

*Winter 1983*

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### Recommended Citation

Jody M. Cramsie, *Gender Discrimination in the Military: The Unconstitutional Excursion of Women from Combat*, 17 Val. U. L. Rev. 547 (1983).

Available at: <https://scholar.valpo.edu/vulr/vol17/iss3/7>

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## GENDER DISCRIMINATION IN THE MILITARY: THE UNCONSTITUTIONAL EXCLUSION OF WOMEN FROM COMBAT

### INTRODUCTION

Although gender-based discrimination has existed in one form or another for thousands of years,<sup>1</sup> it has only recently come within the realm of judicial scrutiny in the United States.<sup>2</sup> Federal statutes

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† The writer does not intend to comment upon the legality of the draft or war in general. This Note assumes for the sake of argument that it is necessary at times for the United States to involve itself and its citizens in a war.

1. The Bible provides many examples of differing treatment for men and women. For instance, the Israelites were forbidden to covet any of their neighbor's possessions. This included the neighbor's house, servants, animals, and wife. Women were considered chattel. *See*, Exodus 20:17 (King James) ("Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's.") *See also* Numbers 5:12-31 (King James) (part of the law describing the differing treatment for men and women committing adultery).

2. This Note addresses those instances where gender-based discrimination has been challenged on the grounds of equal protection as embodied in the fourteenth amendment of the Constitution. That amendment reads in pertinent part: "No state shall . . . deny any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The equal protection clause of the fourteenth amendment precludes "irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). It does not allow states to legislate different treatment for individuals on the bases of criteria wholly unrelated to the objective of the statute. *Reed v. Reed*, 404 U.S. 71, 76 (1971). *Accord*, *Barbier v. Conolly*, 113 U.S. 27, 31 (1885).

The Supreme Court first considered an equal protection challenge to a gender-based classification in 1948. *Goesaert v. Cleary*, 335 U.S. 464 (1948) (Michigan statute which forbade any female to be licensed as a bartender unless she was the wife or daughter of the male owner upheld). It was as recently as 1971 that the first statutory gender-based classification was struck down as discriminatory and violative of the equal protection clause. In *Reed v. Reed*, 404 U.S. 71 (1971), a provision of the Idaho probate code was challenged on equal protection grounds. The provision designated the persons entitled to administer an estate of an individual who died intestate. Fathers and mothers were members of the same entitlement class. When members of the same class claimed the right to administer the estate, the provision required a mandatory preference to males over females. The state's objective behind the classification was the reduction of the workload on probate courts by the elimination of one class of individuals claiming entitlement. The Supreme Court recognized that the objective was not without some legitimacy. However, the objective was not advanced by the classification in a manner consistent with the command of the equal protection clause, and therefore the statute was declared unconstitutional.

that classify on the basis of gender,<sup>3</sup> including those governing military practices and policies,<sup>4</sup> have been subject to equal protection challenges.<sup>5</sup> Significantly, many of the Court's decisions upholding some form of gender-based discrimination in the context of the military,<sup>6</sup> did so by relying on statutes that prohibit the assignment of women to any combat and combat-related positions.<sup>7</sup> The Supreme Court, however, has never considered a direct challenge to the constitutionality of those statutes. The Court has set a dangerous precedent by relying on statutes

3. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (provision of Social Security Act allowing women a more profitable formula by which to calculate old-age retirement benefits than the formula applicable to men upheld); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (provision of Social Security Act requiring widowers to prove financial dependence on wife before receiving survivors' benefits, while not requiring similar proof of widows held invalid); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (provision of Social Security Act granting survivors' benefits to wife and minor children of deceased husband and father, but only to minor children of deceased mother held invalid).

4. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (federal statute requiring the registration of males only for possible compulsory military service upheld because of combat restrictions on women); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (Massachusetts' veteran preference statute granting absolute lifetime preference to veterans for civil service positions upheld); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (federal statutes allowing female naval officers a longer period of time to attain promotion before mandatory discharge than male naval officers upheld because combat restrictions on women did not grant them the same opportunities for promotion); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal statutes requiring female Air Force officer to prove her spouse's actual financial dependence before obtaining increased benefits, while statutes did not require male Air Force officers to prove actual financial dependence for the spouses held invalid); *Campbell v. Beaulhler*, 519 F.2d 1307 (9th Cir. 1975) (Marine Corps regulation requiring male reservists to refrain from wearing short hair wigs in combat, but not female reservists, upheld); *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978) (federal statute prohibiting the assignment of female personnel on Navy vessels other than hospital ships and transports held invalid); *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir. 1976), *cert. denied*, 429 U.S. 838 (1976) (federal statutes providing for registration, induction, and training of male citizens only, upheld).

5. Federal statutes alleged to be violative of equal protection rights are challenged on the basis of the fifth amendment to the Constitution. That amendment reads in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so 'unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

6. See *supra* note 4 and cases cited therein.

7. Women are statutorily restricted from combat participation in the Air Force and Navy. "Female members of the Air Force, . . . may not be assigned to duty in aircraft engaged in combat missions." 10 U.S.C. § 8549 (1959). "[W]omen may not be assigned to duty on vessels or in aircraft that are engaged in combat missions . . . ."

10 U.S.C. § 6015 (Supp. 1981). The Marine Corps and the Army prohibit the assignment of women to combat by policy. *Rostker v. Goldberg*, 453 U.S. at 76.

employing blanket gender-based classifications to justify additional statutory gender-based classifications.<sup>8</sup> Basing the constitutionality of one statutory classification on a similar classification whose constitutional soundness has never been considered is questionable at best.

This note considers the constitutionality of Sections 8549 and 6015 under Title 10, which prohibit the assignment of women to combat positions. An analysis of the constitutionality of those statutes must begin with a determination of the appropriate standard of review to be applied in cases alleging gender discrimination. There is "an uneven and somewhat unsteady trend in the development of a single body of principles to apply in cases raising claims of sex discrimination."<sup>9</sup> Nonetheless, a single standard of review seems to have emerged,<sup>10</sup> and the constitutionality of Sections 8549 and 6015 will be considered in light of that standard. The currently accepted standard requires the Court to examine challenged statutes to determine if the gender-based classification bears a substantial relationship to important governmental objectives.<sup>11</sup> The degree to which military necessity and the protection of women, the asserted governmental objectives underlying Sections 8549 and 6015, actually comport with reality is analyzed in the remainder of the note. The ultimate issue is divided into two parts. The first is whether the objectives of military necessity and the protection of women are important governmental objectives. If this question

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8. In *Schlesinger v. Ballard*, 419 U.S. 498, 511-12 n.1 (1975) (Brennan, J., dissenting), Justice Brennan also stated his uneasiness with the Court's legal reasoning:

Indeed, I find quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself. While it is true that the restrictions upon women officers' opportunities for professional service are not here directly under attack, they are obviously implicated on the Court's chosen ground for decision, and the Court ought at least to consider whether *they* may be valid before sustaining a provision it conceives to be based upon them.

[Emphasis in original].

9. *Owens v. Brown*, 455 F. Supp. 291, 303 (D.D.C. 1978). In *Owens*, female naval personnel instituted an action challenging the gender-based classification prohibiting the assignment of women to any navy vessel other than hospital ships and transports. The district court reviewed the statute to determine if the gender-based classification substantially furthered the goal of maintaining an efficient, prepared, and well-disciplined navy. The court concluded that the gender-based classification did not substantially further that goal, and held the statute violative of fourteenth amendment rights.

10. The standard was announced by Justice Brennan in *Craig v. Boren*, 429 U.S. 190 (1976).

11. *Craig v. Boren*, 429 U.S. 190 (1976). This standard has come to be viewed as the middle-tier standard. See *infra* notes 43-56 and accompanying text.

is answered in the affirmative, the second question is whether the important governmental objective is substantially furthered by the general prohibition against women in combat in a manner consistent with the due process clause of the fifth amendment. Because the statutes that prohibit the assignment of women to combat do not satisfy the requirements imposed by the standard of review, the statutes would not be able to withstand an equal protection challenge. This note then suggests some possible solutions to the legitimate problems associated with an immediate assignment of women to previously all-male combat units, resulting in sexually integrated combat units.

### I. STANDARD OF REVIEW IN GENDER-BASED DISCRIMINATION CASES

Traditionally, the Supreme Court examines equal protection claims by applying the "rational basis" test<sup>12</sup> to the challenged classification. If a "suspect classification"<sup>13</sup> or a fundamental right<sup>14</sup> is involved, the Court reviews the classification with "strict judicial scrutiny."<sup>15</sup> Strict judicial scrutiny requires the Court to examine the classification in light of the compelling interest doctrine.<sup>16</sup> Classifications subject to strict judicial scrutiny can be sustained only if the compelling governmental interests cannot be achieved without the use of the challenged classification.<sup>17</sup>

While gender-based classifications challenged on equal protection grounds presently are not subjected to strict judicial scrutiny, gender is analogous to recognized suspect classifications, and therefore entitled to strict judicial scrutiny. Classifications based on race, national origin, and alienage are suspect classifications.<sup>18</sup> Historically, individuals

12. The rational basis test is best stated in *McGowan v. Maryland*, 366 U.S. 420 (1961). The Court stated that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. *See also*, *Dandridge v. Williams*, 397 U.S. 471 (1970).

13. Classifications based upon race, alienage, and national origin are inherently suspect. *See*, *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). *See also infra* notes 18-29 and accompanying text, describing the characteristics of suspect classes.

14. Fundamental rights recognized by the Court include the right to vote, the right to engage in interstate travel, the right to have children, and the right to political association. *See generally*, *Shapiro v. Thompson*, 394 U.S. 618, 660-62 (1969).

15. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

16. The compelling interest doctrine states that classifications involving a suspect class or a fundamental right must be justified by a compelling governmental interest to withstand a constitutional challenge. *Id.* at 627.

17. *Schlesinger v. Ballard*, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting).

18. *See supra* note 13 and accompanying text.

classified according to those criteria have been targets of discrimination.<sup>19</sup> Similarly, the United States has a long and unfortunate history of gender discrimination,<sup>20</sup> using gender as a touchstone for pervasive but often subtle discrimination.<sup>21</sup> Furthermore, gender, like the recognized suspect classifications, is an immutable characteristic acquired by an accident of birth<sup>22</sup> and often bears no relationship to the individual's ability to do a particular job or task.<sup>23</sup> In addition, suspect classes are usually discrete and insular minorities.<sup>24</sup> Women are not a numerical minority; still, they are inadequately represented in many of the decision-making forums in this nation.<sup>25</sup> Women "still suffer from the selective sympathy and indifference of predominantly male lawmakers,"<sup>26</sup> who have rarely felt the effects of gender classifications.<sup>27</sup> The results of such classifications are to relegate an entire group of human beings to an inferior legal status,<sup>28</sup> as well as branding them with the stigma of second-class citizenship.<sup>29</sup> Because of the similarities between gender and suspect classifications, gender should be recognized by the Supreme Court as a suspect classification and subjected to strict judicial scrutiny.

Despite these similarities, the Court has declined to recognize gender classifications as suspect. At least three members of the Court<sup>30</sup>

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19. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

20. *Id.* at 684.

21. *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting).

22. *Frontiero v. Richardson*, 411 U.S. at 686; *Kahn v. Shevin*, 416 U.S. 351, 357 (1974).

23. *See supra* note 22.

24. *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938).

25. *Frontiero v. Richardson*, 411 U.S. at 686 n.17. Justice Brennan noted that women are "vastly underrepresented in this Nation's decisionmaking councils." Some of the statistics the justice cited are no longer accurate, the most notable change being the appointment of Justice Sandra Day O'Connor to the United States Supreme Court. However, the basic premise supported by the facts is still correct, that women are underrepresented throughout all levels of the State and Federal governments.

26. Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 212 (1979).

27. *Id.*

28. *Frontiero v. Richardson*, 411 U.S. at 686. *See also*, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871, 872 (1971) [hereinafter cited as Brown, Emerson]. *Cf.* *Strauder v. West Virginia*, 100 U.S. 303 (1879).

29. Brown, Emerson, *supra* note 28 at 979.

30. In *Frontiero*, Justice Powell authored a concurring opinion, in which Chief Justice Burger and Justice Blackmun joined. Powell noted that the adoption of the Equal Rights Amendment would resolve the question of the appropriate standard of review in gender discrimination cases. *Frontiero v. Richardson*, 411 U.S. at 692 (Powell, J., concurring). Furthermore, in *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Burger, C.J.,

cited the possible ratification of the Equal Rights Amendment<sup>31</sup> as requiring the Court to adopt an attitude of restraint so as not to assume a decisional responsibility more properly left in the hands of the people.<sup>32</sup> A premature decision making gender a suspect classification would impair confidence in the restraint of the Court,<sup>33</sup> and would not reflect the Court's respect for the prescribed legislative processes.<sup>34</sup> Such a justification for judicial restraint was certainly meritorious in 1973.<sup>35</sup> However, nonratification of the Equal Rights Amendment has seriously undercut that argument.<sup>36</sup>

Nonratification of the Equal Rights Amendment should not cripple the cause of sexual equality. Even Justice Powell acknowledged that "[t]here are times when [the] Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people."<sup>37</sup> Both proponents and opponents of the Equal Rights Amendment agree that there already exists a constitutional basis in both the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment addressing gender-based discrimination.<sup>38</sup> The perceived problem is the Court's lack of active application of equal protection principles

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dissenting), Chief Justice Burger noted the lack of a constitutional basis disfavoring gender-based classifications, therefore refusing to subject gender-based classifications to a higher standard of review than that required in the rational basis test.

31. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). The proposed amendment reads in pertinent part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

32. *Frontiero v. Richardson*, 411 U.S. at 692 (Powell, J., concurring).

33. *Id.*

34. *Id.*

35. The Equal Rights Amendment had just been submitted to the states for ratification in 1972.

36. The deadline for the ratification of the Equal Rights Amendment was June 30, 1982. Thirty-five states ratified the amendment, falling three short of the necessary thirty-eight. See, Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 205 n.36 (1979). The question of the correct standard of review would have been resolved with the ratification of the Equal Rights Amendment. See generally, Brown, Emerson, *supra* note 28. Accord, Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1534 (1973) [hereinafter cited as *ERA and the Military*]. If the Equal Rights Amendment had been ratified, sex would no longer have been a justifiable legal basis for differentiation. In addition, the normal presumption of validity would have been reversed, placing a heavy burden on the government to justify the different treatment. Brown, Emerson, *supra* note 28 at 880, 889. This interpretation of the Equal Rights Amendment constitutes the primary legislative history of the amendment and has been endorsed by the two principle proponents of the amendment, Congresswoman Martha Griffiths and Senator Birch Bayh. *ERA and the Military* at 1536.

37. *Frontiero v. Richardson*, 411 U.S. at 692 (Powell, J., concurring).

38. 116 CONG. REC. H35, 448 (daily ed. Oct. 7, 1970) (remarks of Congresswoman Griffiths).

to strike down statutory gender-based classifications.<sup>39</sup> Admittedly, congressional debates concerning the Equal Rights Amendment took place prior to many of the Supreme Court's decisions that struck down gender-based classifications. However, the fact that the Supreme Court has since applied the fourteenth and fifth amendments to strike down many statutes employing gender-based classifications only strengthens the argument that the fourteenth and fifth amendments can provide the constitutional support for making gender a suspect classification. Thus, the Court's recognition of gender as a suspect classification is not contingent upon ratification of the Equal Rights Amendment.<sup>40</sup>

Although the Court has a constitutional basis for subjecting gender-based classifications to strict judicial scrutiny, it has not done so.<sup>41</sup> Neither does it apply the rational basis test. The Court's deliberations in cases alleging gender discrimination have been characterized by sharp disagreement among members of the Court over the proper standard and analysis in such cases.<sup>42</sup> A seeming accommodation was

39. *Id.* See also, 117 CONG. REC. H35, 801 (daily ed. Oct. 12, 1971) (remarks of Congressman Danielson).

40. The ideals and goals underlying the Equal Rights Amendment are neither new nor unique. The Equal Rights Amendment only states explicitly what this nation has proclaimed to be its very foundation. The writers of the Declaration of Independence declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence (U.S. 1776). If this statement is accepted as an integral part of the organic laws of the United States and therefore the truth that all persons are created equal is self-evident, then ratification of the Equal Rights Amendment is not necessary before the Court recognizes gender as a suspect classification.

Sexual equality before the law is part of a claim by women for the elimination of rigid sex role determinism. Sexual equality demands "the recognition of individual potential, the development of new sets of relationships between individuals and groups, and the establishment of institutions which will promote the values and respect the sensibilities of all persons." Brown, Emerson, *supra* note 28 at 885. Furthermore, a Judiciary Committee's Report to the United States Senate stated:

The ERA embodies a moral value judgment that a legal right or obligation should not depend on sex but on other factors . . . the judgment is rooted in the basic concern of society with the individual, and with the right of each individual to develop his [her] own potentiality . . . the legal principle underlying the ERA is that the law must deal with individual attributes.

Krauskopf, *The Equal Rights Amendment: Its Political and Practical Context*, 50 CAL. ST. B. J. 78, 79 (1975) [hereinafter cited as Krauskopf].

41. A plurality of the Court did recognize gender as a suspect classification in *Frontiero*. Constituting the plurality were Justices Brennan, Douglas, White and Marshall.

42. *Owens v. Brown*, 455 F. Supp. at 303; *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 468 (1981); Note, *Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978-1979 Supreme Court*



reached in *Craig v. Boren*.<sup>43</sup> This accommodation is commonly referred to as the "middle-tier"<sup>44</sup> standard. The middle-tier standard requires that gender-based classifications "serve important governmental objectives."<sup>45</sup>

The middle-tier standard of review requires the Court to determine whether the legislative assumptions underlying the gender-based classification are so inconsistent or insubstantial as not to be supportive of the asserted justifications for the use of the gender-based classification.<sup>46</sup> Stated another way, the Court focuses on two lines of inquiry: first, whether the asserted governmental objective is an important governmental objective. If the Court determines the objective is important, the next line of inquiry focuses on whether the gender-based classification substantially furthers the objective in a manner consistent with equal protection principles.

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*Term*, 14 RICH. L. REV. 515, 552, 583 (1980); Note, *Developing an Equal Protection Standard For Gender Discrimination Cases—Where's the Rub?*, 11 RUT.-CAM. L. J. 293 (1980).

In *Reed v. Reed*, 404 U.S. 71 (1971), the Court stated that the rational basis test was applicable. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court stated that sex was a suspect classification, subject to strict judicial scrutiny. *Kahn v. Shevin*, 416 U.S. 351 (1974), was decided using the rational basis test. The Court declined to address the question of classification at all in *Stanton v. Stanton*, 421 U.S. 7 (1975). The rational basis test was again used in *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

43. 429 U.S. 190 (1976).

44. *Id.* at 210 n.\* (Powell, J., concurring). Justice Powell voiced his dissatisfaction with such a characterization, however.

45. *Craig v. Boren*, 429 U.S. at 197. In *Craig*, an Oklahoma statutory scheme which prohibited the sale of nonintoxicating 3.2% beer to males under the age of 21 and to females under the age of 18 was challenged. The state's important governmental objective was the enhancement of traffic safety. The state contended that statistics which related traffic violations and accident fatalities to gender and age justified the gender-based classification and furthered the objective in a manner consistent with the command of the equal protection clause.

The Court found that the statistical evidence offered by the state did not justify the use of a gender-based classification. Only .18% of females and 2% of males between the ages of 18 and 20 were arrested for driving while under the influence of alcohol. The Court concluded that these statistics did not justify the use of gender as an accurate proxy for the regulation of drinking and driving. The Court noted that "proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204. Therefore, the Court held that the gender-based differential, under the middle-tier standard of review, constituted discrimination in violation of the equal protection clause.

46. *Mathews v. Lucas*, 427 U.S. 495, 516 (1976) (provision of the Social Security Act requiring illegitimate children to prove actual financial dependence before receiving survivors' benefits while not requiring legitimate children to prove actual financial dependence upheld).

The question whether a gender-based classification substantially furthers an important governmental objective is "at best an opaque one."<sup>47</sup> The Court has made various attempts to explain the criteria it uses to determine whether a gender-based classification substantially furthers an important governmental objective. "Substantiality" may be measured in terms of the degree to which the gender-based classification is over- or under-inclusive.<sup>48</sup> Alternately, a gender-based classification may be accepted by the Court as substantially furthering the governmental objective if the state or federal government proves that the gender-based classification is more effective than a gender-neutral classification in promoting the asserted interest.<sup>49</sup> A statute employing a gender-based classification will not be accepted by the Court as substantially furthering the objective even if "the generalizations . . . reflect[ed] [by the classification] may be true of the majority of members of the class . . ."<sup>50</sup> These guidelines are not distinct approaches for determining whether a gender-based classification substantially furthers an important governmental objective. They are more appropriately viewed as various attempts by the Court to articulate the criteria it uses to determine whether the challenged classification substantially furthers an important governmental objective.

The Court examines relevant evidence and statistics when it determines whether the gender-based classification substantially furthers the important governmental objective.<sup>51</sup> The party seeking to uphold the gender-based classification has the burden of proving that the classification substantially furthers the important governmental objective.<sup>52</sup> It follows that if the party seeking to uphold the gender-

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47. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 474 n.10 (1981) (Rehnquist, J.).

48. *Owens v. Brown*, 455 F. Supp. at 305 n.47, citing *Califano v. Goldfarb*, 430 U.S. at 211 n.9. For example, if a gender-based classification presumes all women possess a certain trait or characteristic when in fact not all women do possess that trait or characteristic, the classification is over-inclusive; it includes some women who should not be included. A gender-based classification that presumes no men possess a particular trait when in fact some men do possess that characteristic is under-inclusive.

49. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 496 (Brennan, J., dissenting).

50. *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Steward, J., dissenting). Justice Stewart further states that a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious. *Id.* A precise definition of invidious discrimination has never been articulated by the Court.

51. *See, e.g.*, the Court's analysis of the data in *Craig v. Boren*, 429 U.S. at 200-03, and *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 464 & nn.3-6.

52. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 489 n.2, 496 (Brennan, J., dissenting); *Rostker v. Goldberg*, 453 U.S. 57, 88 (1981) (Marshall, J., dissenting).

based classification comes forward with little or no evidence to support the classification, that party fails to prove the gender-based classification substantially furthers the objective,<sup>53</sup> and therefore the classification will not be upheld.

The middle-tier standard of review enunciated in *Craig v. Boren*,<sup>54</sup> is the presently accepted standard in gender-based discrimination cases.<sup>55</sup> The standard is a compromise between the rational basis test and the compelling interest test. Because it is the standard now used by the Court, and despite the need for the Court to move beyond this compromise, Sections 8549 and 6015, prohibiting the assignment of women to combat and combat-related positions will be analyzed under the middle-tier standard of review.

## II. STATUTORY PROHIBITION OF WOMEN IN COMBAT

Currently, the defense of this nation is the responsibility of men.<sup>56</sup> The exclusion of women is justified primarily on two grounds. First, national security demands that the armed services be efficient and prepared to defend the nation if necessary.<sup>57</sup> Opponents of women in combat maintain that women will seriously imperil the national defense effort. The second justification is that women need protection from the harsh realities of war.<sup>58</sup> Opponents of women combatants assume that the "delicate nature" of women, both physically and mentally, renders women incapable of contributing to the defense of their nation,<sup>59</sup> leaving it to the men to assume the burden of defense.

These two justifications for the exclusion of women from combat are embodied in the two governmental objectives sought to be furthered

53. *Id.* See also MCCORMICK, EVIDENCE § 336, 784 (2d ed. 1972).

54. 429 U.S. 190 (1976).

55. See, Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 1977).

56. M. BINKIN & S. BACH, WOMEN AND THE MILITARY 4 (1977) [hereinafter cited as BINKIN & BACH]. This book is the result of an independent study conducted by the Brookings Institution. It has been cited by the district court in Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978), and the United States Supreme Court in Rostker v. Goldberg, 453 U.S. 57 (1981), and Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979). *Accord*, ERA and the Military, *supra* note 36 at 1533; Brown, Emerson, *supra* note 28 at 967; S. REP. No. 96-826, 96th Cong., 2d Sess. 157, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2612, 2647 [hereinafter cited as S. REP. No. 96-826].

57. 117 CONG. REC. H35, 784 (daily ed. Oct 12, 1971) (remarks of Congressman Wiggins); 118 CONG. REC. S9318 (daily ed. Mar. 21, 1972) (remarks of Senator Stennis, Chairman of the Committee on Armed Services).

58. See *infra* notes 231-38 and accompanying text.

59. Brown, Emerson, *supra*, note 28 at 967.

by the statutory prohibition of women in combat. The first governmental objective is maintaining national security (hereinafter referred to as military necessity). Sparing women from the brutality of war is the second governmental objective. Opponents of women combatants believe these objectives are substantially furthered by the gender-based classification utilized in Sections 8549 and 6015.

The remainder of this note analyzes the asserted objectives and the evidence tendered in support of them. The analysis is divided into two lines of inquiry.<sup>60</sup> The first is whether the two asserted governmental objectives are important governmental objectives. If this question is answered in the affirmative, the second line of inquiry focuses on whether the objective is substantially furthered by the gender-based classification in a manner consistent with the demands of the due process clause of the fifth amendment.

#### A. *Military Necessity*

That the maintenance of our national security is in fact an important governmental objective seems too self-evident to merit in-depth discussion. It is Congress' constitutional responsibility to provide for the defense of the nation by raising and maintaining armies.<sup>61</sup> The Supreme Court has consistently recognized that responsibility,<sup>62</sup> and stated that it is the primary business of armies to fight or be ready to fight should the need arise.<sup>63</sup> Therefore, the governmental objective of maintaining national security passes the first test of the middle-tier standard.

The second test of the middle-tier standard focuses on whether the gender-based classification substantially furthers the important governmental objective in a manner consistent with the due process clause. Opponents of women in combat contend that the integration of women into combat positions will threaten the national security of the United States. The national security would be threatened for three reasons. First, women lack the requisite physical strength and fitness.<sup>64</sup> Second, the integration of women will interfere with group

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60. See *supra* notes 43-46 and accompanying text.

61. "The Congress shall have the power to . . . raise and support armies . . . ; to provide and maintain a navy; [and] to make rules for the government and regulation of the land and naval forces . . ." U.S. CONST. art. I, § 8, cls. 12-14.

62. See generally, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Orloff v. Willoughby*, 345 U.S. 83 (1953); S. REP. No. 96-286, *supra* note 56 at 156-60.

63. *Schlesinger v. Ballard*, 419 U.S. at 501.

64. *Brown, Emerson*, *supra* note 28 at 976; *Hale & Kanowitz, Women and the*

dynamics, resulting in a decrease in morale and discipline.<sup>65</sup> Third, the increased costs incurred as a result of the integration will be more than the armed services can safely absorb.<sup>66</sup> The data and evidence offered in support of these arguments are analyzed below.

### 1. *Physical Requirements and Capabilities*

While the assumption that women are physically unfit for combat enjoys some support in both the Congress<sup>67</sup> and the military establishment,<sup>68</sup> the validity of this assumption can be challenged on two grounds. First, the tests administered by the various branches of the armed services for determining the suitability of an individual for combat assignment are neither well-defined nor consistently applied.<sup>69</sup> Second, modern warfare relies more on technology than muscle.<sup>70</sup> These two observations necessitate a re-evaluation of the belief that women are physically unfit for combat.

In the context of the military, physical fitness includes a combination of strength, endurance, flexibility, speed, balance, agility, and power.<sup>71</sup> Based on an initial medical examination and a subjective assessment by a doctor,<sup>72</sup> an individual's combat suitability is determined. The

*Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199, 202 (1971) [hereinafter cited as Hale & Kanowitz]; 126 CONG. REC. S6534 (daily ed. June 10, 1980) (remarks of Senator Javitts); *ERA and the Military*, *supra* note 36 at 1549.

65. *ERA and the Military*, *supra* note 36 at 1551; BINKIN & BACH, *supra*, note 56 at 89; 126 CONG. REC. S6534 (daily ed. June 10, 1980) (remarks of Senator Javitts); Brown, Emerson, *supra*, note 28 at 977.

66. BINKIN & BACH, *supra* note 56 at 71.

67. See, e.g., 126 CONG. REC. S6534 (daily ed. June 10, 1980) (remarks of Senator Javitts); S. Rep. 96-826, *supra*, note 56 at 159.

68. Howard H. Callaway, Secretary of the Army, testified in opposition to the admission of women to the military academies by stating, "The Academy's (West Point) primary mission of preparing battle leaders for our Nation's military forces is accomplished through . . . rigorous, unremitting training. Any reduction of this emphasis in order to accommodate women would in effect lead to a lowering of standards for men." BINKIN & BACH, *supra*, note 56 at 49. Former Secretary of Defense Harold Brown expressed a similar view: "I believe there are sufficient physical differences between men and women, on the average, that make it wise, as regulations provide, that women not be put into combat roles." *Id.*

69. *Id.* at 78. See also *infra* notes 71-87 and accompanying text.

70. BINKIN & BACH, *supra* notes 56 at 98. See also *infra* notes 104-114 and accompanying text.

71. BINKIN & BACH, *supra*, note 56 at 78.

72. *Id.* The entrance examination consists of seven elements. They are: (1) clinical examination of the body, (2) laboratory findings, (3) physical measurements (height, weight, blood pressure, etc.), (4) narrative summary of defects and diagnoses, (5) subjective determination of military fitness, (6) identification of any disqualifying defects, and (7) evaluation of the examinee's functional capacity. This final element is the subjective assessment referred to above.

doctor's subjective assessment, commonly referred to as the PULHES profile,<sup>73</sup> serves as an index of the overall capacity of an individual to perform military duties.<sup>74</sup>

The Army and Air Force correlate PULHES profile serials with specific specialties and occupations.<sup>75</sup> The Air Force began in 1973 to establish more specific physical standards for certain specialties and occupations.<sup>76</sup> However, even these additional standards did not forestall the misassignment of women.<sup>77</sup>

By contrast, the Navy and the Marine Corps no longer utilize the PULHES profile with respect to classifications of individuals.<sup>78</sup> Furthermore, they have not even established physical standards which are required for the adequate performance of specific jobs.<sup>79</sup> The discontinued use of the PULHES profile by the Navy and Marine Corps, without substituting some other appropriate method of measurement, similarly resulted in women being assigned to jobs for which they lacked the requisite physical strength.<sup>80</sup>

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73. *Id.* Six factors, representing the major human functions, comprise the PULHES profile. Those factors are: (1) physical capacity and stamina, (2) upper extremities, (3) lower extremities, (4) hearing and ear defects, (5) eyes, and (6) psychiatric. The physician grades each factor on a scale from one to four, with grade 1 being the highest level of medical fitness.

74. *Id.* Taking the first factor in the profile, physical capacity and stamina, an assignment of grade 1 indicates good muscular development of an examinee. The Army expects the examinee to perform with maximum effort for an indefinite length of time. Grade 2 is assigned when the examinee has some medical condition or physical defect which may impose certain job limitations, and is expected to perform with maximum effort over long periods of time. An examinee assigned grade 3 has a moderate defect. The Army expects that individual to perform with maximum effort only for brief or moderate periods. Grade 4 indicates the examinee is below minimum standards for enlistment.

75. *Id.* at 79. The Army requires a perfect profile, "111111," for assignment into the infantry field.

76. *Id.* The specialties were classified on the basis of the amount of lifting the job required. The spectrum ranged from sedentary activity (lifting a maximum of 10 pounds) to very heavy activity (frequent lifting of a maximum of 50 to 100 pounds).

77. The Air Force reported that 62 of 97 women assigned to aircraft maintenance were physically unable to perform the work. The duties included changing aircraft tires and brakes, removing batteries and seats, and breaking torque on bolts. The Army reported similar problems with five women ammunition storage "specialists." The women lacked the necessary strength to move the ammunition by hand. The round weighed about 58 pounds and boxes about 120 pounds. BINKIN & BACH, *supra*, note 56 at 80-81.

78. *Id.* at 79.

79. *Id.*

80. For instance, the Marine Corps reported in 1976 that women were assigned to units for training as telephone linespersons. Most of the women assigned were unable to hoist the necessary equipment, which weighed about 50 pounds. The Navy reported

These relatively simple standards and imprecise means of measuring physical capability are currently under review by all branches of the armed services.<sup>81</sup> Some changes have already been instituted.<sup>82</sup> The requirements of basic training for men and women have been revised to apply the same standards to both.<sup>83</sup> This revision was instituted because the military assumed that any person meeting minimum medical standards will be able to acquire the requisite physical fitness in basic training.<sup>84</sup>

Any assessment of the physical capability of women must also take cognizance of the unique occurrence among women of menstruation and pregnancy.<sup>85</sup> The physical condition of a pregnant woman gives

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that women were assigned to tugboats and other small craft as boatswain's mates. The supervisors of these craft stated that women were physically incapable of performing the requisite work. The work included such tasks as lifting and handling sandbags that weighed 100 pounds, paint cans that weighed from 72-94 pounds, and boat lines that weighed as much as seven pounds per foot. *Id.* at 80-81.

81. *Id.* at 82. Much of the discriminatory treatment in the armed services had been changed. For instance, many occupational specialties formerly closed to women have been opened to them. The reason for the change may have been the military's expectation that the Equal Rights Amendment would be ratified. Krauskopf, *supra*, note 40 at 137; BINKIN & BACH, *supra*, note 56 at 14. Why further changes necessary for justice and fairness must wait until the military feels sufficiently "threatened" by the ratification of the Equal Rights Amendment is unclear.

82. See *supra* note 76, 81.

83. LIFE, Sept. 1981, at 69. The excerpt in LIFE is taken from an unpublished book by Rogan, *Mixed Company: Women in the Modern Army* (1981). Compare, ERA and the Military, *supra*, note 36 at 1546-47.

84. BINKIN & BACH, *supra*, note 56 at 78. Professional women athletes illustrate that women, given the opportunity for training and conditioning, can pass the highest tests of physical fitness. *Id.* at 83. In fact, women athletes have closed within 10% or less of the best male times in swimming and track. This fact and other accomplishments in women's sports, illustrate that women are capable of achieving a high degree of physical strength and fitness. NEWSWEEK, May 28, 1981, at 75.

85. See generally, Brown, Emerson, *supra*, note 28 at 929-32, 974-76. Compulsory maternity leave regulations, both in the private sector and the military are discussed in the context of the Equal Rights Amendment. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on account of sex. This absolute prohibition is qualified. Title VII provisions do not apply in instances where sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the performance of the specific job. The authors analogize the BFOQ to differentiation allowed under the Equal Rights Amendment for unique physical characteristics of one sex, such as pregnancy.

An enlightening discussion of BFOQ as it relates to the Equal Rights Amendment and the military was written by Major Henry C. Beans, JAGC, U.S. Army. See, Beans, *Sex Discrimination in the Military*, 67 MIL. L. REV. 18 (1975) [hereinafter cited as *Sex Discrimination*]. Beans also analogizes the BFOQ to exceptions allowed under the Equal Rights Amendment. BFOQ exceptions are allowed only when the sexual characteristics are associated with all members of one sex and none of the other, as compared with characteristics which merely have a high correlation with one sex or the other. *Id.* at 43.

rise to special problems relating to women in combat. The considerations then involve not merely a woman's physical ability to perform specialized tasks, but the effect of the activity and danger to the fetus. Unfortunately, the limited amount of research undertaken to date has yielded evidence and data which is far from conclusive.<sup>86</sup>

Reliable data from research is conspicuously lacking in the evidence advanced by those who claim women are physically unfit for combat duty.<sup>87</sup> There is some evidence to conclude that men, on the average, possess greater physical strength than women.<sup>88</sup> Yet, this fact, which seems at first glance to support the claim that women as a group are not physically fit for combat duty, is insufficient to justify the gender-based classification. In *Weinberger v. Wiesenfeld*,<sup>89</sup> the Court struck down a statute employing a gender-based classification in spite of empirical data supporting the assumption underlying the classification.

The underlying assumption of the statutes at issue in *Weinberger* was that men were the principle wage earners for their families.<sup>90</sup> Therefore, men were not eligible for survivors' benefits if their wife should die, leaving them to care for minor children, whereas women in a similar situation were entitled to survivors' benefits.<sup>91</sup> The Court noted that there was empirical support for the assumption that men

86. The usual justification for curtailment of physical activity during pregnancy is that it could have a dangerous effect on the woman and fetus. The validity of this justification is doubtful. There is evidence that physical exercise actually promotes an easy labor and hence the birth of a healthy baby. Furthermore, some women athletes have successfully competed up to a few days before the onset of labor. BINKIN & BACH, *supra*, note 56 at 83. Moreover, the increased availability of safe and efficient methods of birth control reduces the chances of pregnancy occurring at all. Hale & Kanowitz, *supra*, note 65 at 203.

Recent studies have added to the limited information available on menstruation. The studies center on premenstrual syndrome (PMS) and dysmenorrhea. The number of women experiencing various degrees of discomfort from either of the two conditions ranges from 20% to 90%. The crux of the findings is that both conditions are physiologically-linked, and can be effectively treated with various medications and hormones.

Some researchers advance a theory explaining the lack of in-depth research in these two areas. The medical profession has been predominantly male for many years, a fact which may well account for the limited available evidence and data concerning problems uniquely associated with women.

*See generally*, BINKIN & BACH, *supra*, note 56 at 83-833; TIME, July 27, 1981 at 59; SCIENCE NEWS, April 4, 1981 at 214; NEWSWEEK, May 4, 1981 at 74; LADIES' HOME JOURNAL, June, 1981, at 40.

87. BINKIN & BACH, *supra*, note 56 at 101.

88. *Id.* at 82. The principle differences between men and women which account for this are anthropometric, body composition, and cardiorespiratory factors.

89. 420 U.S. 636 (1975).

90. *Id.* at 644-45.



were the principle wage earners for their families. The Court cited statistics which indicated that in over one-half of the families with both spouses present, the woman was unemployed.<sup>92</sup> Nonetheless, the Court held the data did not justify the use of the gender-based classification, when such a classification denigrated the efforts of women who did work and significantly contributed to their families' support.<sup>93</sup> Similarly, there are women who could meet the necessary standards for combat duty,<sup>94</sup> and significantly contribute to the defense of their country. Accordingly, these women should not have their efforts denigrated by the statutory gender-based classification that prohibits their assignment to combat positions.

Military witnesses testified before a Senate committee that only a few women would be able to meet the necessary standards for combat duty.<sup>95</sup> They contended that testing many women to find the qualified few would create "monumental strains on the training system,"<sup>96</sup> thus justifying the general prohibition on assigning women to combat. The Court rejected a similar justification for statutes prescribing the payment of survivors' benefits to widows, but not widowers, in *Califano v. Goldfarb*.<sup>97</sup>

In *Goldfarb*, the statutes required a widower to prove his actual financial dependence on his wife before being eligible for survivors' benefits, while a widow was not so required. The assumption underlying

91. *Id.* at 683.

92. The statistics cited in *Weinberger* were taken from *Kahn v. Shevin*, 416 U.S. 351, 354 n.7 (1974).

93. *Weinberger v. Wiesenfeld*, 420 U.S. at 645.

94. Senator Warner conceded that there are women who could meet the necessary standards for skills, training, and determination; they could fight as well, if not better, than some men. 126 CONG. REC. S6534 (daily ed. June 10, 1980). *See also*, Hale & Kanowitz, *supra* note 64 at 204. Vice Admiral William P. Mack, former superintendent of the U.S. Naval Academy said:

In my estimation, women could serve in any role in the U.S. Navy at any time if the law restricting women from serving aboard naval vessels and combat aircraft was changed. They could come to the Naval Academy; they could pass the course in large number, and do all that's required of them physically, mentally, professionally, and in any other way, and there would be little requirement for change in our course curriculum, physical facilities, or anything of that sort. If the law were changed, in my mind, women could do anything that men could do, and, in some cases, perhaps even better.

BINKIN & BACH, *supra*, note 56 at 49.

95. S. REP. No. 96-826, *supra*, note 56 at 159.

96. *Id.* This argument was also made in *United States v. Reiser*, F. Supp. 1060, 1066 (D. Mont. 1975).

97. 430 U.S. 199 (1977).

the classification was that men were not financially dependent on their wives, while women generally were financially dependent on their husbands.<sup>98</sup> The evidence indicated that 90% of the women (widows) affected by the statute were actually dependent on their husbands.<sup>99</sup> The government argued that the percentage of women who actually did correspond to the underlying assumption justified the gender-based classification. The Court rejected this argument, stating that a 90% correlation did not justify the use of the gender-based classification.<sup>100</sup>

A similar argument for prohibiting the assignment of women to combat positions ought to be rejected. Moreover, there is no evidence whatsoever that only a few women would qualify for combat duty.<sup>101</sup> The supposed limitations which would disqualify women from combat duty are not traceable to any studied evaluations of male and female capabilities.<sup>102</sup> The argument that only a few women would qualify for combat duty, and thus create too much strain on the training system, is insufficient to justify the gender-based classification employed in Sections 8549 and 6015.

Very little evidence is advanced to support the belief in women's physical incapability for combat duty. The lack of well-defined standards and requirements necessary for the performance of combat duties<sup>103</sup> does not allow for objective determination of individual qualification, for either men or women. Therefore, the question remains whether women are capable of performing combat duties. The question is not whether women are or can be trained to achieve the same level of physical fitness as men, but whether women can meet objective standards and qualifications necessary to the efficient and adequate performance of combat duties.

Women's physical ability to meet objective standards and qualifications necessary in combat positions must also be determined in light

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98. *Id.* at 204. The Court noted that the gender-based classification in the statutes at issue was indistinguishable from the classification in *Weinberger*.

99. *Id.* at 219 (Stevens, J., concurring).

100. *Id.* The 90% correlation arguably resulted in a substantial saving to the government of time and money. But administrative convenience, even to this degree, was not accepted by the Court as justification for the gender-based classification. *Id.* at 217.

101. *United States v. Reiser*, 394 F. Supp. at 1064. Statistics from a 1969 study by the Bureau of the Census indicated that 56.4% of all black male draftees and 43.1% of all white male draftees examined for military service were rejected by the military. Yet, it has never been suggested that all blacks be exempted from service on the basis of these facts. *Id.* at 1067.

102. *Owens v. Brown*, 455 F. Supp. at 295.

103. *See supra* notes 71-86 and accompanying text.

of the changed nature of combat. The emphasis of combat duty has shifted from a match of brute strength to a more efficient use of technological strength.<sup>104</sup> There are many jobs of logistics and combat support within combat zones.<sup>105</sup> These jobs are no different nor are they more difficult than the work performed by women in noncombat zones.<sup>106</sup>

In previous years, soldiers of standing armies primarily fought hand-to-hand combat,<sup>107</sup> which included transporting heavy weapons on long marches.<sup>108</sup> Today's combat soldiers are equipped with very sophisticated weaponry, demanding less physical prowess.<sup>109</sup> Combat soldiers are required to carry loads weighing 40 to 50 pounds, which many women are capable of handling.<sup>110</sup> Furthermore, piloting aircraft and engaging in naval operations are classified as combat duty.<sup>111</sup> These assignments are not classified as combat because of the strength required to perform them, rather it is because of the dangerous conditions under which performance is necessary.<sup>112</sup>

The conditions of combat duty have changed. This condition is reflected in modern airpower and automatic weapons, as well as in the increasing need for larger support infrastructures.<sup>113</sup> The assumption that women are too weak to effectively participate in combat needs to be re-evaluated in light of these changes. The outdated method of warfare from another era is hardly a legitimate consideration, let alone controlling precedent, when confronting today's issues.<sup>114</sup>

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104. 117 CONG. REC. H35, 786 (daily ed. Oct. 12, 1971) (remarks of Congressman Gude). At least one article states that: "the most important factor facilitating the effective use of women in the armed forces is the technological revolution in warfare . . . ." Hale & Kanowitz, *supra* note 64 at 203. "[T]echnology would seem to be moving toward making the traditional warrior obsolete and the technician all important." *Id.*

105. 117 CONG. REC. H35, 798 (daily ed. Oct. 12, 1971) (remarks of Congressman Drinan).

106. *Id.* See also BINKIN & BACH, *supra*, note 56 at 4, indicating that contemporary military institutions demand larger support infrastructures than did previous armies.

107. BINKIN & BACH, *supra*, note 56 at 4; Hale & Kanowitz, *supra* note 64 at 203; Brown, Emerson, *supra* note 28, at 967.

108. Brown, Emerson, *supra* note 28 at 967.

109. BINKIN & BACH, *supra*, note 56 at 4. The use of bombs and high-powered guns minimize the required strength and maximize the needed precision and technological ability. Hale & Kanowitz, *supra* note 64 at 203.

110. Brown, Emerson, *supra* note 28 at 977.

111. *Id.*

112. This argument goes more to the idea that women need to be protected from the dangers and cruelty of war. See *infra* notes 182-243 and accompanying text.

113. United States v. Reiser, 394 F. Supp. at 1067.

114. Hale & Kanowitz, *supra* note 64 at 206.

The assumption that women are physically unfit for combat duty is not supported by the relevant evidence. The tests utilized by the armed services are inadequate and inconsistently administered.<sup>115</sup> The outdated conception of the nature of combat necessitates a redefinition of combat duty.<sup>116</sup> Therefore, the degree to which the blanket generalization that all women are physically unfit for combat correlates with the facts is not substantial, and cannot serve to justify this component of the military necessity objective.

## 2. *Group Dynamics, Morale, and Discipline*

One of the major objections to the assignment of women to combat is that the actual performance of sexually mixed units is unknown, and would present a serious risk to the security of the nation during a war. This is a legitimate concern. However, the logic behind the following quotation from S. Rep. No. 96-826 remains elusive. "Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risks . . ."<sup>117</sup> The alternatives are to assign women to combat positions during a war (which is the exact problem of which opponents complain), or to prohibit the assignment completely. The latter alternative is not going to increase the armed services' knowledge about the performance of sexually mixed units. Therefore it is not a solution to the problem. As stated in the Senate Report, the problem of lack of knowledge admits of no solution. The argument is circular and self-serving. By providing no possible means of solving the problem, this argument will be used indefinitely to oppose the assignment of women to combat. Peacetime assignment of women to combat units would allow the services to simulate combat conditions in a controlled environment. Admittedly, this would not be an exact substitute for data generated by actual combat performance. But it would indicate problem areas, if any existed. The armed services could then deal with those problems and experiment with possible solutions. Furthermore, the evidence generated by preliminary studies and experiments indicates that the concern over group performance and interaction may not be as well-founded as would first appear.

Two theories of group performance are discussed. Depending on which theory is taken as normative, the integration of women into previously all-male units may have a more or less debilitating effect

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115. See *supra* notes 71-86 and accompanying text.

116. See *supra* notes 104-14 and accompanying text

117. S. REP. No. 96-826, *supra* note 56 at 157.

on combat effectiveness. The evidence of women's performance in previous wars, as well as in a recent Navy experiment is examined to determine which theory is better supported by the data.

The Department of the Navy subscribes to the theory which holds that there is a biological basis for bonding between men.<sup>118</sup> This bonding occurs especially in instances of politics, war, and police-work,<sup>119</sup> activities from which women traditionally have been excluded. Furthermore, the exclusively male character is a significant factor for many of the men who are attracted to these activities.<sup>120</sup> The implications of the bonding theory are significant for combat performance.

The implications for combat effectiveness subsequent to an integration of women are twofold. First, the type of men likely to volunteer for traditionally male-dominated units, (particularly airborne and ranger units or combat units assigned to warships) or remain in the Navy on a career basis, may decide not to do so as a result of the women's presence.<sup>121</sup> Second, the close bonding and teamwork necessary between soldiers would not be achieved or maintained. The bonding between men would be disrupted and bonding between men and women would not occur at all.<sup>122</sup>

118. BINKIN & BACH, *supra*, note 56 at 90.

119. *Id.* These activities share the common characteristic of aggressiveness. New research tends to support the biological link with aggressive behavior. The biological basis advanced relies on hormones and the corresponding neurochemical processes. However, this theory is far from conclusive. Many scientists and researchers reject it as merely another example of sexual stereotyping reinforced by a male-dominated culture. An excellent discussion can be found in NEWSWEEK, May 18, 1981, at 72.

120. BINKIN & BACH, *supra*, note 56 at 90.

121. *Id.* at 90-91. In 1975, then Vice Chief of Naval Operations, Admiral Worth Bagley, stated:

Since the inception of the Continental Navy, later the U.S. Navy, traditional male combination of warfare and seafaring has continued. Only recently has there been pressure for change. The naval profession—specifically the business of going to sea—has been advertised as, and accepted as, a closed club for men. The present male-dominated, sea-going facet of Navy life is one that is understood and accepted by the country and the men in the Navy. Men join the Navy for many different reasons; however, a certain portion join and remain in the Navy because they enjoy being in a job which has been historically associated with fellowship among men in a difficult and dangerous endeavor. Changing the fabric of the Navy by integrating women into all combat roles might well reduce the attractions of the Navy to this segment of mankind, as well as to some of those men who might, in the future, join the Navy and make it a career.

*Id.* at 91.

122. *Id.* at 90.

The bonding theory can be criticized on two grounds. First, the Navy's arguments<sup>123</sup> seem more cultural than biological. The traditional pattern of male dominance, especially in military matters, is manifested by the Navy's opposition to female encroachment into the "combat clique," the essence of the military establishment.<sup>124</sup> Second, this theory does not take account of the presence of women in international terrorist groups, such as the Symbionese Liberation Army (SLA) and the Baader-Meinhof Gang,<sup>125</sup> where male bonding would likely exist.

To the extent that male bonding may not be relevant in combat situations, the second theory of group performance stresses the individual's self-interest, where the emphasis is on each person's survival instinct.<sup>126</sup> This theory seems to account for the effectiveness of women in terrorist organizations. Moreover, it is supported by evidence of women who have fought in combat both in this country and other countries. The most notable examples of women engaging in combat are the experiences of Russian women in World War II,<sup>127</sup> Israel's use of women in the War of Liberation in 1948,<sup>128</sup> and women in the Viet Cong.<sup>129</sup> World War II was the turning point in United States history concerning women in the armed services.<sup>130</sup> Women flew combat aircraft,

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123. See *supra* note 121.

124. BINKIN & BACH, *supra*, note 56 at 48.

125. *Id.* at 91.

126. *Id.* at 92.

127. At least one million Russian women participated in World War II. The women served with ground combat units, performing the duties of tank crewmembers, machine gunners, snipers, and artillery crewmembers. They served in air defense units, the most notable being the 58th Women's Aircraft Regiment, the Forty-Sixth Night Bomber Regiment, and the 125th Day Bomber Regiment. The women were used as scouts, snipers, and saboteurs with the partisan forces. They were trained in schools to fight side-by-side with the regular forces. BINKIN & BACH, *supra*, note 56, 123-25.

128. Brown, Emerson, *supra* note 28 at 977. Women's roles in the Israeli army began before the War of Liberation in 1948. It began in the Haganah, the illegal Jewish army which existed prior to the creation of the State. In the first phase of the War of Liberation, women fought side-by-side with men in active and defensive battles. Women were even parachuted in Nazi-occupied countries during World War II to organize Jewish self-defense. BINKIN & BACH, *supra*, note 56 at 13, 131-34.

129. Brown, Emerson, *supra* note 38 at 977. Former Chief of Naval Operations Admiral R. Zumwalt said, "[women should] have the opportunity to . . . go into combat . . . and as far as women soldiers are concerned, when I was in Southeast Asia during the Vietnam War I found that among the most vicious fighters were the Viet Cong women." BINKIN & BACH, *supra*, note 56 at 50. It should be noted however, that Admiral Zumwalt is not in the majority with Navy traditionalists.

130. BINKIN & BACH, *supra*, note 56 at 7. There are instances of women fighting along side of men during the Revolution and the Civil War. However, many of these women were disguised as men. Therefore, the performances of the "mixed units" is not helpful in assessing male attitudes and behavior in sexually mixed units.

followed the invasions of North Africa and Normandy, and to a smaller extent, were involved in the war in the Pacific.<sup>131</sup> This evidence seems to indicate that when the basic facts of life-and-death are confronted, the gender of comrades-in-arms pales in significance.

The evidence of women's performance in combat also indicates that women are capable of being highly disciplined under combat conditions. Combat requires the unnatural behavior of advancing into hostile and potentially lethal fire.<sup>132</sup> To ensure the occurrence of this behavior when necessary, the armed services train a soldier to act without hesitation on the orders of a superior.<sup>133</sup> The Army states that the purpose of basic training is to turn civilians into soldiers who are, among other things, well-disciplined and highly motivated.<sup>134</sup> This indicates that the discipline required by the Army is a learned characteristic.

To the extent that "Army discipline" is learned by an individual, evidence and research indicates that the learning process is greatly facilitated by the possession of a high school diploma. It is believed that a high school graduate adapts more readily to the demands of military life,<sup>135</sup> and poses far fewer disciplinary problems than an individual who is not a high school graduate. The possession of a high school diploma indicates more than a particular ability to the armed services. Over the years, research established an inverse relationship between the level of education and the instances of disciplinary problems. An individual possessing a high school diploma attests to the fact that he or she has the ability to adjust to a routine and to some degree of discipline.<sup>136</sup> Statistics from the fiscal years 1971-1976 reveal that on the average, 92.8% of the enlisted women, compared with 64.65% of the enlisted men, had high school degrees.<sup>137</sup> Accordingly,

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It does seem to indicate that the women had no problems fighting side-by-side with the men. Furthermore, this suggests that even disregarding the advanced technological warfare of the present, women can serve as soliders in combat units. An excellent discussion of women fighting in wars prior to World War II can be found in M. TREADWELL, *THE WOMEN'S ARMY CORPS 3-18* (1954) [hereinafter cited as *THE WOMEN'S ARMY CORPS*].

131. See generally, *THE WOMEN'S ARMY CORPS*; BINKIN & BACH, *supra*, note 56 at 7-9.

132. P. BARNES, *PAWNS: THE PLIGHT OF THE CITIZEN SOLDIER* 59 (1972).

133. *Id.* at 61. A similar statement was expressed by retired Rear Admiral Arnold E. True, "Our Army [in Vietnam] fights only because of discipline. *Id.* at 59.

134. *Id.* at 59. Accord, *ERA and the Military*, *supra* note 36 at 1546.

135. S. REP. No. 96-826, *supra* note 56 at 115-16; BINKIN & BACH, *supra*, note 56 at 74.

136. BINKIN & BACH, *supra*, note 56 at 74.

137. *Id.* at 75.

it would seem that the women were at least as trainable, if not more so, than the men.

Additional evidence supporting the fact that women can be highly disciplined and work well with men is available from an experiment, undertaken by the Navy in 1972, which integrated men and women aboard the ship *U.S.S. Sanctuary*. The experiment lasted for thirteen months with forty-two nonconsecutive days at sea.<sup>138</sup> The *Sanctuary's* commanding officer, in evaluating the experiment, said, [w]omen can perform every shipboard function with equal ease, expertise, and dedication as men do."<sup>139</sup> However, some morale and disciplinary problems were encountered.

With respect to the morale and disciplinary problems, the twelve consecutive days at sea gave rise to public displays of affection,<sup>140</sup> having a demoralizing effect on other crew members, both men and women.<sup>141</sup> As a result, discipline and the good order of the ship were adversely affected.<sup>142</sup> However, the commanding officer's evaluation went on to state that the problem was immediately corrected by the issuance of a policy forbidding public and open displays of affection.<sup>143</sup> The problem was handled in a simple manner and in a short period of time. The report further stated that the men welcomed the women because the women gave some semblance of normal social relations.<sup>144</sup> It would seem that the problem of morality between shipmates is not as awesome as opponents of women combatants would like to believe.<sup>145</sup>

The commander's report of the experiment's results is encouraging. The fact that the Navy undertook this type of experiment at all signifies that the Navy is beginning to investigate and research the effects of sexual integration. The facts show that the obstacles of morale and discipline disruption are not insurmountable. Commanders have sufficient authority to deal with individual crew members having trou-

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138. *Id.* at 93. However, the most days consecutively spent at sea was twelve.

139. *Id.* This evaluation did not apply to engineering since there was no available experience on which to base a judgment. *Accord*, 126 CONG. REC. S6528 (daily ed. June 10, 1980) (remarks of Senator Cohen).

140. BINKIN & BACH, *supra*, note 56 at 94. The commander's report does not elaborate on the kind of public affection which occurred during the period at sea.

141. *Id.*

142. *Id.* Again, the report is silent as to the specific instances where public displays of affection had a detrimental effect on the discipline and good order of the ship. The report merely states that the situation was becoming "serious." *Id.*

143. *Id.*

144. BINKIN & BACH, *supra*, note 56, at 94.

145. Brown, Emerson, *supra* note 28 at 977. The easy resolution of the problem indicates that women can obey orders and conform to standards of discipline.



ble adjusting to a sexually integrated unit.<sup>146</sup> The evidence indicates that the women's presence was simply another fact of life with which the crew members had to deal.<sup>147</sup>

Yet, the evidence generated by the experiment is somewhat limited. The total number of days at sea was only approximately ten percent of the entire length of the experiment.<sup>148</sup> In addition, the wives of male shipboard personnel were strongly opposed to the assignment of women, possibly affecting men's decisions concerning naval careers.<sup>149</sup> Despite these limitations, the *Sanctuary* experiment provides useful guidelines for further research and experiments of this type.<sup>150</sup>

The *Sanctuary* experiment and accounts of women combatants in the world's previous wars provide the sparse and inconclusive evidence concerning the performance of sexually integrated units. The quantity and quality of the evidence is analogous to that advanced in the physical capability component<sup>151</sup> of the military necessity objective. If anything, the available evidence supports the converse of the opponents' argument. Since the government bears the burden of proving that the evidence substantially supports the use of the gender-based classification,<sup>152</sup> and there is little or no evidence to support the use of the classification in Sections 8549 and 6015, this component of the military necessity objective must also fail the second test of the middle-tier standard of review.

### 3. *Economics*

Opponents of women combatants have argued that the integration of women into combat units would increase the costs of the military, and thereby weaken the national security.<sup>153</sup> Since the military operates

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146. *Owens v. Brown*, 455 F. Supp. at 309.

147. *Id.*

148. *See supra* note 138 and accompanying text.

149. BINKIN & BACH, *supra*, note 56 at 94. *See also*, *Sex Discrimination, supra* note 85 at 49, analogizing a BFOQ case in which an employer had a policy against a female truck drivers sharing driver assignments with male truck drivers. The employer defended the policy by pointing to complaints made by wives of the male truck drivers. The justification was insufficient to support a BFOQ exception.

150. The Army is also undertaking experiments to determine the ability of sexually mixed units to adequately perform their duties. BINKIN & BACH, *supra*, note 56 at 95.

151. *See supra* notes 67-116 and accompanying text.

152. *See supra* note 52 and accompanying text.

153. BINKIN & BACH, *supra*, note 56 at 71.

on a budget, if money is spent on adjustments required for sexual integration, then less money can be spent on maintaining the necessary level of efficiency, training, and preparedness. These increased costs can be categorized in two groups: 1) one-time adjustment costs and 2) costs associated with benefits paid to military personnel and their dependents.

The major argument focuses on the one-time adjustment costs associated with modifying or constructing housing facilities.<sup>154</sup> The armed services must modify existing facilities or construct new facilities in order to accommodate soldiers' privacy rights.<sup>155</sup> The Supreme Court recently recognized an individual's constitutional right to privacy,<sup>156</sup> and interpreted this right as requiring separate living quarters for members of the opposite sex.<sup>157</sup> There are instances when this would justify the exclusion of one sex from particular situations. However, a general prohibition of women from all combat at any and all times cannot be supported by this reasoning.<sup>158</sup> Privacy rights would (or should) be the least of a combat soldier's concerns. It is hardly conceivable that an individual, when faced with the life-and-death consequences routinely confronted in a combat situation, would be overly concerned with the prospect of sharing sleeping quarters with or undressing in front of a member of the opposite sex. When an individual's life is at stake, such concerns tend to lose the significance they take on in other non-life-threatening situations.<sup>159</sup>

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154. *Id.* at 53.

155. A letter written by William H. Rehnquist, while serving with the Department of Justice, stated that most combat situations would not allow for separate lavatory facilities or living quarters, thus violating the privacy rights of the soldiers, 118 CONG. REC. S9344 (daily ed.)

156. The Supreme Court recognized the right to privacy in 1965. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a doctor, convicted of giving advice and birth control devices to a married couple, brought suit challenging the Connecticut statute's constitutionality), the Court stated that the specific guarantees in the Bill of Rights have penumbras which create zones of privacy. The "sacred precincts of marital bedrooms," *Id.* at 485, are within the zones of privacy created by the First, Third, Fourth, Fifth, and Ninth Amendments of the Constitution.

157. The right was confirmed in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). One part of the right is to be free from official coercion in sexual relations. *Id.* at 453. This has further been interpreted as not requiring individuals to expose their persons or perform intimate bodily functions in the presence of members of the opposite sex. Thus, segregated living quarters would be required in the armed services. Brown, Emerson, *supra* note 28 at 900-01. See also, *ERA and the Military*, *supra* note 36 at 1544-46; 117 CONG. REC. H9365 (daily ed. Oct. 12, 1971) (remarks of Congressman Ryan).

158. *ERA and the Military*, *supra* note 36 at 1551.

159. A woman officer/faculty member at West Point stated, "As for that business

Conceding that separate living quarters may be necessary, in most instances, soldiers' privacy rights can be accommodated by modifying the present use of existing facilities, together with some type of renovation.<sup>160</sup> This same type of space evaluation has been occurring nation-wide on college and university campuses.<sup>161</sup> It is unclear why the military would not similarly be able to alter its present structures to accommodate men and women.<sup>162</sup> The argument that providing separate quarters for men and women would cost the military too much money was rejected in *Owens v. Brown*.<sup>163</sup> The court stated that Navy ships are periodically refitted and modernized to take account of changing needs,<sup>164</sup> and therefore providing men and women with separate quarters and facilities would pose no serious problems for the Navy.<sup>165</sup> Thus, ensuring the privacy rights of individuals, while at the same time keeping this one-time cost to a minimum, may not be an insurmountable problem.

Another one-time adjustment cost, the redesigning of clothing and equipment, must be considered. Many modifications in uniforms and boots have already been undertaken.<sup>166</sup> The redesigning of equipment has more significant implications, however. Generally, the Army designs its equipment for men with anthropometric dimensions ranging from the fifth to the ninety-fifth percentiles of all men.<sup>167</sup> In many ways the average woman measures significantly less than the average man,<sup>168</sup> and thus does not fit within the percentile range. This difference

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about men and women sharing foxholes, if you are next to a male in a foxhole in a combat situation and you need to urinate or change your Tampax, you'll just go ahead and do it." Another woman added, "Why, I'd just bleed right through." LIFE, Sept. 1981, at 74.

160. BINKIN & BACH, *supra*, note 56 at 54.

161. *ERA and the Military*, *supra* note 36 at 1546.

162. BINKIN & BACH, *supra*, note 56 at 54.

163. 455 F. Supp. 291 (D.D.C. 1978).

164. *Id.* at 309.

165. *Id.*

166. LIFE, Sept. 1981, at 69, 76. The uniforms issued to women were basically the same as those issued to men. The uniforms were altered to provide comfort and easy movement. The women, however, were issued boots originally designed for nurses. The kind of activity an individual in basic training is required to undergo differs vastly from that of a nurse. These boots are no longer issued; women receive male boots. A new boot, appropriate for all soldiers is currently being tested.

167. BINKIN & BACH, *supra*, note 56 at 54. Percentile figures are based upon a division into 100 equal, consecutive groups. For instance, if a man is in the 97th percentile, three out of every 100 men measure more than he does, and 96 out of 100 measure less than he does.

168. *Id.* Anthropometric dimensions of the general population show that women between the ages of 18 and 24 weigh about 54% less than a man at the fifth percen-

is crucial in safe and efficient use of dangerous and complex equipment.<sup>169</sup> Hence, the cost of redesigning equipment to accommodate women may be substantial. It should be noted, however, that equipment costs are often increased due to a design which is needed for larger and heavier soldiers.<sup>170</sup> Since the average woman is significantly smaller than the average man, in the long run the cost of equipment designed to accommodate female soldiers may be less than the cost of equipment designed to accommodate male soldiers. Thus, the net cost of redesigning equipment for women soldiers is speculative.

While redesigning equipment for women soldiers may be costly, the benefits paid to female personnel are actually less than the benefits paid to male personnel. These benefits include housing costs or cash allowances for housing, medical, and travel costs.<sup>171</sup> Most of these costs are higher when the military person is married with dependent children,<sup>172</sup> and 36% fewer women than men are married with dependent children.

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tile in the same age group. Sixty percent of the women are shorter, 30% have a shorter sitting height, and about one-half have a shorter popliteal height.

169. Weight, stature, sitting height, eye height, popliteal height (floor to thigh while seated), functional reach, and foot length are the critical dimensions for the redesigning of equipment. *Id.*

170. *Id.* at 55. For instance, tanks or aircraft designed for men often require more space to safely accommodate the crewmembers. The increased size and weight of the equipment would require a more powerful engine to achieve the same maximum speed that is required of a smaller and lighter plane or tank. The larger size of the equipment as well as the more powerful engine often increase the costs of production.

171. *Id.* at 56.

172. Military personnel usually live in quarters provided by the military. Single individuals generally live in barracks similar to college dormitories. Married personnel are provided with housing in apartments, townhouses, or homes. The costs of providing and maintaining singles' housing are much less than those associated with living accommodations for married personnel and their families.

If there are no government-provided facilities, the government disburses a monthly cash-quarters allowance. The amount paid depends on the individual's marital and dependency status, and rank. In May, 1977, the average difference in the quarters allowance of those with and without dependents was \$52 per month. Since 36% fewer women have dependents, they are less costly per year to the military than men.

Most medical benefits paid each year are dependents' expenses. Women have 1.16 fewer dependents than men in the military. Therefore, the government spends more money for medical support for the male personnel in the military.

Travel costs include the cost of relocating an individual when reassigned. Costs due to shipping weights of household goods and incidental expenses such as hotels and gas, are paid for by the government. Not surprisingly, these costs are much less for a single person than they are for a married person with dependents. In 1977, the average cost of relocating a woman, including all shipping costs and incidental expenses, was approximately \$407 less than the average cost of relocating a man. This was due to the differences in the proportions of personnel with dependents. *Id.* at 55-58.

In recent years, however, an increasing percentage of women volunteers are married.<sup>173</sup> If this trend continues, the difference in annual costs for men and women may well diminish.<sup>174</sup> Even if the difference in annual costs to the military were to disappear completely, that is, that the cost in terms of benefits would be the *same* for men and women, it is still not possible to argue successfully that a greater number of women in the armed services would be too costly, and thus threaten the national security.

Taken in total, opponents of women combatants argue that the integration of women into all areas of the armed services will increase the costs of the military, and thus weaken the national security. The one-time adjustment costs associated with living quarters and the redesign of equipment and uniforms may be substantial,<sup>175</sup> but the statistics and data to support this hypothesis are incomplete and speculative. In addition, these expenses occur only once, and remedying inequality normally does cost money.<sup>176</sup> Moreover, the annual cost to the military in terms of benefits paid to personnel is actually less for female personnel than for male personnel.<sup>177</sup> Data which proved that the underlying assumption of a gender-based classification was correct 90% of the time, was rejected by the Supreme Court as insufficient to support the gender-based classification in *Goldfarb*.<sup>178</sup> Therefore, it is highly unlikely that the incomplete and speculative evidence here advanced will be sufficient to support the third component of the argument that women will cost the military too much money, and thus threaten the national security.

The middle-tier standard of review requires a statutory gender-based classification to substantially further an important governmental objective.<sup>179</sup> The objective of military necessity is an important governmental objective.<sup>180</sup> However, the blanket prohibition against the assignment of women to combat positions used in Sections 8549 and 6015 does not substantially further the objective of military necessity. The

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173. *Id.* at 17, 58.

174. The diminution in the cost differential would be due to the differences in maintaining single and married personnel. *See supra* notes 171-73 and accompanying text.

175. *See supra* notes 154-70 and accompanying text.

176. *Sex Discrimination*, *supra* note 85 at 50.

177. *See supra* notes 171-74 and accompanying text. In 1977, the total difference in annual benefits paid to men and women was \$982 each. BINKIN & BACH, *supra*, note 56 at 58.

178. *See supra* notes 97-100 and accompanying text.

179. *See supra* notes 43-46 and accompanying text.

180. *See supra* notes 61-63 and accompanying text.

sweep of the statutes is too broad. The blanket exclusion of women from combat positions is clearly over-inclusive. The gender-based classification presumes women are unfit physically and mentally for combat duty, and therefore excludes all women, even those who can demonstrate their combat fitness.<sup>181</sup> The military has advanced no evidence to prove that the gender-based classification used in the combat statutes is more effective than a gender-neutral classification in promoting the important governmental objective. In fact, the available evidence is inconclusive, incomplete, and speculative as to all three components of the military necessity objective. Therefore, under the middle-tier standard of review, the gender-based classification which completely prohibits the assignment of all women to combat and combat-related positions does not substantially further the important governmental objective of military necessity in a manner consistent with the command of the due process clause of the fifth amendment. Thus, the statutes that prohibit the assignment of women to combat and combat-related positions are constitutionally infirm.

#### B. *The Protection of Women*

The protection of women from the brutality and carnage of war<sup>182</sup> is the second governmental objective sought to be furthered by the gender-based classification in Sections 8549 and 6015. The argument that women need to be protected by men is based on the centuries-old belief that men are the stronger sex and hence the protectors of women.<sup>183</sup> The argument is part of a past which reflects a pattern

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181. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court refused to accept a blanket exclusionary classification which denied all servicemen stationed in Texas the right to vote. *Id.* at 96. The state's justification was the objective of promoting responsible voting only by allowing residents and citizens of the state to vote. *Id.* at 95. The Court accepted this objective. However, the statutory classification established a nonrebuttable presumption of nonresidence. The presumption was conclusive and was "incapable of being overcome by proof of the most positive character." *Id.* at 96, quoting *Heimer v. Donnan*, 285 U.S. 312, 324 (1931). The Court found this classification violated the equal protection of the laws as guaranteed in the fourteenth amendment.

182. During congressional debates concerning an Equal Rights Amendment, Senator Cellar stated,

Women represent motherhood and creation. Wars are for destruction. Women, integrated with men in the carnage and slaughter of battle—on land, at sea or in the air—is unthinkable. . . . Men could refuse to serve and sacrifice in the butchery of war if women are exempt. Can you imagine women trained by a drill sergeant to charge the enemy with fixed bayonets and bombs? . . . War is Death's feast. It is enough that men attend.

117 CONG. REC. H35, 785 (daily ed. Oct. 12, 1971).

183. *Bradwell v. State*, 16 Wall. 130, 141 (1872) (Bradley, J., concurring).

of male dominance.<sup>184</sup> It is based on the outdated and stereotypical notion that a woman's proper place is in the home.<sup>185</sup> This argument can be summed up with the words "romantic paternalism."<sup>186</sup>

The middle-tier standard of review requires a determination of whether the objective of protecting women is an important governmental objective. Analysis of the paternalistic notion of women's need for protection focuses the inquiry on four different assumptions advanced to support that objective. First, a woman is the center of the home. Second, a woman is entitled to the benefits and privileges of citizenship, but not subject to the responsibilities and duties. Third, the horror of war and the corresponding risk of capture are not to be confronted by women. Finally, this society, generally, is not ready for women to assume active roles in combat.

The belief that a woman is the center of the home enjoys wide support,<sup>187</sup> despite evidence to the contrary.<sup>188</sup> The Supreme Court has expressly rejected the assumption that women are the center of the home as a justification for gender-based classifications. In *Stanton v. Stanton*,<sup>189</sup> the Court considered an equal protection challenge to a Utah statutory scheme establishing the ages 18 and 21 as the ages of majority for females and males, respectively.<sup>190</sup> The issue arose in the context of a father's obligation for support payments for his children. The mother contended that the statute discriminated against the daughter since she received no support payments from her father after she reached age 18, whereas the son continued to receive support payments until he was 21 years old. The age differential was based on the notion that "generally it is the man's primary responsibility to provide a home and its essentials . . . that it is a salutary thing for him to get a good education and/or training before he undertakes those respon-

184. BINKIN & BACH, *supra*, note 56 at 39.

185. Brown, Emerson, *supra* note 28 at 872. Hale & Kanowitz, *supra* note 64 at 205; 126 CONG. REC. S6543 (daily ed. June 10, 1980) (remarks of Senator Leahy); *Stanton v. Stanton*, 420 U.S. at 15; *Orr v. Orr*, 440 U.S. at 283.

186. The practical effects of romantic paternalism are not to put women on a pedestal, but in a cage. *Frontiero v. Richardson*, 411 U.S. at 684. *See also*, Brown, Emerson, *supra* note 28 at 872; 126 CONG. REC. S6543 (daily ed. June 10, 1980) (remarks of Senator Leahy); BINKIN & BACH, *supra* note 56 at 48.

187. *See supra* note 185.

188. As of 1974, 43% of all married women were employed outside the home. The employment rate of all women between the ages of 20 and 54 was 56%. *Califano v. Goldfarb*, 430 U.S. 199, 238 n.7 (1977) (Rehnquist, J., dissenting). In 1974, the percentage of working married women had risen to 44%. Furthermore, women composed nearly 40% of the entire labor force. Krauskopf, *supra* note 40 at 82.

189. 421 U.S. 7 (1975).

190. *Id.* at 9.

sibilities . . . that girls tend generally to mature physically, emotionally, and mentally before boys . . . and that they generally tend to marry earlier . . .<sup>191</sup> The state argued that these assumptions justified requiring support payments for a male until the age of 21 in order that he may obtain an education.

The Court expressly rejected this justification for the majority age differential. Recognizing that women are “[n]o longer . . . destined solely for the home and the rearing of family, and only the male[s] for the marketplace and world of ideas,”<sup>192</sup> the Court took judicial notice of women’s presence in business and in professional occupations.<sup>193</sup> Therefore, “under any test—compelling state interest, or rational basis, or something in between— . . .”<sup>194</sup> in the context of child support, the gender-based classification did not survive an equal protection attack.

Similarly, in the context of alimony payments, a gender-based classification requiring a husband, but never a wife, to pay alimony was struck down. In *Orr v. Orr*,<sup>195</sup> a husband challenged an Alabama statute which conclusively exempted a woman from ever paying alimony, while a man may have been obligated to pay alimony to his ex-wife.<sup>196</sup> The state’s objective was the reinforcement of a belief about family responsibilities under which the wife played a dependent role.<sup>197</sup> Relying on *Stanton*, the Court rejected such an objective as an important governmental objective and stated that “[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”<sup>198</sup>

A corollary to the belief that women are the center of the home is that compelling a woman to serve in combat would disrupt the family unit, and place unprecedented strains on family life.<sup>199</sup> The claim that a mother’s absence disrupts the family cannot be denied. But it seems equally clear that a father’s absence has a detrimental effect on the family as well. The disruption is caused by the absence of a parent and the lack of that parent’s contributions, whether those contributions are of a maternal or paternal nature. The belief that a mother’s love,

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191. *Id.* at 10 (citations omitted).

192. *Id.* at 14-15.

193. *Id.*

194. *Id.* at 17.

195. 440 U.S. 268 (1979).

196. *Id.* at 270 n.1.

197. *Id.* at 279.

198. *Id.* at 283.

199. S. REP. No. 96-826, *supra* note 56 at 159.



care, affection, and discipline are significantly more important to the family than the father's degrades the father by failing to take account of his importance and by implicitly asserting his minimal value to the family unit.

The Supreme Court rejected the argument that there exists a fundamental difference between maternal and paternal relations, that " 'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.' " <sup>200</sup> In *Caban v. Mohammed*, <sup>201</sup> a New York statute which permitted an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent, <sup>202</sup> was challenged on the ground that it employed a gender-based classification which discriminated against unwed fathers. The objective of the statute was to further the interests of illegitimate children by removing a possible barrier to their adoption. <sup>203</sup>

This asserted governmental objective was accepted by the Court as an important governmental objective. However, the Court held that the gender-based classification, which rested on the assumption that mothers have closer relationships with their children than do fathers, did not substantially further that objective. <sup>204</sup> The facts established that both the father and the mother had a substantial relationship with the children. <sup>205</sup> The Court stated that "maternal and paternal roles are not invariably different in importance. Even if . . . mothers as a class were closer . . . than fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." <sup>206</sup> Therefore, the broad gender-based classification is not supported by the belief in a difference between maternal and paternal relations. The Supreme Court has similarly recognized the rights of fathers by stating that a father, no less than a mother, has a right to "the companionship, care, custody, and management of the children" he has sired and raised, which "undeniably warrants deference, and

200. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

201. 441 U.S. 380 (1979).

202. *Id.* at 385-87.

203. *Id.* at 391.

204. *Id.* at 394.

205. *Id.* at 389. In *Caban*, the mother and father of the children, though unmarried to each other, lived with each other and the children as a family for five years. The controversy occurred when the couple separated and the mother took the children, petitioning the state for their adoption. (Both parents had remarried). The father was unable to stop the adoption unless he could prove the mother was an unfit parent.

206. *Id.*

absent a powerful countervailing interest, protection."<sup>207</sup> Presumably then, love, care, companionship and affection are not characteristics solely belonging to mothers.

Parental relationships with children, and parental contributions to the family are not readily distinguishable on the basis of whether the relationship and contributions are of a maternal or paternal character.<sup>208</sup> It seems clear that the sudden lack of such a relationship disrupts the family unit. The gender-based classification in Sections 8549 and 6015 prohibits the assignment of women to combat on the ground that a mother's absence will disrupt the family unit, implying that a father's absence will not disrupt the family unit in the same degree. In light of *Stanley* and *Caban*, this justification for the general prohibition against women in combat positions is unacceptable and cannot maintain the gender-based classification against an equal protection challenge.

The second aspect of the argument that women need protection is that women are entitled to enjoy the benefits and privileges of citizenship without being subject to the responsibilities and duties.<sup>209</sup> This argument is inconsistent with basic notions of equality. Equal rights means equal responsibilities.<sup>210</sup> The Supreme Court stated, "the duty of citizens . . . to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."<sup>211</sup> To

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207. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (Illinois statute which employed the presumption that unwed fathers of children whose mother had died were unfit and neglectful parents, while proof of unwed mothers' unfitness was required before the children were declared state wards, held invalid).

208. See *supra* notes 200-07 and accompanying text.

209. Brown, Emerson, *supra* note 28 at 887, 908.

210. See Ginsburg, *The Status of Women*, 20 AM. J. OF COMP. L. 585 (1972); 116 CONG. REC. H35, 450 (daily ed. Oct. 7, 1970) (remarks of Congressman Bayh); Hale & Kanowitz, *supra* note 64 at 200.

211. *United States v. Schwimmer*, 279 U.S. 644, 650 (1929). The facts of *Schwimmer* are interesting in the context of this Note. Ms. Schwimmer was a 49 year old citizen of Hungary. She desired to become a citizen of the United States and made a proper application. Her application was denied on the grounds that she was not attached to the principles of the Constitution. *Id.* at 652. This conclusion rested on the fact that Ms. Schwimmer was a pacifist and therefore would not take arms in defense of the United States. The Court stated that the duty to defend the country was a fundamental principle of the Constitution, and therefore denied Ms. Schwimmer citizenship.

From the opinion, it is clear that the Court was concerned with the world events of the previous 15 years. The fear of Bolshevism had permeated the consciousness of the United States, and the Court was reacting to that. *Schenk v. United States*, 249 U.S. 47 (1919), is one example of the fear experienced by the United States during that period of history. The fact that Ms. Schwimmer, a woman over 50 years old,

contribute to the defense of the nation is a fundamental civic obligation;<sup>212</sup> it is participation in an essential national enterprise.<sup>213</sup> To categorically exclude women, citizens, from this participation is to deny them the opportunity and duty to carry their share of the defense of the nation.<sup>214</sup>

Analogously, sharing in the administration of justice is a phase of civic responsibility,<sup>215</sup> thereby making jury service a duty as well as a privilege of citizenship.<sup>216</sup> In *Taylor v. Louisiana*,<sup>217</sup> a state statute excluded women from jury service unless the woman had previously filed a written declaration of her desire to be subject to jury duty.<sup>218</sup> That state's objective behind this requirement was to regulate and provide stability to the state's idea of family life. The state's idea of family life included the belief that women, as a class, served a distinctive role in society and that jury service would substantially interfere with that function.<sup>219</sup>

The Court rejected the belief that women serve a distinctive role in society with which jury service would substantially interfere.<sup>220</sup> Recognizing that a similar justification had been upheld by the Court fourteen years earlier in *Hoyt v. Florida*,<sup>221</sup> the Court stated that "[i]f it was ever the case that women were unqualified to sit on juries

was unable by law to bear arms was irrelevant in the opinion of the Court. The concern was that she would advocate her views and encourage other individuals to adopt them.

Justice Holmes dissented, with Justice Brandeis concurring in his opinion. Much of the dissent dealt with matters unrelated to this Note, but Justice Holmes did say that the adequacy of Ms. Schwimmer's oath as a citizen could hardly be affected by her statement concerning the defense of the United States, inasmuch as she was a woman over 50 years of age and unable to bear arms even if she had so desired.

212. *Rostker v. Goldberg*, 453 U.S. at 86 (Marshall, J., dissenting).

213. *Owens v. Brown*, 455 F. Supp. at 295.

214. 117 CONG. REC. H35, 784 (daily ed. Oct. 12, 1971) (remarks of Congressman Gude).

215. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (a federal court jury panel from which persons who work for a daily wage were intentionally and systematically excluded held unlawfully constituted).

216. *Id.* at 224.

217. 419 U.S. 522 (1975).

218. *Id.* at 523. This requirement was provided for in both the Louisiana Constitution and the Louisiana Code of Criminal Procedure.

219. *Id.* at 533.

220. *Id.* at 534-35. The Court said, "[i]t is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties." (Emphasis in the original).

221. 368 U.S. 57 (1961). The state objective in *Hoyt* was based on the assumption that "woman is still regarded as the center of the home and family life." *Id.* at 62.

or were so situated that none of them should be required to perform jury service, that time has long since passed."<sup>222</sup> The Court noted the societal changes, encompassing both a higher degree of sensitivity to gender-based classifications and the changing nature and structure of the family unit,<sup>223</sup> that had occurred in the intervening fourteen years since the *Hoyt* decision.

Exclusion of a class of citizens comprising 53% of the eligible jurors was held incompatible with the fourteenth amendment.<sup>224</sup> Societal changes required the Court to re-examine the validity of the assumption underlying the state's objective. The Court concluded that community participation in the administration of the law was consistent with the democratic heritage of the United States.<sup>225</sup>

Democracy contemplates full, informed and active participation in society.<sup>226</sup> Active involvement is predicated upon a sense of commitment and responsibility.<sup>227</sup> If women are similarly denied participation in a national defense effort, and excluded from the responsibility of combat duty, their sense of commitment and meaningful contribution to the relevant decisions are necessarily diminished. Men and women should jointly determine the course of their history.<sup>228</sup>

If serving in combat for the defense of the nation is viewed as the most burdensome and onerous responsibility of citizenship, then it is discriminatory against men to categorically exclude women on the basis of gender.<sup>229</sup> Requiring a man to sacrifice his personal freedom and safety for the defense of the nation, when a woman possessing the same qualifications is not required to make the sacrifice, is inconsistent with egalitarian principles. The obligation of serving in the armed services should be shared generally, in accordance with a system of selection which is fair and just.<sup>230</sup>

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222. *Taylor v. Louisiana*, 419 U.S. at 537.

223. *Id.* at 542 (Rehnquist, J., dissenting).

224. *Id.* at 538.

225. *Id.* at 530. The Court continued by saying that community participation in the administration of the criminal law is critical to public confidence in the fairness of the criminal justice system.

226. 126 CONG. REC. S6530 (daily ed. June 10, 1980) (remarks of Senator Cohen).

227. *Id.* See also, Brown, Emerson, *supra* note 28 at 968-69; Hale & Kanowitz, *supra* note 64 at 215-16.

228. 117 CONG. REC. H 35, 787 (daily ed. Oct. 12, 1971) (remarks of Congressman Gude).

229. 117 CONG. REC. H35, 786 (daily ed. Oct. 12, 1971) (remarks of Congressman Gude); Brown, Emerson, *supra* note 28 at 968; *Sex Discrimination*, *supra* note 85 at 70; *United States v. Reiser*, 394 F. Supp. at 1062.

230. *United States v. Reiser*, 394 F. Supp. at 1062. The Court quoted the con-

The obligation and duty of serving in the armed services is a concomitant to the privileges of citizenship. There once may have been a valid justification for excluding women from certain duties associated with citizenship, but those justifications must be critically re-examined in light of the changes in society. Citizenship in a democratic nation requires burdens and benefits to be shared by all qualified and capable citizens. Therefore, the notion that women can selectively participate in the duties and privileges of citizenship cannot support the objective of the protection of women from the brutality of war.

The third argument relied on by advocates of women's protection is that women should not be exposed to the horrors of war and the risk of possible capture.<sup>231</sup> Evidently, the supporters of this position believe that war and the attending risk of capture by the enemy are somehow less horrendous when faced by a man. The brutality and carnage of war does not change as a result of the gender of the individuals involved. To believe otherwise, degrades men.

Despite the fact that men and women differ in many ways, in their most basic and fundamental character—their humanity—they do not.<sup>232</sup> It is perverse to argue that “women should not be drafted where they will be slaughtered or maimed by the bayonets, the bombs, the bullets, the handgrenades, the mines, the poison gas, and the shells of the enemy . . .”<sup>233</sup> implying that somehow the same considerations

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gressional policy behind the Military Selective Service Act of 1967. “[I]n a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.” *Id.*

231. Former Vice Chief of Naval Operations, Admiral Worth Bagley, has stated: For this nation to open combat roles to our women, short of a dire emergency, in my view, offends the dignity of womanhood and ignores the harsh realities of war. Military history, the lessons of which again we ignore at our peril, my own personal experience in combat, in prisoner of war camps, and in command of units convince me that fighting is a man's job and should remain so. Those who press to inject women in combat roles grossly underestimate the physical, the mental and the emotional stresses of combat in all its implications, including capture by the enemy. In my view, Sherman was right: “War is hell and you cannot refine it.” To seek to do so to accommodate the pressures of social activism is to invite disaster in battle.

BINKIN & BACH, *supra*, note 56 at 48.

232. 117 CONG. REC. H 35, 795 (daily ed. Oct. 12, 1971) (remarks of Congressman Drinan).

233. 118 CONG. REC. S9333 (daily ed. Mar. 21, 1972) (remarks of Senator Ervin).

are not involved when men are drafted. The implication is that a woman's life is intrinsically more valuable than a man's life. No amount of logic can support such an implication.<sup>234</sup>

In addition to the brutality faced by soldiers in combat, heavy emphasis is placed on the risk of women's capture by the enemy. The overriding concern is the "unthinkable consequences of those situations . . . ."<sup>235</sup> The unthinkable consequence envisioned is rape. Rape is a form of both physical and mental abuse, undoubtedly a heinous violation of an individual's dignity. However, in the context of a prisoner of war camp, amid countless other incidences of sexual, physical, and mental abuse, the significance of rape is lessened. It is one more dehumanizing and degrading experience suffered by the captured.<sup>236</sup>

Furthermore, men are similarly subject to the dehumanizing and degrading atrocities, including sexual abuse, that captured soldiers suffer at the hands of the enemy. Such an experience should clearly be unthinkable in that situation as well. The error committed by advocates of this view is not that the consequences of capture are unthinkable; certainly the abuse captured soldiers are required to withstand is unthinkable. But rather, that the consequences of capture, including physical and mental abuse, are unthinkable only when women are forced to suffer them.

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234. During Congressional debates concerning an Equal Rights Amendment, one congressman stated: "Although there is no doubt that all combat is dangerous, degrading, and dehumanizing, we have a tendency to glorify it as manly when it comes to men and only recognize its reality when the possibility of women assuming the same role arises." 117 CONG. REC. H35, 978 (daily ed. Oct. 12, 1971) (remarks of Congressman Drinan). See also Brown, Emerson, *supra* note 28 at 977.

235. 118 CONG. REC. (daily ed. Mar. 21, 1972) (remarks of Senator Stennis, Chairman of the Committee on Armed Services).

236. The experiences of inmates in concentration camps in Nazi-occupied countries and internment camps in the Orient during World War II are analogous to those experienced in prisoner of war camps. A particularly informative book was written by a woman interned in a Japanese camp. Living conditions for men and women were identical. Yet, "according to certain objectively determinable gauges, i.e., participation in or withdrawal from the internee-initiated camp program, actual and percentage losses in weight, mental breakdown, deaths from disease, and suicides, women seemed to adjust more readily to the internment situation than did men." E. VAUGHN, *COMMUNITY UNDER STRESS: AN INTERNMENT CAMP CULTURE* ix (1949). Ms. Vaughn states that the population of the camp was 61% male and 39% female. Of the deaths due to disease, 89.5% were men and 10.5% were women. All of the suicides in the camp were men. *Id.*

For further reading, see, H. KRAUSNICK, H. BUCHHEIM, M. BROZAT, H. A. JACOBSEN, *ANATOMY OF AN SS STATE* (1965); A. KEITH, *THREE CAME HOME* (1946); O. NANSEN, *FROM DAY TO DAY* (1949).

The statement that "war is hell and you cannot refine it"<sup>237</sup> is equally applicable to men and women. The brutality and horror faced by soldiers in combat is not different if the soldier is male or female. In addition, captured male soldiers are as vulnerable to the tortures inflicted in prisoner of war camps as are female soldiers. War, with all the attending consequences, is devastating for men.<sup>238</sup> To believe otherwise is to deman and devalue the humanity and lives of men. Therefore, the assumption that only women should not face the horrors of war cannot support the objective of the protection of women.

Last, there may be some truth to the statement that "this country, societally speaking, is not ready for women sailing submarines . . . and commanding aircraft carriers."<sup>239</sup> Nevertheless, what the United States may or may not be ready for is not dispositive of right or wrong. For many years, this country practiced slavery, racial discrimination in one of its worst forms. The fact that this country was not ready to recognize black people as more than inferior human beings did not make the institution of slavery right. Additionally, the country was not ready to have black and white children in the same public schools in 1954. Yet, the Supreme Court held that in the area of public education, separate was not equal,<sup>240</sup> and ordered the schools integrated. The continuing controversy concerning desegregation indicates that many people in the United States are not yet ready to accept black and white children in the same schools. Yet, it is doubtful that any court would accept that justification for segregated schools. It would seem, therefore, that the "ready for" argument is unpersuasive.

The governmental objective of protecting women with legislation designed to benefit them is not an important governmental objective in this day and age.<sup>241</sup> Protective legislation is merely additional discrimination,<sup>242</sup> supported by the archaic notion that women need the protection of men. The law does not permit the government to seek to protect women paternalistically so as to relieve them from the duties, obligations, and privileges of citizenship.<sup>243</sup> The paternalistic attitude results in discrimination against men and women. Qualified

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237. See *supra* note 231.

238. *United States v. Reiser*, 394 F. Supp. at 1062.

239. *ERA and the Military*, *supra* note 36 at 1549.

240. *Brown v. Board of Education*, 347 U.S. 483 (1954)

241. 118 CONG. REC. S9319 (daily ed. Mar. 21, 1972) (remarks of Senator Cook).

242. 117 CONG. REC. H35, 784 (daily ed. Oct. 12, 1971) (remarks of Congressman Gude); *Brown, Emerson*, *supra* note 28 at 873; *Hale & Kanowitz*, *supra* note 64 at 220.

243. *United States v. Reiser*, 394 F. Supp. at 1069.

men are required to submit to combat duty, whereas qualified women are not.<sup>244</sup> The assumption that women are the center of the home is no longer viable.<sup>245</sup> Women are deprived of their status as full citizens by being denied the responsibility and duty of the defense of their nation.<sup>246</sup> The attitude that only men should be vulnerable to the destruction of war and possible capture, implies that a man's life and humanity are less valuable than a woman's life and humanity.<sup>247</sup> Therefore, the governmental objective of protecting women does not pass the first test of the middle-tier standard. Under the guise of rights and benefits, both men and women are discriminated against by the statutory gender-based classification prohibiting the assignment of women to combat and combat-related positions. The gender-based classification denies the equal protection of the laws because the objective allegedly served by the classification is not an important governmental objective and cannot serve to justify the gender-based classification.

The two governmental objectives sought to be furthered by the gender-based classification prohibiting the assignment of women to combat and combat-related positions are military necessity and the protection of women. Military necessity is an important governmental objective. However, that objective is not substantially furthered by an overbroad classification prohibiting the assignment of all women to combat positions. The gender-based classification used in Sections 8549 and 6015 establishes a presumption of combat unfitness, and does not allow a woman to ever controvert that presumption. Therefore, the gender-based classification violates the due process clause of the fifth amendment.

As regards the protection of women, this objective, in light of the requirements imposed by our emerging sense of humanity, cannot be accepted as an important governmental objective. The gender-based classification, which is intended to further the objective of the protection of women, cannot stand "when supported by no more substantial justification than 'archaic and overbroad' generalizations or 'old notions' . . . that are more consistent with 'the role-typing society has long imposed' than with contemporary reality."<sup>248</sup> Further,

a traditional classification is more likely to be used without

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244. See *supra* notes 229-30 and accompanying text.

245. See *supra* notes 187-98 and accompanying text.

246. See *supra* notes 209-30 and accompanying text.

247. See *supra* notes 231-38 and accompanying text.

248. *Califano v. Goldfarb*, 430 U.S. at 207.



pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.<sup>249</sup>

Under the middle-tier standard of review, which is applied to gender-based classifications challenged on equal protection grounds, the statutes that prohibit the assignment of women to combat and combat-related positions are unconstitutional. The important governmental objective of military necessity is not substantially furthered by the gender-based classification. The governmental objective of the protection of women is not an important governmental objective. Therefore, the statutes employing the gender-based classification excluding women from combat are constitutionally infirm.

### III. SUGGESTIONS FOR THE INTEGRATION OF WOMEN INTO COMBAT UNITS

Determining that the gender-based classification used in Sections 8549 and 6015 is discriminatory and violative of the due process clause of the fifth amendment does not end the inquiry. The foregoing discussion reveals the great amount of uncertainty surrounding the integration of women into combat units. To order an immediate and full-scale integration in spite of the uncertainty would be inappropriate and irresponsible. Yet, recognition of the legitimate and complex problems associated with sexual integration of combat units does not justify an abandonment of the problem altogether. If initial, preliminary steps are never taken, no change in the current situation could be realistically expected. The following suggestions are general proposals for the initiation of research and investigation to adequately assess the effects and implications of sexual integration of combat units. The tests and experiments would yield results over a period of years, therefore the integration would take place gradually, as any potential problems were encountered and solved.

One of the first steps should be an objective determination of the necessary qualifications for combat soldiers in each of the armed

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249. *Mathews v. Lucas*, 427 U.S. at 520-21 (Stevens, J., dissenting).

services. Such qualifications should be gender-neutral and should correspond closely with the actual task or job to be performed. The qualifications should include both physical and mental requirements. The physical requirements should reflect the changed nature of modern combat. A reliable method should be utilized for determining which individuals could meet the standard of physical fitness after the requisite training.

Assessing the effects of sexual integration on combat effectiveness and group performance could be done only through actual experiments, similar to the one conducted by the Navy aboard the *U.S.S. Sanctuary*. Since such experiments are lacking in most areas of the armed services, the guidelines drawn up would have to consider the classification, selection, and assignment of personnel very carefully.<sup>250</sup> Care should be taken to select participants with the necessary qualifications, but not limit the selection to the outstanding individuals, since the results would not be a true reflection of an average combat unit.

The current status of peace, as far as this country is concerned, would allow the experiments designed to assess group performance to proceed without endangering the lives of the individuals in actual combat situations. Combat situations should be simulated to test and evaluate the integrated units' performance. But the attending risks and danger inherent in actual combat zones would be absent, since the experiments should be run in controlled environments.

Legislative modifications would be necessary for these experiments to be conducted.<sup>251</sup> Two options are available. The statutory prohibitions could be removed entirely, or the statutes could merely be modified to the extent that certain exceptions would be allowed for a testing period.<sup>252</sup>

### *Conclusion*

To withstand an equal protection challenge, the middle-tier standard of review requires a gender-based classification to substantially further important governmental objectives. The statutory gender-based classification prohibiting the assignment of women to combat and combat-related positions does not further the important governmental objective of military necessity in a manner consistent with the due process clause of the fifth amendment. Neither can the gender-based classification used in the statutes support the objective of women's protection,

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250. BINKIN & BACH, *supra*, note 56 at 110.

251. *Id.* at 112.

252. *Id.*

since it is not an important governmental objective in light of contemporary attitudes and values. Therefore, the gender-based classification used to exclude all women from combat positions offends the prohibitions against the denial of the equal protection of the laws as embodied in the fifth amendment. Accordingly, the law must be changed to allow for the integration of women into combat units.

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