the achievement of those objectives.

Here, the important government objective is ensuring there is an able-bodied pool of individuals available in the event of a draft to replace fallen ground troops. The method to ensure this pool is registration with the Selective Service System. However, through this method the government discriminates between men and women in requiring men, but not women, to register. In *Rostker*, the Supreme Court rejected a challenge to women’s draft exclusion because men

²²⁶ *Id.*

and women were not “similarly situated” in regards to a draft because women could not serve in combat roles.²²⁷ However, after December 2015, all positions in the military are open to women,²²⁸ removing the main motivating factor behind the *Rostker* decision.

Now that women are no longer excluded from combat arms positions, it is clear that the “discriminatory means employed” are no longer “substantially related” to the achievement of an important governmental objective. Women and men are now “similarly situated” for the purposes of a draft, and therefore the “added burden” of including women in the registration system is no longer present.

However, an argument could be made that the \$8.5 million needed for the first year to register women, in addition to the \$23 million already in the Selective Service System’s budget, would be too cost prohibitive.²²⁹ But, an argument based solely on administrative concerns is not viable. If maintaining the Selective Service System truly is cost prohibitive then it is within Congress’ powers to abolish it completely. While abolishing the Selective Service System may be a better alternative to a gender-inclusive draft, if registration remains in place, it cannot continue to discriminate between men and women. Even though administrative and fiscal concerns are strong arguments to dissolve the Selective Service System, they are not viable arguments to continue women’s draft exclusion in the face of intermediate scrutiny.²³⁰

However, to prevent a disruption within families in the event a draft is reinstated, the government would not be in violation of the Equal Protection Clause to include a parental exemption from registration with the Selective Service System. If such an exemption were only available for mothers, it is unclear whether such a distinction between mothers and fathers would survive intermediate scrutiny.

²²⁷ See generally *Rostker*, 453 U.S. at 76-78.

²²⁸ Just, *supra* note 11, at 1161-62.

²²⁹ Fromer, *supra* note 1, at 185.

²³⁰ *Id. C.f. Rostker*, 453 U.S. at 78-79. The Court probably would have found administrative convince insufficient to justify draft exclusion because the main focus of the opinion was that men and women differently situated when it came to combat inclusion.

Further, such a distinction would place the burden of child care solely on the mother, which could reinforce “overbroad generalizations about the different talents, capacities, or preferences of males and females.”²³¹

B. A Parental Exemption from Selective Service Registration Would be Integral to Promoting Gender Equality in the U.S.

In Israel, “overbroad generalizations about the different talents, capacities, or preferences of males and females”²³² is expected in the legal system. The law is designed around affording women privileges and exemptions from certain duties in order to preserve their roles as mothers.²³³ In the military, it means shorter terms of service and exemptions from mandatory service if the woman is married, pregnant, or has children.²³⁴ While in theory, this may appear to be a positive step towards protecting women, it instead works to the detriment of women in two key ways. First, it perpetuates the stereotype that women are the sole caregivers within a family, instead of acknowledging the role a father could play in rearing his children.²³⁵ Second, in limiting women’s service in the military, the law is actively removing the main avenue for advancement in Israeli society²³⁶ and “serves to lessen the value on women’s citizenship.”²³⁷

This parallels America’s draft laws and highlights why an exemption from registration with the Selective Service System must be afforded to both mothers and fathers. Both mandatory military service and registering for the draft have the same underlying principles. One, to provide a pool of able-bodied individuals to protect the nation and two, to instill civic responsibility in the nation’s citizens. However, in distinguishing between men and women, Israel’s service laws have unintended consequences for women. Therefore, if a parental exemption from registration is not included, the Selective Service

²³¹ See *United States v. Virginia*, 518 U.S. at 533.

²³² *Id.*

²³³ See Eisenstadt, *supra* note 43, at 367-68.

²³⁴ Seidman & Nun, *supra* note 18, at 111.

²³⁵ See Eisenstadt, *supra* note 43, at 404-05.

²³⁶ See Seidman & Nun, *supra* note 18, at 113-114.

²³⁷ *Id.* at 98.

System will have the same discriminatory results seen in Israel. If women could opt out of registering because they were mothers, the onus would be placed on women to care and raise children in the event of a draft. Further, it would signal that women's service to their country is secondary to men, devaluing their citizenship and their ability to contribute to society.

Therefore, should women become draft eligible, a parental exemption from registration would protect the strong state interest in preserving families in the event a draft is reinstated. Further, it avoids the paternalistic results seen in Israel that work to the detriment of women's inclusion in society. A parental exemption would prevent women from being forced into a maternal role and would allow them to actively participate in one of America's most revered institutions.

Additionally, such an exemption would pass the intermediate scrutiny test because it acknowledges the role mothers and fathers play in raising children avoiding "overbroad generalizations about the different talents, capacities, or preferences of males and females."²³⁸ Further, it would allow the parents to decide together who should raise their children, rather than defaulting to the traditional conception that mothers are the only caregivers. Thus, a parental exemption to the draft would be integral to promoting gender equality in the United States.

V. CONCLUSION

Women's service in Israel's and the United States' militaries has evolved over time to the point where women in both militaries can serve side by side with their male peers. Given both the practical and symbolic importance of both militaries, this could be seen as a testament to the commitment both nations have made towards greater gender equality. However, in distinguishing between the service requirements of men and women, Israel's laws work to the detriment of its women. While this may be an acceptable outcome in Israel, to protect a woman's place as a mother, such disparate treatment of men and women is unacceptable in the United States. Therefore, if the U.S.

²³⁸ See *United States v. Virginia*, 518 U.S. at 533.

is truly committed to gender equality, the disparate treatment of men and women in draft registration cannot continue. In order to give full weight to the equal protection clause, men and women must both be required to register with the Selective Service System. To do otherwise would be to impermissibly discriminate between men and women. To take the U.S.'s commitment to gender equality even further, a parental exemption should be included to Selective Service registration, to afford mothers or fathers the choice to raise their children. To do so would further the principles of the equal protection clause and would prevent "overbroad generalizations about the different talents, capacities, or preferences of males and females."²³⁹

²³⁹ *Id.*