The Combat Exclusion Rule and Equal Protection

Christopher Horrigan

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THE COMBAT EXCLUSION RULE AND EQUAL PROTECTION

I. INTRODUCTION

A. *The Combat Exclusion Rule*

The United States today has about two million soldiers, sailors, and airmen\(^1\) under arms.\(^2\) Of that number, approximately 230,000—eleven percent—are female.\(^3\) Despite impressive improvements in recent decades in both the overall numbers of women in the military and the career opportunities presented to them,\(^4\) military women today are still proscribed from engaging in the primary function of the military: combat.

Women are excluded from combat roles in the military under a mechanism popularly known as the "Combat Exclusion Rule." Each service has its own variation. Utilization of women in the Navy\(^5\) and the Air Force\(^6\) is governed by statute. The Army's exclusion rule is one of policy rather than statute.\(^7\) The Marine Corps, falling within the Department of

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1. The words "soldier," "sailor" and "airman" have various meanings within the military. In this comment, "soldier" means any member of the Army or Marine Corps, "sailor" means any member of the Navy, and "airman" means any member of the Air Force, irrespective of rank or gender.
2. Rick Maze, Panel drafts largest force cut since Vietnam, NAVY TIMES, Oct. 29, 1990, at 4. As of October 1990, labor figures were:
   - Army 744,170
   - Navy 590,500
   - Air Force 545,000
   - Marines 196,700
   - Total 2,076,405
   Id.
7. The Army's lack of a statutorily mandated combat exclusion rule stems from the process by which women were initially introduced into the Army—the
the Navy, is generally covered by the Navy’s rule, but has adopted rules similar to those in the Army to cover ground combat situations.\textsuperscript{8}

The focus in this comment is on women in the Navy. The Navy is highlighted for a number of reasons. First, the services have vastly different roles and definitions of “combat.” Directing attention to just one service will avoid confusion. The Navy and Air Force rules are relatively clear-cut: women are not allowed on combat ships or aircraft. The Army and Marine Corps rules, with their zone concept of “combat,” complicates the analysis without adding significantly to the legal debate.\textsuperscript{9} Second, the Navy, along with the Air Force, is today a very high-technology operation. These services anticipate fighting “over-the-horizon” battles, where the enemy may never be actually seen by any but a very few of the warriors\textsuperscript{10}—a factor which bears upon the current value of physical strength, which will become relevant as the analysis develops. Finally, of the two services, the Navy is more steeped in tradition. The Air Force, created as a separate service in 1948, is over 150 years

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Women’s Army Corps. That corps had its own exclusions. With the dissolution of the corps, the Army adopted policies which it believed Congress would have desired. See Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the House Armed Services Comm., 100th Cong., 1st and 2d Sess. 7-8 (1987 & 1988) [hereinafter 1987 Hearings] (statement of Martin M. Ferber, Senior Associate Director, National Security and International Affairs Division, General Accounting Office).

8. See 1987 Hearings, supra note 7, at 6-7.

9. The complexity of the Army’s system is seen in an explanation provided to Congress by the General Accounting Office:

Army policy is governed by the Direct Combat Probability Code, which ascribes to each Army job an assessment of the probability of that job participating in direct combat. The policy was derived from an analysis of four criteria: the duties of the job specialty, the unit’s mission, tactical doctrine, and location on the battlefield. Jobs are assigned a code, P1 through P7. P1 represents the highest probability of engaging in combat and P7 the lowest. Women cannot be assigned to P1 jobs . . . . Battlefield location has the greatest impact upon the “P” rating of a position.

MILITARY WOMEN, supra note 4, at 69.

10. The recent Persian Gulf War illustrates this concept. Faced with what appeared to be a classic “ground war” against what was called the world’s fourth largest army, the U.S. first pummeled its opponent with an air assault, relying upon missiles and other “smart weapons,” making the short ground campaign an almost casualty-free endeavor. High technology all but eliminated the need for a ground confrontation.
younger than the Navy, which traces its origins back to the Revolutionary War era.

In the Navy, the governing statute is 10 U.S.C. section 6510. Section 6510 provides that the Secretary of the Navy may prescribe the kinds of duty women may be assigned, but it also limits that discretion by stating “women may not be assigned to duty on vessels or aircraft engaged in combat missions.”

The Navy has interpreted that language to mean women must be excluded from all “combatant” vessels, that is, ships which seek out, reconnoiter or engage the enemy. Owing to their close and frequent interaction with the combatants, other “support” ships, such as cargo, ammunition, and re-fueling vessels, had, until recently, also been determined to be unavailable to female sailors.

B. The Impact of the Rule on Military Women

The impact of the combat exclusion rule on women is pronounced. First, some skills are only relevant on combatants, and so women are precluded from jobs concerned with those

11. 10 U.S.C § 6015 states:
The Secretary of the Navy may prescribe the manner in which women officers, women warrant officers, and enlisted women members of the Regular Navy and Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions.


12. A recent Navy formulation for “combat mission” reads:
A combat mission is defined as a mission of an individual unit, ship or aircraft that individually, or collectively as a naval task organization, has as one of its primary objectives to seek out, reconnoiter, and engage the enemy. The normal defensive posture of all operating units is not included within the definition.


Second, a large number of otherwise-available jobs with skill areas open to women are made unavailable because they are to be performed aboard combatants. The result of these two factors, as revealed by Navy figures, is that approximately half of the total number of Navy jobs are closed to women. Third, to maintain the sea-shore rotation at the level the Navy considers optimal, there must be some shore jobs set aside for men to rotate into after a sea duty tour.

The end result of these limits is that the Navy has effectively placed a ceiling on the overall number of women it can absorb—at around eleven percent of total end-strength. The situation was summed up by a Federal District Court judge as follows:

Despite the current policy to enlarge the female component in the naval forces, the fact remains that only so many shore-confined members are capable of being integrated into a contingent that is "organized, trained and equipped primarily for prompt and sustained combat incident to operations at sea."
The rule also impairs the professional advancement of Navy women. Advancement within those skills which are off limits to women is completely foreclosed. Moreover, especially in the officer ranks but also among senior enlisted, career progression is often tied to successful completion of jobs which only exist on combatants. Most high-level positions within the military can only be attained by properly "getting your ticket punched," that is, by successfully completing key jobs that provide experience necessary to perform at the next level within each particular professional field.

For example, the Commander, Naval Air Forces, U.S. Pacific Fleet (COMNAVAIRPAC)—the Navy admiral who controls all of the aircraft and related bases and units located on the U.S. West Coast and in the Pacific—is chosen based upon a record of accomplishments within the aviation warfare specialty. These accomplishments must necessarily include, among many other things, having flown in a carrier-based aviation unit, commanded a carrier-based aviation unit, and commanded an aircraft carrier. As a result of the combat exclusion rule, none of these jobs are open to women. Therefore, as the system is currently constructed, no woman, regardless of her competence as a pilot or military leader, can become COMNAVAIRPAC.

C. The Impact of the Rule Outside the Military

These two related constraints—limits on the number of women which the services can absorb and limits on the career opportunities for those women—deny women valuable economic, educational and sociological benefits.

1. Economic

The principle area of impact is economic. Having over two million employees, excluding civilians, the Defense Department is the country's largest employer, public or private. The military provides its members with compensation tied to a pay scale which does not differentiate between men and women,

§ 5012(a) (1970)).

20. BINKIN & BACH, supra note 17, at 31-32.
nor between types of jobs, within the same rank. It also provides tax-free allowances or benefits-in-kind for housing and subsistence. In addition, medical care is provided at no cost, and life insurance is available at minimum costs.

The military also serves as the nation's largest and best known vocational trainer. "[E]ach year the armed services offer to thousands of people an opportunity to acquire skills and knowledge that not only enables them to carry out their military duties but, in many instances, prepares them for more productive careers when they leave the service." There are also programs such as the GI Bill, the Veterans Educational Assistance Program, and tuition assistance, which financially assist members seeking to continue their education either while still on duty or upon leaving the service.

2. Sociological

The other major impact that the combat exclusion rule has on women is sociological. Women are not allowed to engage in an activity which for a large number of men in the services constitutes an expression of patriotism or devotion to constitutional ideals. The situation was summed up by two researchers as follows:

The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification.

22. BINKIN & BACH, supra note 17, at 31-32.
23. Additional economic benefits include a retirement plan that allows members to retire at between 50% (at 20 years of service) and 75% (at 30 years of service) of the pay earned at the time of retirement; civil service preferences; a world-wide low-cost hotel service; tax free shopping on base; and limited free travel wherever military cargo planes fly. See BINKIN & BACH, supra note 17, at 33.
24. BINKIN & BACH, supra note 17, at 35.
26. BINKIN & BACH, supra note 17, at 38 n.12 (quoting statement by Professor Norman Dorsen, Equal Rights: Hearings before the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970)).
Examples of the utility of that "special qualification" range from civil service preferences for veterans\(^\text{27}\) to the 1988 presidential campaign in which the combat record of George Bush was made a focal point. In fact, the lack of a military record added significantly to the problems of Vice Presidential candidate Dan Quayle in that election.

Further, the various reasons advanced in support of the combat exclusion rule serve to enforce the notion that women need to be protected.\(^\text{28}\) Those reasons for keeping women out of combat boil down primarily to two: (1) protecting women from combat and (2) protecting men, particularly the morale of men, from the intrusion of women into this historically-male arena. However, both rationales can be and have been extended to occupations outside of the military. If women require protection against hostile forces, perhaps they require protection from employment as prison guards.\(^\text{29}\) It is reasonable to extrapolate from society's segregation of women from combat that women should also be protected from other unpleasant and hazardous aspects of life.

The military, in dealing with very large numbers of young people, also plays a significant socialization role. Individuals from all over the country and from all cultural, religious, and economic groups are brought together. Since prejudice is generally the product of ignorance about others, forced interaction as equals with those others can break down the prejudice.

\(^\text{27}\) An "absolute lifetime" civil service preference plan which required that "all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualified nonveterans" was upheld by the Supreme Court in Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). The Court, finding the law facially gender-neutral with no "discriminatory purpose," denied a challenge by a woman who claimed that the preference operated "overwhelmingly to the advantage of males" in that there were almost no female veterans. Id. at 259

\(^\text{28}\) See infra text accompanying notes 133-54 for a discussion of some of the justifications for the combat exclusion rule.

\(^\text{29}\) That was the conclusion of the Supreme Court in Dothard v. Rawlinson, 433 U.S. 321 (1977).

In denying a Title VII challenge to the State of Alabama's refusal to hire an otherwise qualified female as a prison guard, the Court stated "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." Id. at 336.
After the enlistment expires, these new, broadened conceptions of the outside world are taken back home.

These attitudinal changes are often crucial to success in other institutions in American society. The extent to which women are judged on their abilities and performance rather than upon sexual differences could lead "to a higher estimation of their personal worth and to placing a higher value upon achievement and competence."

D. Focusing the Issue

In sum, the combat exclusion rule takes a toll on women within the military and impacts upon society as a whole. This concept is an essential foundation for any objective review of the rule. The combat exclusion rule, despite its seemingly benign nature, has real costs.

The purpose of this comment is to examine the current state of the combat exclusion rule, assess the rationale behind the rule, and then to analyze the rule's validity and its appropriateness in today's society. In particular, the analysis will focus on the applicability of current constitutional equal protection theory and on the role of the courts in this debate.

The stakes involved have been laid out above. What follows is an effort to place the combat exclusion debate within a legal framework. The first part details the legislative history of the statutory bar against Navy women on combat vessels. The paper next explores the role the courts have assumed in military affairs. Then the paper examines the courts and women, specifically how the courts apply equal protection to gender classifications. Finally, through an extended analogy to a case which did strike down aspects of the combat exclusion rule, the current justifications for the combat exclusion rule are held up to the court's current standards.

30. BINKIN & BACH, supra note 17, at 37 n.11 (quoting Mariclaire Hale & Leo Kanowitz, Women and the Draft: Response to Critics of the Equal Rights Amendment, 23 HASTINGS L.J. 208 (1971-72)).
II. BACKGROUND: THE MILITARY, WOMEN, AND THE LAW

A. The Legislative History of Women in the Military

1. The Early Years

Prior to World War II, the role of women in the services was minimal. A few women—disguised as men—did participate in the Revolutionary War, the War of 1812, and the Civil War. However, due to the predominance of brute strength as the deciding factor in essentially hand-to-hand combat and “Victorian concepts of propriety” women were kept from participating in combat.

Though approximately 13,000 women did serve in the Navy and Marine Corps during World War I, the impact of women in the military was first felt to a significant degree in World War II. In that war, about 350,000 women were utilized by the four services. Though generally placed in “traditional” female roles, such as health care and administration, women “demonstrated their competence in virtually every occupation outside of direct combat.” Some of these women were employed as little as twelve miles behind the advancing front lines.

That dramatic and unprecedented utilization of women in the services did not survive the war. As part of the de-mobilization, which caused the total number of military personnel to plummet from a peak of 12.1 million down to 1.4 million, the number of women in the services was reduced to just 14,000, or one percent of the total, by 1948.

2. The Inception of the Combat Exclusion Rule

However, despite the apparent willingness to return to pre-war policies, Congress expressed its appreciation of women’s service in the form of the Women’s Armed Services

31. BINKIN & BACH, supra note 17, at 4-5.
32. BINKIN & BACH, supra note 17, at 4-5.
33. BINKIN & BACH, supra note 17, at 5.
34. BINKIN & BACH, supra note 17, at 7.
35. BINKIN & BACH, supra note 17, at 7.
36. BINKIN & BACH, supra note 17, at 7.
37. BINKIN & BACH, supra note 17, at 10.
38. BINKIN & BACH, supra note 17, at 10.
Integration Act of 1948.\textsuperscript{39} The act eliminated the "temporary" status applied to women during World War II, making them a regular part of the armed forces. It also had the effect of setting a limit on the number of women in the military, the kinds of jobs they could hold, and the maximum ranks they could achieve.\textsuperscript{40} It also provided the nation with the original combat exclusion rule.\textsuperscript{41}

The status of women in the military remained within the 1948 Act's guidelines until 1967. As a result of pressure from the growing women’s movement and the desire to lower the number of men required to be drafted, Congress in that year removed the statutory two percent end-strength limit on women in the services and raised the maximum ranks women could achieve.\textsuperscript{42}

The 1970s saw a dramatic increase in the number of women in the services and in their utilization. Congressional passage of the Equal Rights Amendment,\textsuperscript{43} increasing pressure from women’s groups, the suspension of conscription, and increasing judicial scrutiny combined to create a "watershed decade for women."\textsuperscript{44} In the Navy, the percentage of women among the enlisted sailors and officers more than doubled between 1970 and 1980, from approximately three percent to almost eight percent.\textsuperscript{45}

In 1978, shortly after a Federal District Court had struck down the Navy’s combat exclusion rule, section 6015, in \textit{Owens v. Brown},\textsuperscript{46} the law was amended. The absolute restriction against women serving on ships was modified: ships not ex-

\textsuperscript{40} See 1987 Hearings, supra note 7, at 2.
\textsuperscript{41} See 1987 Hearings, supra note 7, at 2.
\textsuperscript{42} BINKIN & BACH, supra note 17, at 12.
\textsuperscript{43} The Equal Rights Amendment was passed by Congress on March 22, 1972. The original deadline for ratification by two-thirds of the states was March 22, 1979. By 1978, 35 states had ratified the proposed amendment, just three short of the number required. Congress extended the original deadline by three years, to March 22, 1982. During that time no states ratified the ERA and, in fact, three states rescinded their ratifications. The ratification effort failed with the expiration of the second deadline, on March 22, 1982. \textit{See} LAURENCE H. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} §§ 16-30 (2d ed. 1988).
\textsuperscript{44} ARMY TIMES, supra note 3, at 104. \textit{See also} BINKIN & BACH, supra note 17, at 13-14.
\textsuperscript{45} MILITARY WOMEN, supra note 4, at 3, 45.
\textsuperscript{46} 455 F. Supp. 291 (1978). \textit{See infra} notes 114-32 and accompanying text for a more detailed review of the decision.
pected to be involved in combat were made open to women. Thus, repair ships and salvage ships were opened up to women. Recently, the Navy's Combat Logistics Force (CLF) ships, which have primary responsibility for replenishing ships at sea, were also made available for females.\(^\text{47}\)

Since 1978, the legal status of Navy women has not changed. The law now mandates that women may not serve aboard combatants, except for limited periods of up to six months when the ship is not expected to have a combat mission.\(^\text{48}\)

B. **Judicial Oversight of Military Affairs**

A threshold question for any examination of congressional legislation prescribing the role of women in the military must concern the role of courts in military affairs. The Constitution provides that Congress shall have the power to “provide and maintain a Navy,”\(^\text{49}\) and to “make rules for the government and regulation of the land and naval forces.”\(^\text{50}\) The executive branch is granted power as Commander in Chief of the armed forces.\(^\text{51}\) The judiciary has no similar explicit role in military affairs.

In 1973, the Supreme Court had occasion to explore the role of the judiciary in light of these explicit constitutional grants to the congressional and executive branches. *Gilligan v. Morgan*,\(^\text{52}\) which came about in the wake of the 1970 shootings at Kent State University, concerned an effort by students attending Kent State to enjoin the governor of the state from “prematurely” employing the National Guard to quell civil disturbances.\(^\text{53}\)

In dismissing the claim on justiciability grounds, the court stated:

> The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Execu-
The court, however, was careful to point out that "we neither hold nor imply that the conduct of the National Guard is always beyond judicial review."\(^5\)

Despite the general deference which the Court stated was owed to the Congress and the President, the Supreme Court has engaged in reviews of military matters. In 1973, an Air Force lieutenant challenged a law which automatically granted benefits to male members with spouses but required female members to prove that their spouses were in fact dependent on them. The Court, in *Frontiero v. Richardson*,\(^6\) did indeed find the matter justiciable. Relying upon equal protection arguments, the Court struck down the law without any mention of a concern for encroaching into military matters.

Two years later, in *Schlesinger v. Ballard*,\(^7\) the Supreme Court again reached the merits in a case involving military affairs. The Court there rejected a claim from a Navy lieutenant that he had been discriminated against by a policy which granted women a longer period of time to attempt to gain promotion before being involuntarily separated from that job. In reaching this conclusion, the Court, again applying equal protection analysis, determined that "Congress may thus quite rationally have believed" the law necessary.\(^8\) As in *Frontiero*, the military affairs concerns expressed in *Gilligan* were not addressed.

Clearly then, the courts do have a role to play in military affairs. In striking down the then-existing combat exclusion law for the Navy, the United States District Court for the District of Columbia, as part of a review of Supreme Court treatment of the matter, stated:

> Whether the deference due particular military determinations rises to the level of occasioning nonreviewability is a question that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will

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\(^5\) Id. at 10.
\(^6\) Id. at 11.
\(^7\) 411 U.S. 677 (1973).
\(^8\) 419 U.S. 498 (1975).
involve the courts in an inappropriate degree of supervision over primary military activities.\textsuperscript{59}

From the \textit{Frontiero} and \textit{Ballard} cases, at least, it appears the Court is willing to entertain qualifying equal protection cases involving gender-based line drawing by Congress despite the military nature of the regulation at issue.

Keeping in mind the constraints imposed by very real separation of powers concerns, the focus here now shifts to an examination of the treatment by the courts of gender classifications within the equal protection clauses.

III. \textbf{EQUAL PROTECTION AND WOMEN}

A. \textit{Establishing the Standard}

The relationship between men and women for most of this country's history was summed up in 1973 by Justice Brennan, writing for the Supreme Court in \textit{Frontiero v. Richardson}.\textsuperscript{60} "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."\textsuperscript{61}

Indeed, as that court noted in support of its position, the founders of this country were, at its conception, of the opinion "that women should be neither seen nor heard in society's decisionmaking councils."\textsuperscript{62}

That widely-held position dramatically impacted the way women were treated by the law. Women were long considered by the law not to be persons distinct from their husbands. It was not until 1920 that women were given the right to vote in this country by the Nineteenth Amendment to the Constitution.\textsuperscript{63}

A critical point in surveying the genesis of the application of equal protection concepts to lines drawn along gender lines is that that genesis does not parallel the archetypical equal protection case—that of race. In fact, five years after the

\begin{itemize}
\item[60.] 411 U.S. 677 (1973).
\item[61.] \textit{Id.} at 684.
\item[62.] \textit{Id.} at 684 n.13.
\item[63.] U.S. \textit{CONST. amend.} XIX.
\end{itemize}
post-Civil War Amendments\textsuperscript{64} freed the slaves and provided us, 100 years later, with the doctrinal tool for legally eradicating distinctions drawn along racial or ethnic lines, a Supreme Court Justice remarked:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . .

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.\textsuperscript{65}

Clearly, while the legislators and citizens of the late nineteenth century United States were concerned with the arbitrary imposition of legal inequalities upon black people, they had no such concern for the somewhat similar situation faced by women. As a consequence, the Supreme Court's review of gender discrimination claims has taken a less stringent form than that utilized in racial classification cases.

B. Early Cases—"Rationality Review"

The most noteworthy of the early gender discrimination cases is the 1948 decision in \textit{Goesart v. Cleary}.\textsuperscript{66} There the Supreme Court refused to enjoin the enforcement of a Michigan law which banned a woman from working as a bartender unless she was "the wife or daughter of the male owner."\textsuperscript{67} After

\textsuperscript{64} U.S. CONST. amend. XIII, XIV, XV.

\textsuperscript{65} Bradwell v. Illinois, 83 U.S. 442, 446, (1873) (Bradley, J., concurring). See also \textsc{Laurence H. Tribe, American Constitutional Law} 1559 (2d ed. 1988).

\textsuperscript{66} 335 U.S. 464 (1948). There is an earlier case of interest, \textit{Muller v. Oregon}, 208 U.S. 412 (1908), in which a labor law setting a ten hour per day limit on women who worked in "any mechanical establishment, or factory, or laundry" was challenged. Despite the Court's deference to the 1905 decision in \textit{Lochner v. New York}, 198 U.S. 45 (1905), in which the "right and liberty to contract" was enshrined, the limitation was upheld. Though asserting that "in the matter of personal and contractual rights [women] stand on the same plane as the other sex," Justice Brewer wrote:

Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon him and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.

\textsuperscript{67} The opinion reads:
determining "Michigan could, beyond question, forbid all women from working behind a bar," the Court stated that since "the line they have drawn is not without a basis in reason" the law must be upheld. Thus, in sharp contrast to the early race cases, laws drawing lines based upon gender were initially subjected to the Court's most minimal standard, rationality review.

Despite the deference normally associated with rationality review, in 1971 the Supreme Court for the first time struck down a gender-based classification on equal protection grounds. In Reed v. Reed, the mother of a deceased child

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As part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed in all cities having a population of 50,000 or more, but no female may be so licensed unless she be "the wife or daughter of the male owner" of a licensed liquor establishment.


68. Id. at 465.
69. Id. at 467.
70. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1466 (2d ed. 1988). As early as 1879, the Supreme Court was evidencing a hostility towards racial line drawing. The actual classification of race as a "suspect" classification demanding "strict scrutiny" came in 1944, in Korematsu v. United States, 323 U.S. 214 (1944), four years before Goesart.
71. See generally Russell Galloway, Means-Ends Scrutiny in American Constitutional Law, 21 LOY. L.A.L. REV. 449 (1988). The article offers a succinct discussion of the different analyses used by the Supreme Court. Of particular relevance to this comment are the labels ascribed to the three most utilized and recognizable levels of review: strict scrutiny, intermediate, or heightened, scrutiny, and rationality review. The particular requirements set forth by the Supreme Court will be discussed as they become relevant.
72. Id.
73. The concept of "equal protection" is rooted in the very wording of section 1 of the Fourteenth Amendment, which reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

The Fourteenth Amendment is explicitly directed towards actions by state governments. Equal protection was held by the Supreme Court to be a component of the Fifth Amendment's Due Process Clause and therefore applicable to the federal government's actions in Bolling v. Sharpe, 347 U.S. 497 (1954).
74. 404 U.S. 71 (1971).
challenged an Idaho law which preferred the child's father in appointment as administrator of the child's estate. This statutory preference was based simply upon the gender of one of the competing, otherwise equally qualified, contestants.\textsuperscript{75} The State of Idaho argued that the law was a simple way to eliminate some controversy whenever two equally qualified persons, one male, one female, were situated to be appointed to administer an estate.\textsuperscript{76} The law would, on occasion, eliminate the necessity for a hearing to choose between the petitioning relatives.\textsuperscript{77}

After embracing a now-classic “rationality review” formulation\textsuperscript{78} from its earlier \textit{Royster Guano Co. v. Virginia}\textsuperscript{79} decision, the Court addressed Idaho’s argument with the following:

To 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.\textsuperscript{80}

Thus, despite its employment of the most deferential form of review, the Court indicated it was willing to put some bite into gender discrimination cases.

\textbf{C. Struggling Towards a New Standard}

\textbf{1. Flirting With “Strict Scrutiny”}

The Supreme Court’s increased concern with gender-based discrimination was brought home forcefully just two years later in \textit{Frontiero v. Richardson}.\textsuperscript{81} Lieutenant Sharron Frontiero was a female Air Force officer who wished to receive

\begin{itemize}
\item \textsuperscript{75} “Section 15-314 [of the Idaho Code] provides that ‘of several persons claiming and equally entitled to administer, males must be preferred to females.’” \textit{Id.} at 73 (quoting \textsc{Idaho Code} § 15-314).
\item \textsuperscript{76} \textit{Id.} at 76.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} “The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” \textit{Royster Guano Co. v. Virginia}, 253 U.S. 412, 415 (1920).
\item For a discussion on the Supreme Court’s fondness for the \textit{Royster Guano} formulation, see \textsc{Gerald Gunther}, \textsc{Constitutional Law} 594 (11th ed. 1985).
\item \textsuperscript{79} 253 U.S. 412 (1920).
\item \textsuperscript{80} \textit{Reed v. Reed}, 404 U.S. 71, 76 (1971).
\item \textsuperscript{81} 411 U.S. 677 (1973).
\end{itemize}
increased pay allowances which are granted to service members with "dependents." For male members, Air Force policy was to provide these increased allowances whenever that member had a spouse. For female members, the allowances were granted only if the member could show the spouse was in fact dependent upon her for over one half of his support.

Justice Brennan, writing for himself and three other justices, held the policy up to exacting scrutiny. Citing Reed for his support, he stated that "classifications based upon sex, like classifications based upon race, are inherently suspect." Since the government conceded that it had no other justification for the policy beyond "administrative convenience," the policy was considered to be the "very kind of arbitrary legislative choice forbidden by the [Constitution]."

The Court, then, came within one vote of making gender a suspect classification subject to "strict judicial scrutiny.

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82. The military paycheck is composed of a number of different types of pay. Typically, the bulk of the member's paycheck is comprised of "Basic Pay," which is taxable salary. In addition, there are a number of non-taxable allowances. Among these are allowances for quarters. The quarters allowance is comprised of the Basic Allowance for Quarters (BAQ) and the Variable Housing Allowance (VHA). Both BAQ and VHA are determined by the member's rank and the member's dependents status. Members with dependents, i.e., non-member spouse, child, etc., receive a greater allowance than do "single" members. NAVY TIMES, Nov. 5, 1990, at 10.

83. 411 U.S. at 679-80.
84. Id. at 682.
85. Id. at 688.
86. Id. at 690 (quoting Reed v. Reed, 404 U.S. at 77, 76).
87. Justice Brennan's words were: "[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Id. at 688.

A clear statement of what the court means by "strict scrutiny" was offered in Plyler v. Doe, 457 U.S. 202 (1982). Justice Brennan, in his plurality opinion, wrote:

[W]e have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.

457 U.S. at 216-17 (footnotes omitted) (emphasis added).
2. Falling Short

Strict scrutiny, however, was not embraced by the Court. One problem with Justice Brennan's plurality opinion, as explained by Justice Powell in a concurrence joined by two other Justices, was that such a classification was unnecessary to the holding. Reed provided adequate authority for striking the statute.88

Of greater, indeed "compelling," concern to Justice Powell, however, was the prospect of intervening in the political process.89 The opinion was handed down in May 1973, just over one year after Congress had passed the Equal Rights Amendment—six years before the first ratification deadline was to expire.90 The short concurring opinion concluded:

[D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.91

With the narrow, and apparently historically fortuitous, failure to classify gender as a suspect classification, the standard of review for gender cases reverted to the traditional rationality review.

3. Back to "Rationality Review"

Two years after Frontiero this reversion took place in the 1975 case Schlesinger v. Ballard.92 That case presented the Court with another challenge to a military, gender-oriented policy statute—this time by a male. Lieutenant Robert Ballard challenged a Navy policy which required that he be discharged from the Navy where a similarly situated female officer would not be discharged.93 Congress had allowed female officers

88. 411 U.S. 677, 692 (Powell, J., concurring in the judgment).
89. Id.
90. See supra note 43.
91. 411 U.S. at 692.
93. Lieutenant Ballard's complaint rested upon disparate treatment given to
more time to gain promotion before falling victim to the military's "up or out" philosophy.\textsuperscript{94}

The Court's denial of relief to Lt. Ballard was based upon its conclusion that "Congress may quite rationally" have desired to make allowance for female officer's more limited opportunities for advancement.\textsuperscript{95} This deference, highlighted by the Court's willingness to hypothesize about Congressional motives, was tempered somewhat. After pointing out that the classification was not brought about "merely because of administrative or fiscal policy considerations,"\textsuperscript{96} the Court contrasted Lt. Ballard's situation with those posed in \textit{Reed} and \textit{Frontiero}:

\textit{[T]he different treatment of men and women naval officers... reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty.}\textsuperscript{97}

Three points of interest arise from the \textit{Ballard} opinion. First is the Court's previously noted reversion, after \textit{Frontiero}, to rationality review, albeit a more stringent version, for gender-based classifications. The second point regards the Court's construction, "archaic and overbroad generalizations." This standard seems to indicate that despite the deferential review, the court will require some legitimate reason behind the classification. Third and most important to this discussion

members according to sex. Being a male, Lt. Ballard was subject to 10 U.S.C. § 6382, which required he be discharged from the Navy after failing two times to be selected for the next-highest rank, Lieutenant Commander. Females were specifically excluded from coverage by this law. Instead, female lieutenants were covered by 10 U.S.C. § 6401, which allowed them to remain in the Navy, even if passed over for promotion two or more times, until they had completed 13 years of service as an officer. \textit{See Schlesinger}, 419 U.S. at 498-99.

94. \textit{Id.} at 501-05. The "up or out" philosophy in the military is based upon the organization's pyramidal structure. To avoid stagnation in the lower ranks, officers who fail to gain promotion are honorably discharged. The purpose is to vacate an appropriate number of spots within that rank into which junior officers can move. \textit{See id.} at 502-03.

95. \textit{Id.} at 508.

96. \textit{Id.} at 503.

97. \textit{Id.} at 508.
is the fact that the Court was careful to point out that there had been no challenge by Lt. Ballard to that law which ensured that males and females were "not similarly situated"—the combat exclusion rule.

While the full import of the third point is still unclear, since the Supreme Court has not heard a direct challenge to section 6015, the apparent heightened emphasis to be accorded gender-based classifications, evidenced by the first two points, was soon to be more explicitly addressed. In the wake of two lower-court decisions affecting military women,98 both of which had utilized rationality review, the Supreme Court came to grips with its ambivalence over gender-based classifications and forged a new level of review: "intermediate scrutiny."99

4. Embracing an Intermediate Standard

The practice of subjecting gender-based classifications to intermediate scrutiny was launched in the 1976 case *Craig v. Boren.*100 In *Craig,* the Supreme Court was faced with a challenge to an Oklahoma law which had set different age limits for the purchase of "nonintoxicating" 3.2% beer, depending upon the sex of the person. Males were prohibited from pur-

98. In Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), the Second Circuit Court of Appeals struck down a Marine Corps regulation which required pregnant Marines to be discharged from the Corps.

In Kovach v. Middendorf, 424 F. Supp. 72 (D. Del. 1976), the district court in Delaware upheld a Naval Reserve Officer Training Corps (NROTC) policy which created a disparity between males and females in required Scholastic Aptitude Test (SAT) scores. Female applicants were required to score higher on the SAT than were male candidates.


This technique of "intermediate" scrutiny permits us to evaluate the rationality of legislative judgement with reference to well-settled constitutional principles . . . [Only] when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice.

Id. See also Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988). Despite the arguably wide-ranging criteria established by Plyler, Justice O'Connor noted in Kadrmas that intermediate or, as named by her, "heightened," scrutiny "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." Id. at 459.

100. 429 U.S. 190 (1976).
chasing the beer until they reached the age of twenty-one; females were allowed to purchase the beer at age eighteen.\textsuperscript{101}

Justice Brennan's majority opinion\textsuperscript{102} quickly stated the standard of review to be applied: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."\textsuperscript{103}

In the instant case, the disparate treatment of males and females was not, in the Court's view, adequately justified. Though Oklahoma's interest in protecting the health and safety of its citizens through reducing incidents of driving while under the influence was held to be "important,"\textsuperscript{104} and so passed the first part of the test, the law failed in the "means" analysis, that is, the classification was not sufficiently related to the important health and safety "end."\textsuperscript{105}

5. \textit{Settling in With the New Standard}

Intermediate scrutiny, forged in \textit{Craig}, appears to have become the standard for review of gender-based classifications. In 1977 the Supreme Court utilized its \textit{Craig} formulation in \textit{Califano v. Goldfarb}\textsuperscript{106} to strike down a federal law which granted benefits to widows upon the death of their insured spouse, but only granted benefits to surviving widowers if they were dependent upon the deceased.

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 191-92. The issue was phrased by the Court as follows: The interaction of two sections of an Oklahoma statute, Okla. Stat. Tit. 37 sections 241 and 245 (1958 and Supp. 1976), prohibits the sale of "nonintoxicating 3.2\% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the Equal Protection of laws in violation of the Fourteenth Amendment.
\item \textit{Id.} at 192.
\item \textsuperscript{102} Unlike in \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973), Justice Brennan had the necessary five votes to support his opinion. In fact, six justices explicitly supported the application of Justice Brennan's new standard of review. One other concurrence was silent on the matter, and therefore arguably supportive as well. The vote was 7 to 2. 429 U.S. at 191.
\item \textsuperscript{103} 429 U.S. at 197-98.
\item \textsuperscript{104} \textit{Id.} at 199-200.
\item \textsuperscript{105} \textit{Id.} at 200.
\item \textsuperscript{106} 430 U.S. 199 (1977).
\end{itemize}
Three years later, Justice Rehnquist, writing for the majority in *Michael M. v. Superior Court of Sonoma County*,\(^7\) acknowledged Craig's call for "a somewhat 'sharper focus' when gender-based classifications are challenged."\(^8\) The Court there upheld a California statutory rape law which had been challenged because it applied only to males.

Finally, in the 1981 decision *Rostker v. Goldberg*,\(^9\) the Supreme Court declined an invitation by the Solicitor General to modify its heightened scrutiny test in the areas of military affairs and national security.\(^10\) The Court upheld the Military Selective Service Act despite the fact that it required only males, not females, to register for a military draft.\(^11\)

In sum, though the Court's current members have not addressed a gender-based classification, it is apparent the current standard remains the one adopted in *Craig v. Boren*: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."\(^12\)

108. *Id.* at 468.
110. *Id.* Justice Rehnquist, again writing for the majority, wrote:

   The Solicitor General argues, largely on the basis of cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA [Military Selective Service Act] only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Governmental purpose, and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination. We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government.

*Id.* at 69 (citations omitted).
111. Not surprisingly, the case focused on the combat exclusion rule.

Justice Rehnquist stated for the majority "[t]he 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 a pool of potential combat troops." *Id.* at 79.

Both dissenting opinions took note of the fact as well. Justice White opened his dissent (writing for himself and Justice Brennan) with: "I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution." *Id.* at 83. Justice Marshall, with whom Justice Brennan joined, noted that "this case does not involve a challenge to the statutes or policies that prohibit female members of the Armed Services from serving in combat." *Id.* at 87.
IV. APPLICATION OF HEIGHTENED SCRUTINY TO THE COMBAT EXCLUSION RULE

The Supreme Court has not dealt with a direct challenge to the combat exclusion rule. The purpose of this comment is to anticipate that analysis, for surely it must come, barring an unlikely renewed effort to pass another Equal Rights Amendment or the equally unlikely prospect that Congress will change its mind on the matter.113

The immediate task is to pose a hypothetical challenge to the combat exclusion rule and examine that challenge within the guidelines of the court's espoused heightened scrutiny. The imagination, fortunately, need not be strained greatly in posing this hypothetical, for the precise issue has been put to a federal district court.

A. Framing the Debate—Owens v. Brown

The one federal district court case dealing with the combat exclusion rule is Owens v. Brown.114 Judge Sirica, sitting in the United States District Court for the District of Columbia, was presented with a challenge to 10 U.S.C. section 6015 by a group of female Navy officers and enlisted personnel.115 The law, as it then existed, banned women from all Navy vessels.116 The complainants sought injunctive and declaratory

113. On May 22, 1991, the U.S. House of Representatives did pass a Defense appropriations bill which included a provision that would eliminate the barrier to women serving as pilots, navigators, or crew members on military combat aircraft. The Senate passed a similar measure on September 30, 1991. The appropriations act has not yet been acted on by the President. NAVY TIMES, August 12, 1991, at 3. The bill, if signed, would apparently have no effect on the exclusion of women from combatant vessels.
115. Id. at 293-94.
116. As noted by the court in July 1978, 10 U.S.C. § 6015 read:

The Secretary of the Navy may prescribe the manner in which women officers appointed under section 5590 of this title, women warrant officers, and enlisted women members of the Regular Navy and Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such military members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports.
relief aimed at preventing the Secretary of the Navy from relying on section 6015 in setting personnel policy.\textsuperscript{117}

The four plaintiffs identified in the opinion\textsuperscript{118} were all seeking access to Navy jobs they considered important to their professional advancement.\textsuperscript{119} For instance, the named plaintiff, Yona Owens, was an Interior Communications Electrician.\textsuperscript{120} Her job consisted of repairing complicated electronics components which were used by the Navy for navigational purposes. Sensibly enough, most of that navigation gear was located aboard ships. Owens sought assignment aboard a vessel so that she could "utilize her skills more fully."\textsuperscript{121} The three other plaintiffs described in the opinion had similar professional concerns.\textsuperscript{122}

After a fairly lengthy discussion in which the court denied the Government's claim that this case presented a "nonjusticiable political question,"\textsuperscript{123} Judge Sirica launched into an equal protection analysis. The test to be applied, on the strength of \textit{Craig} and \textit{Califano v. Goldfarb},\textsuperscript{124} was heightened scrutiny.\textsuperscript{125}

The first part of that analysis was simple. As the court phrased it, the Government's assertion that the law was designed to "increase the combat effectiveness of Navy ships" was

\begin{itemize}
  \item \textsuperscript{117} 455 F. Supp. at 294 n.1.
  \item \textsuperscript{118} The court goes on to note that "[i]t is undisputed that there are no hospital ships or transports currently in service in the Navy." \textit{Id}.
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} The case was certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. The Government challenged the certification of the class on the grounds that "some female personnel may not share plaintiff's desire to remove the statutory bar." \textit{Id}. at 293.
  \item \textsuperscript{121} The court granted certification for two reasons. First, the Government had not demonstrated there was such "antagonism among Navy women." \textit{Id}. Second, the argument was not "legally significant" in that the suit was not attempting to force women into sea duty, but rather was aimed at stopping the Navy from using gender as an automatic disqualifier for sea duty. \textit{Id}.
  \item \textsuperscript{122} \textit{Id.} at 295-96.
  \item \textsuperscript{123} \textit{Id}. at 295.
  \item \textsuperscript{124} \textit{Id}. at 295-96.
  \item \textsuperscript{125} \textit{Id}. at 296.
  \item \textsuperscript{126} \textit{Id.} at 299.
  \item \textsuperscript{127} 430 U.S. 199 (1977).
  \item \textsuperscript{128} "[T]o withstand constitutional challenge, classifications by gender must be substantially related to the achievement of [important] objectives." 455 F. Supp. at 305 (citations omitted).
\end{itemize}
a "governmental objective of the highest order." The Court, therefore, quickly dispatched the "ends" analysis, and the focus was shifted to the relationship of section 6015 to "combat effectiveness."

That "means" analysis did not fare as well. The Court began its review by observing the Government had not even established that military preparedness was in fact the objective of the legislation. It noted that apparently the prohibition of women on ships was "added casually, over the military's objections and without significant deliberation." Further, "the sense of the discussion is that section 6015's bar against assigning females to shipboard duty was premised on the notion that duty at sea is part of an essentially masculine tradition."

Nonetheless, the court acknowledged there could be legitimate governmental objectives behind this legislation. It then turned to the justifications offered by the government, which the court succinctly enumerated:

126. Id.
127. Id.
128. Id.
129. Id. The point retains its relevance today. The current version of the law was created by amendment on October 20, 1978—three months after the Owens decision voided the 1948 version. In hearings before the Military Personnel Subcommittee of the House Armed Services Committee, military officials were still of the opinion that the combat exclusion law was not needed or desired from a military perspective. See Hearings on Military Posture and H.R. 10929, Department of Defense Authorization for Appropriations for Fiscal Year 1979, H.R. 7431, Assignment of Women on Navy Ships, Before the House Armed Services Comm., 95th Cong., 2d Sess. 1192, 1203 (1978) [hereinafter 1978 Hearings].

The Deputy Secretary of Defense had written to the speaker of the House that "[t]he best long-term solution is to repeal both 10 U.S.C. § 6015 and 8549." Id. at 1192. Section 8549 is the Air Force's combat exclusion rule.

Then-Secretary of the Navy Claytor was quite candid about the Navy's position regarding amending § 6015:

If Congress is prepared to abolish the statute and leave it to the Secretary of the Navy, I'm sure that I and my successors are perfectly prepared to take that responsibility, and so I do not oppose the [Office of the Secretary of Defense's] proposal to repeal the statute. But rather than have a controversy or have a very difficult political problem over doing that and accomplishing nothing, let's take the step that will get us somewhere now and examine the question of whether we should take the big step later on.

Id. at 1203.

130. The court notes that "there is no requirement that the Court must overlook unexpressed legislative objectives that reasonably could have formed the basis of the statute in question." Owens, 455 F. Supp. at 306 n.55.
These concerns focus on the unknown effects that full sexual integration might have on group dynamics under combat conditions, on the ability of the Navy to operate as effectively as it might with all male combatants, on the capacity of the American people to accept the prospect of female combat casualties, and on the attitude of enemies to engage the United States in combat because of a perceived weakness in our combat arms.¹³¹

Additionally, the government argued that "the integration of men and women aboard Navy ships is apt to cause morale and discipline problems."¹³²

Judge Sirica dispatched each of these arguments on his way to voiding section 6015. Eighteen years after that decision was handed down, the reasons for striking the law have become even more compelling. The points will now be addressed sequentially, with an eye towards the situation facing today's society.

B. The Justifications of Combat Exclusion

1. The Unknown Effects Full Sexual Integration Might Have on Group Dynamics Under Combat Conditions

There are two ways to examine this argument. First, in the abstract, the argument seems to fall short of constitutional significance. The test from Craig requires that the Government's means, here to prevent women from going into combat, be substantially related to the admittedly "important" goal of military effectiveness. It is difficult to see how "unknown effects" can qualify as any reason whatsoever, let alone a substantial reason.

This problem is borne home by the obvious fact that Congress alone has the authority to make the modifications in the law necessary to test the premise. Were Congress interested in demonstrating its actions were not based upon "archaic and overbroad generalizations"¹³³ it alone could do so. Such a proposal has been rejected by the Congress.¹³⁴

¹³¹. Id. at 306 (emphasis in original).
¹³². Id. at 308-09.
The second view of this argument acknowledges the truth in the observation that we do not have any combat experience involving females on which to draw, but observes the military does have some relevant experience in the area. Female military personnel are widely regarded by the military as highly capable. As a result of that view, and the 1978 amendment to section 6015, the Navy estimated that by the end of 1990 there would be almost 10,000 women serving in shipboard assignments. This number includes women assigned to the recently opened Combat Logistics Force (CLF) ships, which have responsibility for replenishing combatants at sea.

The rationality of this line of argument can best be understood by juxtaposing two points. The first was eloquently stated by the Secretary of the Navy back in 1978: "[W]hen you get to the Navy it's a different problem. There is no hand-to-hand combat in the Navy. There just is none. You don't board enemy ships with a cutlass in your teeth any more. This is all done by electronics and long-range missiles and that type of thing."

The second point can best be illustrated by a statement from Representative Schroeder:

Anybody who has seen the latest Army recruiting commercial, has seen a female soldier operating a "non-combat" communications van during field maneuvers. I think all of us know that if you were in a real battle, the first person you usually try to hit is the person running the communications van.

If it can be assumed that CLF ships, without which the "combatants" would soon run out of food, ammunition, fuel, etc.,

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The Senate has, however, recently created a commission to study the issue of women in combat. Mark Thompson, *Senate OKs Women Combat Pilots*, SAN JOSE MERCURY NEWS, Aug. 1, 1991, at A1.


137. 1990 Hearings, supra note 12, at 29, 32.


139. 1990 Hearings, supra note 12, at 3. Again, the recent Persian Gulf War provides additional illustration. A major concern of the U.S. was Iraq's Scud missiles. The U.S. response was the Patriot missile system, which were tasked with destroying incoming Scuds. Women were assigned to the Patriot missile batteries. See Jeannie Ralston, *Women's Work*, LIFE, May 1991, at 56.
would be as likely a target as Representative Patricia Shroeder's communication van, then we can say that for all practical purposes Navy women, like Army women, will be in combat, should there be a war.

When it is realized that (1) ships which do have women aboard and interact with the Fleet, such as the CLF's, share the risk of being hit with the combatants, and (2) the fact that, other than being hit, those combatants would be engaged only in "war done by electronics and long-range missiles and that type of thing," the difference between what women do now and what they could do without this law comes down to pushing buttons and monitoring electronics. Group dynamics aboard combatants engaged in offensive action will not be much different from group dynamics aboard any naval vessel during normal training exercises. Group dynamics aboard combatants suffering under an attack should not differ from those dynamics which will take place should a CLF ship fall under attack. In other words, the Navy seems to have already made the argument moot.

2. The Ability of the Navy to Operate as Effectively as it Might with All-Male Combatants

This is essentially the same argument as that debated above, with a somewhat less gender-neutral flavor. As above, the argument hinges upon a narrow view of "combatant." If one views a combatant as any ship which might reasonably be exposed to combat, the CLF ships noted above would certainly qualify. The Congress and the Navy, by placing women on such vessels, have impliedly concluded that those CLF ships can operate as effectively with women aboard as with males only.

Another anecdote might illustrate the point. In a 1988 hearing before the House Military Personnel and Compensation Subcommittee, Representative Jack Davis told of a question he posed to an Army Major General. This Major General was responsible for protecting central Europe from forty-six divisions of Soviet tanks. Davis asked about a report he'd heard that there were female intelligence officers assigned to American forces there. Davis reports:

[A]pproximately 54 percent or roughly 35 women officers, lieutenants and captains, [were] serving as the intelli-
gence... officers at the company level. The question was then put to Major General Griffin, what happens if the balloon goes up? He said to me, they go forward with their units.

I said, there is no thought of returning those officers to the rear echelon? He said, "Congressman, they go forward with their units."140

3. The Capacity of the American People to Accept the Prospect of Female Combat Casualties

The responses posed to arguments one and two above also apply here. If a Naval war were to come about, either the Navy would have to pull its women off the CLF ships, change the way in which ships are replenished, or accept that the American people are going to experience female combat casualties.

There are, in addition, other points worth noting. The first is drawn from a review of the historical utilization of women in the United States military. As detailed above, female participation in the military has jumped at those times when the United States was involved in a national emergency. From World War I through the Vietnam involvement, female participation in the military has been related to engagement in hostilities. As a sociologist has observed in relation to this protection notion: "It is therefore ironic that women tend to serve in the military when the risks are the greatest."141

Aside from that, it can be argued that women are already being exposed to "combat." In the words of Representative Shroeder:

[W]e are seeing that the public is much more aware of the realities than some of us think—that female police officers face life threatening dangers every single day, that one women [sic] in America every 3.5 minutes is raped or subjected to some kind of violence of some sort. We know that we cannot protect women from violence anywhere in our cities and in our rural areas. So I think the whole Victorian notion of "we want to save them," is outdated.142

140. 1987 Hearings, supra note 7, at 14.
141. 1987 Hearings, supra note 7, at 92.
Further, the accuracy of these views of "public opinion" is in doubt. In 1990, a New York Times/CBS News poll asked Americans if "women members of the Armed Forces should be allowed to serve in combat units if they wanted to." Sev-
enty two percent of the respondents answered in the affirmative. A 1982 National Opinion Research Center poll revealed similar feelings. A 1991 poll, taken after the Persian Gulf War, found 79% of respondents agreeing with the proposition.

Indeed, the recent Persian Gulf War seems to have laid the matter to rest. Despite the combat deaths of ten women during the brief war, "[t]here hasn't been any national hue and cry over the deaths of the women." Similarly, the capture of two female American troops by the Iraqis during the war did not arouse pronounced concern on the part of the public.

Essentially, then, aside from the debatable question of whether such an argument should stand in the way of equal protection, this argument can be challenged as both inconsequential in light of military realities and as being simply incorrect.

143. 1990 Hearings, supra note 12, at 4, 8.
144. 1990 Hearings, supra note 12, at 4, 8.
145. 1987 Hearings, supra note 7, at 98. The testimony broke down the information in detail:

I will read you all of the jobs that were given and the percent who felt that women should be in those jobs. Typists in the Pentagon—97 percent; nurses in a combat zone—94 percent; . . . military truck mechanics—83 percent; jet transport pilots . . .—73 percent; jet fighter pilots—62 percent; missile gunners in the United States—59 per-
cent; . . . commander of a large base—59 percent; . . . and then the only job that did not have a majority agreeing was phrased as "soldiers in hand-to-hand combat"—and actually, the researchers who did this research were surprise[d] at the large minority of people who approved, which was 35 percent.

148. Id.
4. The Attitude of Enemies to Engage the United States in Combat Because of a Perceived Weakness in Our Combat Arms

Seemingly, the most sensible way to examine that argument is to look to what the experts—the military—have stated. In both 1948,149 when the law was first enacted, and 1978,150 when the law was amended, the military has asked that there be no statutory bar.

The responses to arguments one and two, above, are also pertinent. The enemy which saw women aboard combatant vessels as a weakness should reasonably also view women aboard the essential CLF ships as a weakness as well. The Navy seems to believe that such concerns are not of sufficient weight to keep women off of those CLF ships.

Finally, this argument is apparently mere speculation. There is no discussion of the argument in the *Owens* case, nor is there even a mention of it in any of the hearings before House subcommittees in 1978, 1987 or 1990, despite the fact that the military and, of course, Congress were represented at each of those hearings.

5. Morale and Discipline Problems

The crux of this argument is that in combat situations men and women would act in such a way as to degrade the combat effectiveness of the mixed units. The problem was phrased colorfully by Congressman Lancaster:

> [O]ne of the problems raised with regard to women in combat situations is . . . attitudinal and is something that perhaps is very deeply ingrained in the American male psyche. This is an attitude of protectiveness in a brother or sister, . . . or for that matter, girlfriend kind of relationship. Second, is the romance angle that may develop in a unit.151

We can recognize two distinct premises from the above arguments. One assumption is that military men will be more inclined to protect military women in combat situations at the

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expense of combat effectiveness. The second is that romantic
relationships, especially during extended at-sea periods aboard
Naval vessels, would prove to be detrimental to the morale of
the unit as a whole.

The first point was addressed by Congresswoman
Schroeder in response to the above query of Congressman
Lancaster. She noted two counter arguments. First, military
training and professionalism are likely to prove more powerful
than this ingrained tendency. After all, many men would also
be inclined to stop and help a wounded fellow male, but this
tendency has not been of great import in past conflicts.

Second, attitudes are neither uniform nor static. Con-
gressman Herbert Bateman, discussing the National Opinion
Research Center poll, noted above, stated: "[T]o the extent
that the role of women in the military is denigrated by a cul-
tural bias, the cultural bias is not as strong now and would not
appear likely to be as strong in the future as has been in the
past."152 Common sense observations tend to bear that view
out.

As for the concern romance will prove detrimental to
morale, the military is singularly equipped to deal with that
problem. Where a civilian court would be abhorred by a law
prohibiting Public Displays of Affection, the military is not so
constrained. The current Chief of Navy Personnel, Vice Admi-
ral J.M. Boorda, has stated "[o]ur new fraternization policy
seems to be working. It is a common sense approach to a
tough problem. Yes, we have fraternization incidents, but they
are on the decline and our chain of command seems to be
able to deal with them effectively."153

Finally, in reviewing this argument it is helpful to keep
Secretary Claytor's words in mind: "You don't board enemy
ships with a cutlass in your teeth any more."154 And again,
from arguments one and two above, these situations are al-
ready being faced in today's Navy. It seems unlikely that they
will be substantially more difficult just because they occur
aboard a "combatant."

152. See 1987 Hearings, supra note 7, at 99.
V. PROPOSAL

The step needed to correct this situation is clear: amend 10 U.S.C. section 6015 so the Secretary of the Navy is not proscribed from assigning women to permanent duty aboard the Navy's combatant vessels.\footnote{155}

Congresswoman Schroeder recently noted: "[w]e can only guess that the combat exclusion law was intended to protect women in the military from harm, ensure a combat-effective force, and reflect public opinion. In fact, the law fails on all three counts."\footnote{156} When a law is inexplicably denying millions of young women, and the society at large, such important benefits as are at stake here, the people have a right to better representation than that offered in the 1948 law 10 U.S.C. section 6015.

Congress has not responded to Judge Sirica's call for an examination of the "unanswered questions" regarding integrating women into combat vessels.\footnote{157} Thirteen years is long enough to wait. It's time to shift from the assumption women would disrupt the military unit and embrace the more widely held belief in our society that women are as effective as men. Let objectively defined standards determine which sailors can serve aboard combatants, not immutable and essentially irrelevant factors such as gender.

This is not to say that the government's concern with the "unknown effects" of integrating these combatants is not valid. As Judge Sirica noted in his own limited striking of section 6015, "nothing in this decision is meant to shape the contours of Navy policy concerning the utilization of female personnel."\footnote{158} Similarly, nothing in this comment is meant to affect the rational determinations of the Legislature and the Executive pertaining to the utilization of military personnel. The goal

\footnote{155} I propose that § 6015 be amended to read:

The Secretary of the Navy may prescribe the manner in which women officers, women warrant officers, and enlisted women members of the Regular Navy and Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such military members may be assigned and the military authority which they may exercise.

\footnote{156} 1990 Hearings, supra note 12, at 6.


\footnote{158} Id. at 310.
should be the establishment of objective standards for all military personnel, regardless of sex. The only relevant question should be: Can this individual do this job?

It must now be left to the courts. What now exists is a situation where Congress justifies the combat exclusion rule by pleading "military necessity," and the military is defending itself by responding "social policy." This cycle will not end unless the courts hold this law up to the well-established equal protection test for gender-based discrimination.

VI. CONCLUSION

The United States military holds a unique position in our society. The military is the country's largest employer. As an employer it provides many valuable benefits, some of which cannot be duplicated in the private sector—or in any other portions of the government. In addition, the military is a highly visible institution in our society. Honorable service in the military continues to lend veterans an air of competence in the affairs of the country and a right to be involved. Many other benefits, not least of which is socialization of our young citizens, are available to those who serve—and to the rest of us.

The combat exclusion rules place many limitations upon women seeking to avail themselves of the benefits the military offers. The most direct is that it simply places a ceiling on the number of women that the military can effectively utilize. The result is that a group which comprises over fifty percent of the population is restricted to eleven percent participation in the defense of the nation. The rules also serve to restrict the professional advancement of women. Despite the great efforts the military has undertaken to expand women's career opportunities, it stands as a simple truth no woman will ever serve on the Joint Chiefs of Staff until she has combat experience. That will only happen after the combat exclusion rules are removed.

As the military has struggled with Congress' restrictions, the Supreme Court has, through great effort, forged a standard by which laws drawing lines based on gender must be evaluated. The question becomes: Does Congress' law stand up to that standard? It seems it does not. While putting forth a seemingly sensible "military necessity" justification, Congress has failed to show where such a notion has come from. It apparently has not come from the military.
Despite the judicial call for a substantial relationship between government's gender-based discriminations and its purpose, Congress has not acted. In the fifteen years since Craig, Congress has advanced no reasons for the law which are substantially related to military effectiveness. In the thirteen years since Owens, Congress, even in its hearings on amending the voided statute, has advanced no reasons for the law which are substantially related to military effectiveness. Even after the 1981 case which supported a gender-based classification in a military context, but only used the validity of section 6015 as an assumption, presumably open to challenge, Congress has advanced no reasons for the law which are substantially related to military effectiveness.

It is time for this country to give female sailors an objective review. The only rationale left for excluding women from the Navy's combatants, lacking as we do any evidence that they are unfit for such service, must be rooted in our notions that such work is not for women. The courts have recognized our Constitution does not accept that justification for a law with such impact as this. It is time for the courts to extend that view into the midst of the United States military.

Christopher Horrigan