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Women in the Crossfire: Should the Court Allow It

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NOTES

WOMEN IN THE CROSSFIRE: SHOULD THE COURT ALLOW IT?

INTRODUCTION

During the Gulf War, 540,000 soldiers participated in Operation Desert Storm.[1] Of these soldiers, 35,000 were women.[2] Women performed combat support missions during the war[3] and received the respect of the public[4] and of Congress.[5] In August 1991, Congress passed legislation to modify the current combat exclusion laws and policies, and to examine further the issue of women in combat.[6]

Despite recent gains that women have accomplished in the military, the combat exclusion issue remains controversial. While top military leaders and proponents of combat exclusion see the issue as a matter of national security,[7] supporters of women in combat see the issue as one of equal opportunity.[8] Many opponents of the combat exclusion rules consider congressional response to the issue weak and inadequate.[9] The alternative for those disheartened by

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1 The American government responded to Iraq's invasion of Kuwait in August 1990 by deploying troops and implementing a military strategy called "Operation Desert Storm."

2 *See* Jon Nordheimer, *Women's Role in Combat: The War Resumes*, N.Y. TIMES, May 26, 1991, at A1, A28 (discussing female soldiers' participation in the Gulf War).

3 Women flew support aircraft carrying supplies and troops into combat zones, worked in supply units, crewed Patriot and Hawk missile units, and performed various other duties. *Id.* at A28.

4 *See generally* David H. Hackworth, *War and the Second Sex*, NEWSWEEK, Aug. 5, 1991, at 25 (reporting that in a July 1991 Newsweek poll, 72% of the public believed that women in combat support positions could be an advantage to the military during Operation Desert Storm).

5 During recent congressional hearings, Senator John McCain noted the achievements of females during the Gulf War. "The obvious impetus for the reexamination of restrictions excluding women from combat roles is the outstanding performance of U.S. servicewomen in Operations Desert Storm and Desert Shield." *Women in Combat: Hearing of the Manpower and Personnel Subcommittee of the Senate Armed Services Committee*, 101st Cong., 2nd Sess. 56 (1990) [hereinafter *Women in Combat Hearings*].

6 S. Res. 3549, 8549, 102d Cong., 1st Sess. 137 CONG. REC. 12417 § 530 (1991).

7 *See infra* notes 52-54 and accompanying text.

8 *See infra* notes 55-56 and accompanying text.

9 *See, e.g.*, Barton Gellman, *Combat Role for Women Stalled by Senate Panel*, WASH. POST, July 10, 1991, at A4 [hereinafter Gellman, *Senate Panel*]; Rowan Scarborough, *Bias Feared in Panel on Women in Combat*, WASH. TIMES, Oct. 6, 1991, at A3; Rowan Scarborough, *Navy Pregnancies Raise Readiness Issue*, WASH. TIMES, Oct. 25, 1991, at A1 [hereinafter Scarborough, *Navy Pregnancies*].

Congress' ineffectual response is to present the issue to the Supreme Court.

Using the combat exclusion issue as an example, this Note evaluates two important jurisprudence issues: whether the Supreme Court's "absolute deference" to Congress in military constitutional claims adversely affects judicial review; and whether, on certain issues, the political question doctrine offers a better alternative to the principle of deference. Part I of this Note discusses the combat exclusion issue, its justifications, and its critiques.[10] Part II examines major military-related gender discrimination cases decided by the Supreme Court and distinguishes the issues in those cases from the combat exclusion issue.[11] Part III analyzes both the principle of deference, which the Court grants to Congress on military matters, and the political question doctrine. This section argues that the latter applies to the combat exclusion issue and concludes that, if faced with this issue, the Court should decline review under the political question doctrine.[12]

I
EXAMINING COMBAT EXCLUSION LAWS AND POLICIES

A. Background of Combat Exclusion Laws and Policies

Although women have served in the military since the Revolutionary War, their numbers were quite low until World War II.[13] During World War II, Congress established the Women's Army Auxiliary Corps (WAAC), Women Accepted for Voluntary Emergency Service (WAVES), and "Semper Paratus, Always Ready" (SPARs) to compensate temporarily for the manpower shortage in the military.[14] Three hundred fifty thousand female volunteers served in the fields of "health care, administration, and communications."[15]

After the war, Congress responded to lower male enlistments and the impending dissolution of the WAC[16] by enacting the Wo-

10 *See* discussion *infra* part I.

11 *See* discussion *infra* part II.

12 *See* discussion *infra* part III.

13 *See* MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY 4-7 (1977).

14 *See id.* at 7; *see also* George H. Quester, *The Problem*, *in* FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS? 217, 219 (Nancy L. Goldman ed., 1982) [hereinafter FEMALE SOLDIERS] ("Moves were thus made to establish women's auxiliary services for each of the military services. . . . [T]he initial move entailed less than full membership in the military for females . . . .").

15 *See* BINKIN & BACH, *supra* note 13, at 7.

16 *See id.* at 10; Quester, *supra* note 14, at 219.

men's Armed Services Integration Act of 1948.[17] The Act accomplished four things. First, it gave women permanent status in the military.[18] Second, it established that women could constitute two percent of all enlisted personnel, and it limited the number of female officers to ten percent of the total female enlisted strength.[19] Third, it stipulated that commanders could not promote female officers above the grade of 05 (Lieutenant Colonel or its equivalent).[20] Fourth, it limited women's role in the military by excluding women from combat duties, combat units, and combat ships.[21] The Act allowed each branch of service considerable leeway in determining which assignments it would categorize as "combat" or "combat-support."[22]

At the Army's request, Congress did not subject it to the combat exclusion laws.[23] Instead, the Act stated that "[t]he Secretary of the Army shall prescribe the military authority which commissioned officers of the Women's Army Corps may exercise, and the kind of military duty to which they may be assigned."[24] The Army opposed restrictions on the assignment of female soldiers until it was certain how it was going to utilize them.[25] In 1979, the Army dissolved the WACs and implemented its own combat exclusion policy, which restricts women to combat-support assignments.

The Armed Forces have had considerable difficulty in defining combat.[26] The definition of "combat" is important because the

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17 Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

18 *Id.* §§ 101, 201, 301, 62 Stat. at 356, 363, 371.

19 *Id.* §§ 102, 202, 302, 62 Stat. at 357, 363, 371 (repealed 1967).

20 *Id.* §§ 104(d)(3), 203, 303(d)(4), 62 Stat. at 357, 363-64, 371.

21 *Id.* §§ 101, 201, 301, 62 Stat. at 356, 363, 371.

22 *See, e.g., id.* § 307(a), 62 Stat. at 373

> The Secretary of the Air Force shall prescribe the military authority which female persons of the Air Force may exercise, and the kind of military duty to which they may be assigned: *Provided*, That they shall not be assigned to duty in aircraft while such aircraft are engaged in combat missions.

Id.

23 *See* BINKIN & BACH, *supra* note 13, at 26. At the Senate Hearings on the combat exclusion laws, the Army argued that

> [w]hile it is War Department policy to limit the utilitization of women in the Army to noncombat jobs, it is impossible for the War Department to outline combat areas in the future since the experts advise that modern warfare makes the entire United States vulnerable as a combat area in the future.

Id. (quoting *Women's Armed Services Integration Act of 1947, Hearings Before the Senate Armed Services Committee*, 80th Cong., 1st Sess. 88 (1947)).

24 Women's Armed Services Intergration Act, § 509A(g), 62 Stat. at 359.

25 *See* BINKIN & BACH, *supra* note 13, at 26-27.

26 *See* Jill L. Goodman, *Women, War, and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S RTS. L. REP. 243, 258 (1980) (stating that even after the Secretary of Defense provided a definition for combat, "the term was useless in discussions

scope of the definition correlates to the opportunities available to women in the military. The definitions that the Armed Forces offers do not address what combat *is*, but rather describes *where it takes place*.[27] In 1978, Congress requested that the Department of Defense (DOD) formulate a definition of "combat" in order to reevaluate the role of women in the military.[28] DOD's definition of "close combat" included the probability of three components: engaging the enemy, coming into direct contact with the enemy, and risking capture by the enemy.[29]

The Armed Forces effectively constrict the use of women in the military.[30] This is accomplished in several ways. For example, the Armed Forces exclude women from assignments that they classify as "combat-related."[31] They also exclude women from noncombat assignments that they designate as "high risk." In 1988 the DOD adopted the Risk Rule in an effort to facilitate the Armed Services' occupational classifications, which are used to exclude women from noncombat positions. This rule is based on the level of risk involved in certain assignments.[32] The Risk Rule was considered a type of "balancing test based on the type, degree, and duration of certain risks."[33] The rule stated that the "[r]isks of direct combat, exposure to hostile fire, or capture are proper criteria for closing *non-combat positions or units* to women, when the type, degree, and duration of such risks are equal to or greater than the combat units."[34]

In addition to the use of classifications, the Armed Forces exclude women by reserving for men a certain number of noncombat assignments based on the following rationales: to provide a "mobil-

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about opportunities for women in the service"); Lori S. Kornblum, *Women Warriors in a Men's World: The Combat Exclusion*, 2 LAW & INEQ. J. 351, 358 (1984) (pointing out that none of the military branches have tried to "define [combat] uniformly . . . and to categorize jobs accordingly").

27 *See* Goodman, *supra* note 26, at 258; Kornblum, *supra* note 26, at 359.

28 *See* Department of Defense Appropriation Authorization Act, Pub. L. No. 95-79, § 303, 91 Stat. 327 (1978).

29 *See* Kornblum, *supra* note 26, at 359.

30 *See* Wayne E. Dillingham, *The Possibility of American Military Women Becoming Prisoners of War: Justification for Combat Exclusion Rules?*, 37 FED. BAR NEWS & J. 223, 225 (1990) ("By far, the more restrictive of these limitations have been and continue to be those imposed as a matter of policy rather than law.").

31 10 U.S.C. §§ 8549, 6015.

32 Each branch of the Armed Forces classifies its occupations and designates jobs as combat or combat support. *See* DEPARTMENT OF DEFENSE, MILITARY WOMEN IN THE DEPARTMENT OF DEFENSE vi (1988) [hereinafter MILITARY WOMEN].

33 Dillingham, *supra* note 30, at 225.

34 *Id.* at 225 (quoting MEMORANDUM FROM THE ASSISTANT SECRETARY OF DEFENSE FOR FORCE MANAGEMENT AND PERSONNEL TO THE SECRETARY OF THE AIR FORCE (Feb. 25, 1988)) (emphasis added).

ization base for wartime,"[35] to account for "housing limitations,"[36] to maintain a proper rotation for sea-to-shore duty,[37] and "to ensure that the men are provided equitable promotion and assignment opportunities."[38] This policy, in combination with other restrictions such as more stringent recruitment standards for women, allows the Armed Forces to exclude women from many of the noncombat jobs that they are otherwise eligible to perform.[39]

B. Contemplating the Combat Exclusion Rules

The concept of women in combat is subject to much controversy. Many law review articles, books, and editorials have examined the issue.[40] The issue pits feminists against exclusionists,[41] soldiers against soldiers,[42] and even women against women.[43] Combat exclusion is one of the leading topics in political and social debate for several reasons. First, gender discrimination in employment remains a national problem, and the military is one of the nation's largest employers. In many ways, the Armed Forces offer

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35 *See* BINKIN & BACH, *supra* note 13, at 23.

36 *Id.*

37 *Id.* at 25.

38 *Id.* at 28.

39 *See* BINKIN & BACH, *supra* note 13, at 30. "Contrary to widely held beliefs, the major restrictions on the recruitment and functions assigned to women in the United States military establishment are not explicitly incorporated in federal law. . . . More limiting are the set of policies established by the military services . . . ."

40 *See generally* G. Sidney Buchanan, *Women in Combat: An Essay on Ultimate Rights and Responsibilities*, 28 HOUS. L. REV. 503 (1991) (arguing that the combat exclusion laws are unconstitutional); Dillingham, *supra* note 30, at 223 (evaluating whether the possibility of women becoming prisoners of war justifies the combat exclusions rules); Elizabeth V. Gemmette, *Armed Combat: The Women's Movement Mobilizes Troops in Readiness for the Inevitable Constitutional Attack on the Combat Exclusion for Women in the Military*, 12 WOMEN'S RTS. L. REP. 89 (1990) (contrasting various feminists' views regarding women in the military and the combat exclusion rules); Goodman, *supra* note 26, at 243 (demonstrating how the combat exclusion rules generate sexual discrimination in the military); Kornblum, *supra* note 26, at 351 (examining the combat exclusion rules and demonstrating how the justifications for the rules are invalid); Jeanne M. Lieberman, *Women in Combat*, 37 FED. BAR NEWS & J. 215 (1990) (discussing the role of women in the military and evaluating the possibilities for change).

41 "Exclusionists," as Paul Roush defines them, are "those who want to exclude military women from assignment to combat units." Paul E. Roush, *The Exclusionists and Their Message*, 39 NAVAL L. REV. 163 (1990) (presenting and critiquing exclusionists' claims). Other commentators refer to supporters of combat exclusion as traditionalists.

42 *See, e.g.*, Ron Martz, *Skirmishes in the Military: Former WACs Divided over Ban on Combat*, CHICAGO TRIB., May 31, 1992, at 5; Eric Schmitt, *Ban on Women in Combat Divides Four Service Chiefs*, N.Y. TIMES, Jun. 19, 1991, at A16.

43 *See, e.g.*, Gemmette, *supra* note 40, at 90, 91 (discussing the different positions among feminists concerning various issues among women in combat. Some feminists argue that the military should recoguize sex-based differences. However, other feminists, such as assimilationists, disagree.); *see also* Jeff M. Tuten, *The Argument Against Female Combatants*, *in* FEMALE SOLDIERS, *supra* note 14, at 237, 252-54 (arguing that on some issues regarding women in combat "feminists themselves are divided").

women exceptional opportunities not easily matched in the civilian world. For example, it provides women with opportunities to train for careers that were traditionally male-dominated.[44] The military also provides equal pay for equal work. In addition, veteran's preference, achieved through military service, helps women obtain civil service jobs usually reserved for men.[45]

Second, the public always has considered combat service an honor. Movies, novels, political speeches, and art have idolized combat service.[46] Jill Goodman writes that "according to popular conceptions about war, combat more than tests men; it tests them under conditions at once compelling, exciting, and glamorous. The vast literature on war attests to the fascination of combat . . . ."[47]

Third, the opportunity to serve in combat relates to political privilege. Many have equated women's exclusion from combat to the discrimination African-Americans once experienced.[48] For example, in *Dred Scott v. Sandford*,[49] Justice Taney reasoned that blacks were not citizens because, in part, they could not serve in combat. Although the Constitution recognizes women as citizens, opponents of combat exclusion argue that political and social equality must involve equal opportunity to serve one's country. Thus, "military service is a means of establishing full political rights as well as an essential political right in itself."[50]

Fourth, the combat exclusion issue directly relates to women's struggle for equal rights.[51] Exclusionists argue that feminists use "the military [as] their battlefield" in order to obtain equality.[52]

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44 *See, e.g.*, Patricia A. Gilmartin, *Women Pilots' Performance in Desert Storm Helps Lift Barriers in Military, Civilian Market*, AVIATION WEEK & SPACE TECH., Jan. 13, 1992, at 63 ("Expanded participation by women in nontraditional, combat flying roles would prove that women can be successful in all aspects of aviation. It also would boost their career prospects, since many airlines still prefer pilots with military training.").

45 *See* Buchanan, *supra* note 40, at 511-12; Goodman, *supra* note 26, at 245.

46 *See* Goodman, *supra* note 26, at 255.

47 *Id.*

48 *Id.* at 246; *see* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 525 (1991).

> Achieving full citizenship for women in America is going to require a lot more than ending the exclusion of servicewomen from combat positions, but those two goals are interrelated. As Frederick Douglass and W.E.B. DuBois understood, the long-standing connection between military service and full citizenship has centered not on uniforms but on weapons.

Id.

49 60 U.S. (19 How.) 393, 420 (1857).

50 *See* Goodman, *supra* note 26, at 247.

51 *See* Kornblum, *supra* note 26, at 378 ("The combat exclusion affects all women. It reinforces women's political powerlessness in many different ways."); *see also* Goodman, *supra* note 26, at 257 ("The combat restrictions are the cornerstone of the military's discriminatory policies. Were the prohibitions on women in combat removed, the entire system of unequal treatment would probably fall.").

52 Roush, *supra* note 41, at 168.

They further contend that the combat exclusion issue is not about equal opportunity but about national security.[53] Exclusionists argue that women's integration into combat service threatens that security.[54] In contrast, feminists argue that the Armed Forces and exclusionists use the combat exclusion issue as a means to preserve the inequality of women in the military.[55] According to feminists, this issue implicates the following theories that serve to reinforce traditional stereotypes: that men need to protect women, that women cannot be the aggressors, and that women's proper place is in the home.[56]

C. Combat Exclusion Rules: Discrimination Against Both Sexes

Combat exclusion discriminates against women both occupationally and economically. The military system treats men and women equally in terms of pay. As women climb the ranks, however, they experience a "glass ceiling" similar to that experienced by women in the corporate world.[57] For example, many of the low-ranking officer and enlistment promotions are automatic and determined by length of service. However, promotions to higher ranks, such as noncommissioned officers (E-5 to E-9) and command of-

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53 *Id.*

54 *See, e.g.*, Tuten, *supra* note 43, at 248 ("Equal opportunity on the battlefield spells defeat."); Jean Yarbrough, *The Feminist Mistake: Sexual Equality and the Decline of the American Military*, 38 POL'Y REV. 48, 52 (1985) (arguing that when equal opportunity is "applied to military affairs, it is wrong and dangerous.").

55 *See* Buchanan, *supra* note 40, at 544-45; Goodman, *supra* note 26, at 250-51; Kornblum, *supra* note 26, at 378-82.

56 *See, e.g.*, Buchanan, *supra* note 40, at 543; Goodman, *supra* note 26, at 260-64; Michael Gordon, *Military Chiefs Report Plans to Curb Sexual Harrassment*, N.Y. TIMES, July 31, 1992, at A10 (demonstrating the protective nature of the top military leaders towards women when discussing women in combat. General McPeak stated "I have a very traditional attitude about *wives* and *mothers* and *daughters* being ordered to kill people." Similarly General Mundy said that combat is "something that [he] would not want to see women involved in.") (emphasis added); Francis Hamit, *Soldier Girl: Is Her Future in Combat?*, DEF. NEWS, Sept. 17, 1990, at 31 ("[T]he issue is more dependent upon cultural perceptions and politics than on whether women can do the jobs required in a combat environment."); Kornblum, *supra* note 26, at 385-90; *see also* United States v. Saint Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) (rationalizing why Congress did not include women in MSSA, the court noted that "Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women *keep the home fires burning*") (emphasis added).

57 *See* Lieberman, *supra* note 40, at 215. Lieberman discusses the plight of the female soldier:

> [I]f she is ambitious, the Army opportunities begin to closely parallel the civilian ones. The number of women who climb the corporate ladder beyond the intermediate rungs (and the price they pay) is not far removed from the number of military women who greatly advance in rank (and the price they pay).

Id.

ficers (O-4 to O-9), are based on a composite of factors: leadership skills, test scores, and supervisors' recommendations.[58] Deciding who gains access to these high-ranking positions involves more subjectivity. It is at this career stage that women find that the lack of combat experience acts as a hindrance to their military futures by limiting their opportunities for advancement.[59] The Supreme Court recognized this disadvantage in *Schlesinger v. Ballard*.[60] Although the Court acknowledged that a different promotional track for women existed, it ruled that the Navy's policy did not violate the Equal Protection Clause because female and male lieutenants were not similarly situated.[61] Justice Stewart, writing for the majority, reasoned that:

> in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. . . . Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."[62]

Due to combat exclusion, female officers suffer a related occupational disadvantage in that they often have little opportunity to engage in military decisionmaking.[63] This lack of opportunity affects both female soldiers' credibility with their peers and their chances for recognition by their superiors.[64] By denying women the chance to participate in combat, the military is effectively denying female soldiers the chance to prove themselves.

A closely related disadvantage is that when the military denies female soldiers an opportunity to demonstrate their abilities, it forces them into a stereotype that they cannot disprove.[65] Argnments that women are not effective leaders, that they are not aggres-

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58 *See* MILITARY WOMEN, *supra* note 32, at 29-31, 46.

59 *See, e.g.*, Gordon, *supra* note 56, at A10 (quoting General McPeak, "[combat exclusion] works to their disadvantage in a career context."); *see also* Barbara Kantrowitz, et al., *The Right to Fight*, NEWSWEEK, Aug. 5, 1991, at 22.

60 419 U.S. 498 (1975).

61 *Id.* at 506.

62 *Id.* at 508 (citation omitted).

63 *See, e.g.*, Kornblum, *supra* note 26, at 379.

64 *See* Lieberman, *supra* note 40, at 215 (Women are "seriously restricted in [their] career credibility, [they have] no voice in this major decision about [their] qualifications, capabilities, and potential.").

65 *See* Buchanan, *supra* note 40, at 544. "[E]xclusion of women from combat positions and the draft reinforces the 'us-them dichotomy' between men and women. The exclusion reinforces 'traditional, often inaccurate, assumptions about the proper roles of men and women' in society." (quoting Mississippi Univ. of Women v. Hogan, 458 U.S. 718, 726 (1982) (O'Connor, J.)).

sive soldiers, or that they are sexual objects will remain unchallenged as long as the combat exclusion rules exist.

Economically, the combat exclusion rules deny women the opportunity to earn more money because they cannot rise through the ranks at the same rate as their male counterparts.[66] Because the length of service and the grade of rank determine military pay, women on the whole are destined to earn less than men.

Combat exclusion affects women's potential earnings outside of the military as well. For example, because the Armed Forces do not allow women to join in the same numbers as men, male veterans continue to outnumber female veterans substantially. As the dissent states in *Personnel Administration of Massachusetts v. Feeney*,[67] veteran's preference disadvantages females disproportionately when competing for goverumental jobs.[68] In addition, due to their lower numbers as veterans, women are less likely to be eligible for the many benefits that the government allots to veterans, such as educational assistance, loans, and medical and insurance benefits.[69]

The combat exclusion rules also discriminate against men. Because of the rules, only men bear the burden of fighting wars, thus possessing the greater risk of being killed, maimed, or captured. Similarly, the military drafts only men in times of war.[70] Men often have argued that this burden is unfair.[71] For example, several men

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66 The Department of Defense noted that promotions were based on the following factors: "inventory status (by grade, specialty or *experience level*), resource constraints and legislative or Defense guidance." MILITARY WOMEN, *supra* note 32, at 72 (emphasis added).

67 442 U.S. 256 (1979). Justice Marshall argues, in his dissent, that:

> the impact of the Massachusetts statute on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative.

Id. at 283 (Marshall, J., dissenting) (citations omitted).

68 *See, e.g.*, Goodman, *supra* note 26, at 245 ("Veteran's preference in public employment gives veterans at least an edge and often an easy victory in the competition for civil service jobs.").

69 *Id.* at 245.

70 *See* Rostker v. Goldberg, 453 U.S. 57 (1981); Buchanan, *supra* note 40, at 508-09; Kornblum, *supra* note 26, at 382-83. Kornblum writes that:

> The combat exclusion [rule] unfairly burdens men as a group. . . . For example, in the event of a military draft, even men who believe in nonviolent conflict resolution and abhor militaristic values would be pressured to fight. Conversely, even women who wish to fight would be excluded from a draft and from combat. Men who do not wish to fight would suffer, solely because they are men, if they refuse to participate in the military or in combat.

Id. at 382.

71 Men have opposed recent changes in the combat exclusion rules because such changes allow women, unlike men, to *choose* whether they want combat roles. These men

have brought lawsuits in which they claim that involuntary registration and induction violated their rights under the Equal Protection Clause.[72]

D. Justifications for the Combat Exclusion Rules

The combat exclusion rules have two main justifications: the need to maintain national security and the need to protect women. Exclusionists criticize feminists and "opportunistic" female officers for promoting the concept of women in combat as a means for securing equal rights for women while ignoring the countervailing issue of national security.[73] For exclusionists, combat exclusion rules are not about equal opportunity but about national security.[74] Exclusionists see women in combat as "an unprecedented social experiment with alarming potentially disastrous effects on national security."[75] They believe that women in combat would adversely affect national security by decreasing combat effectiveness.

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have little sympathy for the arguments that opponents of the combat exclusion rules propose. One male responded that:

> [p]revious wars have shown—through conscription—that killing, in terms of combat, is more a matter of those who have to kill as opposed to those who want to kill. Thus, for all the killing that [opponents to combat exclusion want] to see other women volunteer for, why are young American men still vulnerable to the draft?

L.A. TIMES, Aug. 10, 1991, at B5.

72 *See, e.g.*, United States v. Dorris, 319 F. Supp. 1306, 1308 (W.D. Pa. 1970) (responding to the defendant's argument that the Military Selective Service Act (MSSA) was discriminatory in that it excepted females, the court applied the compelling governmental interest test and held that the government had a compelling interest to "maximize efficiency and minimize expense of raising an army") (quoting United States v. Fallon, 407 F.2d 621, 623 (7th Cir. 1969)); United States v. Cook, 311 F. Supp. 618, 622 (W.D. Pa. 1970) (holding that the classification was rationally related to the government's interest in "establish[ing] and maintain[ing] armed forces of males which may at least physically be equal to the armed forces of other nations, likewise composed of males, with which it must compete."); United States v. Saint Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) (ruling that the MSSA was constitutional because the classification was rationally related to its goal of maintaining an effective fighting force).

73 *See, e.g.*, Tuten, *supra* note 43, at 263 ("[C]ombat readiness should take priority over feminist desire for full equality even on the battlefield."); Yarbrough, *supra* note 54, at 50 ("Pressure for change comes most from the female junior officers whose careers are most directly affected by the combat exclusion policy.").

74 *See* Roush, *supra* note 41, at 169-70; Tuten, *supra* note 43, at 261.

> If the primary purpose were to provide jobs on an equal opportunity basis, then the answer would be to press on and grant women full warrior status. But, the primary function of the U.S. armed services is to provide for the common defense—not to redress perceived social and sexual inequalities in our society. More bluntly—*the primary function of the military service is to defend American society, not to change it.*

Id.

75 Phyllis Schlafly, *Women in Military Combat? What it Means for American Culture and Defense*, HERITAGE FOUND. REP., June 3, 1991, at 109; *see* Tuten, *supra* note 43, at 261 ("To the extent that we use the military as a testbed for social experimentation we risk the security of the nation.").

1. *Physical Requirements*

In arguing that women in combat would adversely affect combat readiness, exclusionists cite three gender-related biological differences: lowered physical capabilities,[76] pregnancy,[77] and menstruation.[78] First, they believe that women are weaker than men,[79] and thus are unable to perform the rigorous duties of a conventional combat soldier.[80] Second, exclusionists argne that women's reproductive capabilities would affect their ability to perform as combat soldiers. "Lost time is an important aspect of the whole readiness issue. The exclusionists like to talk about pregnancy and single parenting as prime sources of lost time."[81] Menstruation and pregnancy, they argue, have no place on the battlefield.[82]

Opponents of combat exclusion rules challenge these arguments. First, they claim that, while physical strength is important, describing combat in terms of rigorous hand-to-hand combat is no longer accurate.[83] They reason that because contemporary weapons are more technical, soldiers utilize their mental skills more than their physical skills.[84] Second, opponents of combat exclusion argue that physical differences between genders do not justify excluding *all* women from combat, especially if *some* women can improve their strength through physical conditioning.[85] Third, opponents to

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76 *See, e.g.*, Roush, *supra* note 41, at 163-64; *see also* Tuten, *supra* note 43, at 248 (arguing that women's lowered physical capabilities alone are enough to exclude women from combat).

77 *See, e.g.*, Roush, *supra* note 41, at 167; *see also* Yarbrough, *supra* note 54, at 52 (suggesting that pregnancy "creates problems of lost time, child care, and deployability.").

78 *See, e.g.*, Gemmette, *supra* note 40, at 91-92 (discussing premenstrual stress syndrome).

79 According to a background study by the Office of the Assistant Secretary of Defense, "[w]omen have about 67% of the endurance of men and 55% of the muscular strength of men." OFFICE OF THE ASSITANT SECRETARY OF DEFENSE, USE OF WOMEN IN THE MILITARY 26 (2d ed. 1978) [hereinafter USE OF WOMEN].

80 Gemmette, *supra* note 40, at 92-93; *see* Kornblum, *supra* note 26, at 409-10; Roush, *supra* note 41, at 163-64; Tuten, *supra* note 43, at 247-51.

81 Roush, *supra* note 41, at 167.

82 *See, e.g.*, Schlafly, *supra* note 75, at 108 ("Pregnancy and motherhood are simply not compatible with military service. It is wrong to pretend that a woman who is pregnant or has a baby is ready to ship out to fight war. She is not ready, and she should not be paid as though she were ready."); Tuten, *supra* note 43, at 251 (suggesting that some women would intentionally get pregnant to avoid deployment).

83 *See* Kornblum, *supra* note 26, at 410-14.

84 *See, e.g.*, Elaine T. May, *Women in the Wild Blue Yonder*, N.Y. TIMES, Aug. 7, 1991, at A21 ("[T]hese women would be flying planes, not lifting them. And with sophisticated weaponry, women can push the buttons to drop the bombs as easily as men can."). *But cf.* Yarbrough, *supra* note 54, at 52 ("[V]ictory will depend more on traditional infantry stamina than sophisticated weapons.").

85 *See, e.g.*, Kornblum, *supra* note 26, at 415-16 (arguing that the military should focus on training women effectively instead of noting female soldiers' deficiencies without proper training). *But cf.* Tuten, *supra* note 43, at 247 ("It should be noted that . . .

the rules stress that arguments based on disparities in physical strength are less convincing when focusing on mixed crews comprised of male and female soldiers.[86] Fourth, opponents respond to exclusionists' concerns about female reproductive capabilities by arguing that it is unfair to deny *all* women the opportunity to engage in combat because *some* women get pregnant while in service.[87] In response to the lost time issue, opponents argue that pregnant female soldiers are absent for only a short period of time, and, on average, male soldiers are more apt to be absent than women.[88] For example, the Department of the Navy reported that male soldiers were absent from duty almost twice as often as female soldiers.[89]

2. *Psychological Requirements*

In terms of psychological differences, exclusionists seek to justify the combat exclusion rules by argning that women do not have the capacity to be aggressors.[90] In order to be an effective combat soldier, they argue, one must not only defend oneself, but also attack one's enemy.[91] Women, according to exclusionists, thrive on caring and nurturing; it is against their moral make-up to kill people.[92] Exclusionists also argue that because women are unable to handle pressure as well as men, they would shrink from their duty in

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male physical advantages are genetic—no amount of physical conditioning will change them.").

86 *See* Gemmette, *supra* note 40, at 93. ("It might be presuasive to de-emphasize the differences between men and women and instead emphasize the usefulness of the reciprocity of different skills provided by mixed crews."). *But cf.* Yarbrough, *supra* note 54, at 51 ("Although it is true that many military tasks require teamwork rather than virtusio displays of physical strength, it is not so clear that men will cooperate with women as readily as men.").

87 *See* Marily A. Gordon & Mary J. Ludvigson, *The Combat Exclusion for Women Aviators: A Constitutional Analysis*, 39 NAVAL L. REV. 171, 181 (1990). *But see* Gemmette, *supra* note 40, at 91 (noting that feminists are divided on the pregnancy issue: some recognize that there are major concerns that could affect the military's decision to allow women in combat, and others do not believe that the pregnancy issue should exclude all women from combat).

88 *See* USE OF WOMEN, *supra* note 79, at 28 ("Even though pregnancy is the major cause of lost time among women, they lose, on the average, only about half as much time as men.").

89 *See* BINKIN & BACH, *supra* note 13, at 62-64.

90 *See* Roush, *supra* note 41, at 166-67 (describing exclusionists' concerns). *See also* Tuten, *supra* note 43, at 254-55 (suggesting that aggressiveness might be linked to cultural conditioning or to male hormones. "That the male of the species is more combative is a fact of life in contemporary society. . . . Even if female submissiveness is nongenetic and nonchemical . . . the fact remains that women are less aggressive.").

91 *See, e.g.*, Tuten, *supra* note 43, at 255 ("[C]ombativeness and aggressiveness are necessary traits in the combat soldier.").

92 *See, e.g.*, May, *supra* note 84, at A21.

> The combat barrier somehow seems different, more ominous than other rights gained by women. Not because it marks the invasion of women into one of the few remaining bastions of masculinity, but because it

stressful situations.[93] They theorize that women would lose their composure on the battlefield and either break down and cry or abandon their posts.[94] Combat effectiveness would be diminished because male soldiers would have to compensate for female soldiers.[95] According to Paul Roush, Brian Mitchell, a well-known exclusionist, believes that women in combat are "psychologically unfit. They are not as aggressive as men. They are less daring. They are better suited for the more tedious, routine tasks—tasks that require little imagination."[96]

Opponents argue that, in modern warfare, face-to-face combat is obsolete since most soldiers are miles away from their targets when an attack begins.[97] In addition, they claim that exclusionists' theories are generalizations based on societal conceptions of the proper role of women.[98] None of the theories have actually been substantiated. In fact, studies show that women perform well in mock combat battles.[99] Finally, opponents argue that men are also susceptible to battle stress.[100] In past wars, military doctors have treated combat soldiers suffering from shell shock—post-traumatic stress disorders (PTSD).[101] For example, during the Vietnam War, the military reported PTSD in record numbers.[102]

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threatens what is perhaps the sole surviving gender myth of the 20th century: that women are the world's nurturers.

Id.

93 *See* Goodman, *supra* note 26, at 261; Gordon & Ludvigson, *supra* note 87, at 181; *see also* Tuten, *supra* note 43, at 252 (arguing that, since it is impossible to simulate combat stress, integration of women risks impeding combat effectiveness).

94 Exclusionists point to an incident during the Panama invasion to illustrate the "typical female emotional state." During the invasion, two female truck drivers, whose duties were to transport troops into combat zones, were relieved of their posts when they suffered breakdowns. *See* Robert H. Knight et al., *Women in Combat: Why Rush to Judgment*, HERITAGE FOUND. REP., June 14, 1991, *available in* LEXIS, Nexis Library, Currnt File.

95 *See* Yarbrough, *supra* note 54, at 50 (noting that when male soliders compensate for female soldiers it leads to lower morale because of resentment).

96 Roush, *supra* note 41, at 163 (paraphrasing BRIAN MITCHELL, WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY 188 (1989)).

97 *See* Gordon & Ludvigson, *supra* note 87, at 181-82; Kornblum, *supra* note 26, 406-08; Roush, *supra* note 41, at 164-65.

98 *See* Kornblum, *supra* note 26, at 407 ("Finally, even if women were not aggressive enough, their lack of aggression is due more to social and cultural conditioning than innate characteristics.").

99 *See* U.S. ARMY RESEARCH INSTITUTE FOR THE BEHAVORIAL AND SOCIAL SCIENCES, WOMEN COMBAT IN UNIT FORCE DEVELOPMENT TEST (1977); WOMEN CONTENT IN THE ARMY—REFORGER 77; STUDY (REF-WAC 77) AND EVALUATION OF WOMEN IN THE ARMY (EWITA) STUDY (1977).

100 *See* Lieberman, *supra* note 40, at 219.

101 *See id.* at 219.

102 *Id.*

3. *Cohesion*

Exclusionists argue that women would adversely affect national security by disrupting the much needed cohesion in a combat unit.[103] Male soldiers value the "nonerotic psychological bonding"[104] that exists between their squads or platoons. This bonding instills a measure of loyalty within combat soldiers that a woman's presence, exclusionists contend, would disrupt. In peacetime, this disruption would be a nuisance, but in wartime, it could impede the performance of a combat unit.[105]

According to exclusionists, if the Armed Forces were to allow women into combat units, cohesion would be adversely affected in three ways. First, sexual attraction between male and female soldiers would interfere with the bonding of a unit, thereby destroying group cohesion.[106] Due to sexual integration, men would no longer develop bonding relationships; instead, they would view themselves as rivals in a sexual contest.[107] The end result, exclusionists conclude, is that the unit would perform less efficiently.[108] To illustrate, exclusionists point to the Persian Gulf War media reports of incidents of prostitution by female soldiers[109] and pregnancies aboard the mixed-crew ship Arcadia.[110]

Second, exclusionists argue that the differences in treatment between male and female soldiers would destroy the bonding of a combat unit. Bonding, they claim, is created through uniformity—

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103 *See* Kornblum, *supra* note 26, at 420-25; Roush, *supra* note 41, at 166-67; Laurie J. Sanderson-Walcott, *The Army's Combat Exclusion: An Update*, 16 W. ST. UNIV. L. REV. 665, 672 (1989).

104 *See, e.g.*, Roush, *supra* note 41, at 166; *see also* Kirk Spitzer, *Male Bonding, Ground Combat: Are Women Up to it?*, GANNETT NEWS SERV., July 5, 1992, *available in* LEXIS, Nexis Library, Currnt File (quoting Maj. Gen. Gene Deegan saying that "many of the factors that lead to success on the battlefield are intangible and difficult to quantify. The most important of those characteristics . . . is the 'bonding' that occurs between infantrymen who share the hardships . . . .").

105 *See, e.g.*, Knight et al., *supra* note 94 (examining the historical significance of Israeli's experience with women in combat and concluding that "[m]en moved to protect the women members of the unit instead of carrying out the mission of the unit.").

106 *See, e.g.*, Brian Green, *Women in Combat: The Question Isn't If They'll Be Shot At—It's Whether They Can Shoot Back*, AIR FORCE MAG., June 1990, at 76 ("Would the presence of women in a predominantly male combat unit undercut its cohesion and therefore its performance? Traditionalists say yes, arguing that social relationships between men and women would create jealousies and sexual tensions.").

107 *See, e.g.*, Gemmette, *supra* note 40, at 93 ("sexual attraction between men and women is as likely to destroy camaraderie as it is to produce constant dissention among men in a group.") (quoting Seth Cropsey, *Women in Combat?*, 61 PUB. INTEREST 58, 72 (1980)).

108 *See, e.g.*, BINKIN & BACH, *supra* note 13, at 90 (arguing that integrating women in units "with a machismo image" might "disrupt[] group cohesion and, hence, combat effectiveness").

109 *See* Kantrowitz, *supra* note 59, at 23.

110 *Id.*

soldiers experiencing *similar* situations under *similar* conditions. They contend that "[e]ven the smallest difference . . . disrupts the bonding that's needed to survive in battle."[111]

Third, exclusionists believe that women "do not bond with one another or with men."[112] Their concern is that, by integrating women into combat units, men would lose their ability to bond.[113] They believe that female soldiers' presence in a combat unit would "destroy[] the possibility of bonding for the men and lead[] to physic emasculation, stifling of masculinity, and even sterilization of the whole process of combat leadership."[114]

In response, opponents of combat exclusion argue that similar occupations, such as policemen or firemen, have mixed units and still perform effectively.[115] That is, the presence of women does not always disrupt group cohesion. If a lack of bonding exists, they argue that it is not female soldiers' incapacity to bond but male soldiers' perceptions about female soldiers that lead to the destruction of camaraderie between men and women.[116] Combat exclusion instills a belief that women are not equal to men. This inequality leads to disrespect and resentment of women that often leads to overt hostility.[117] The recent Tailhook scandal illustrates this phenomenon. One of the most disturbing aspects of the scandal was that many of the sailors participating believed that "drunken gangs . . . shov[ing] terrified women down the gauntlet, grabbing at their breasts and buttocks and stripping off their clothes"[118] constituted "acceptable social conduct."[119]

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111 Spitzer, *supra* note 104.

112 *See* Roush, *supra* note 41, at 166.

113 *See id.* at 166-67.

114 *Id.* at 166 (describing exclusionists' views about women in combat units).

115 *See, e.g.*, BINKIN & BACH, *supra* note 13, at 91 ("It is becoming increasingly difficult . . . to reconcile this hypothesis [about women destroying male bonding] with the mounting evidence of women's prominent role in terrorist and guerrilla groups, in which strong patterns of male-bonding would be expected to exist."); Gemmette, *supra* note 40, at 94 ("Evidence tends to show that this is not the case in sexually integrated police forces.").

116 *See, e.g.*, Kornblum, *supra* note 26, at 424 ("As long as leaders continue to emphasize women's presumed weaknesses and as long as men relate male sexuality to men's domination of women, military men will continue to compete against military women to the detriment of men's combat effectiveness. This problem is *men's* problem, not *women's*.") (emphasis added).

117 *See* Eric Schmitt, *Wall of Silence Impedes Inquiry into a Rowdy Navy Convention*, N.Y. TIMES, June 14, 1992, at A1.

118 *Id.*

119 *Id.*

4. *Economics*

Exclusionists also offer economic justifications for the combat exclusion rules. First, they argue that including women in combat units would be costly because the military would have to modify facilities, such as ships and barracks, in order to provide privacy for the soldiers.[120] The military would also have to modify equipment in order to accommodate women. Currently, the military desigus their equipment based on the average "anthropometric dimensions" of a male soldier.[121] Exclusionists argue that adaptions could be very expensive because "[s]eemingly minor variations of a few centimeters in the essential dimensions . . . may be critical determinants in the efficient and safe usage of vehicles and vehicular subsystems, controls, instrument panels, displays, etc. and in the adequate accommodation of some clothing and protective gear."[122]

Second, exclusionists believe that the cost incurred in training women will be ill-spent.[123] They argue that the military trains women at great expense only to have them leave the military service, either because of pregnancy or a desire to capitalize on their newly acquired skills in the civilian world.[124]

Third, exclusionists argue that since the military is downsizing, expanding women's role is not cost effective. They contend that because men make the "better soldier," providing quotas for women into combat positions would not be in the best interest of the military.[125] California Representative Robert Dornan "predict[ed] that coming cuts in the size of the U.S. military will doom any expansion of women's roles."[126]

Opponents of the combat rules counter that any additional costs associated with changing facilities would be reflected in one-time expenditures and would not constitute an ongoing burden.[127] In addition, the military already calculates some expenses, such as uniform modifications, into the military budget.[128] Opponents also

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120 *See* BINKIN & BACH, *supra* note 13, at 53-54.

121 *Id.* at 54.

122 *Id.* at 54-55 (citation omitted).

123 According to military sources, it costs 6 million dollars to train an F-16 pilot. Hackworth, *supra* note 4, at 28. "If a woman pilot becomes pregnant she doesn't fly. If war comes along, a unit is missing a pilot, and after the baby, that pilot must requalify." *Id.* at 28.

124 *See* Tuten, *supra* note 43, at 250-51.

125 *See* Kantrowitz, *supra* note 59, at 22.

126 *Id.* at 23.

127 *See* BINKIN & BACH, *supra* note 13, at 53.

128 Gemmette, *supra* note 40, at 97-98.

As well as costs associated with privacy rights for women in combat, there are other increased costs for uniform modification and for medical expenses due to pregnancy; but these costs, like costs for separate facilities

argue that some women leave military service because they do not have the same opportunities as men. If given the chance, women would be willing to make sacrifices in order to obtain the training and have the opportunity to utilize it.[129]

5. *Protection of Women*

Besides national security concerns, another justification for the combat exclusion rules is the protection of women.[130] The legislative history of the combat exclusion rules shows that Congress wanted to protect women from the harsh realities of war.[131] Excluding women from combat decreases their risk of being captured, injured, or killed. Exclusionists believe that, instead of fighting, women should be at home.[132] Their vital function is to maintain the homefront.[133] The implication is that by protecting the family, women are doing their appropriate part in protecting America.

Opponents point out that the combat exclusion rules do not adequately decrease female soldiers' risks.[134] Despite the existence

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for men and women, have already been incorporated in military spending.

Id.

129 For example, Captain Troy Devine submits to mandatory pregnancy tests every two weeks and agreed not to become pregnant for at least one year in order for the Air Force to protect its investment in training her as a spy plane pilot. It costs more than a half millon dollars to train Captain Devine. Kantrowitz, *supra* note 59, at 23.

130 *See, e.g.*, Green, *supra* note 106, at 78 ("The 1988 Department of Defense Task Force on Women in the Military found that policies serving to exclude women from combat reflect society's cultural standards and Congress's desire to 'protect women from the most serious risks of harm or capture.' ").

131 S. REP. No. 567, 80th Cong., 1st Sess. (1947); H.R. REP. No. 1616, 80th Cong., 2nd Sess. (1948).

132 *See supra* notes 30-34 and accompanying text. *See* Kornblum, *supra* note 26, at 378 (quoting JOHN LAFFIN, WOMEN IN BATTLE 185 (1967)).

Laffin argued that allowing women into combat would destroy men's incentives to fight wars.

> One of the great inducements to the end of a war is the intense desire of men to return home to women and bed. If a man is to have women at war with him, is he to think of women as comarades-in-arms rather than as mistresses-on-mattress the inducement disappears. In the first place he can have what he needs without going home and in the second he is apt not to feel the need.

Id.

133 *See* Schlafly, *supra* note 75, at 6-7 (argning that the idea of men sending mothers to war "is contrary to our culture, to our respect for men and women, and to our belief in the importance of the family and motherhood.").

134 *See, e.g.*, Green, *supra* note 106, at 78 (noting the argnments of Former Secretary of the Army Clifford L. Alexander that "[combat] exclusion not only fails to protect women, but also weakens military effectiveness because the services are prevented from taking full advantage of the high skills of women troops.").

of combat exclusion rules, women get captured,[135] shot at,[136] and killed.[137] The real difference between male and female soldiers is that female soldiers cannot capture, shoot, or kill *offensively*.[138]

Opponents to combat exclusion also argue that being a soldier and being a mother can be compatible.[139] Family issues concern both genders. The military, opponents believe, could be the first to discredit the stereotype that women are solely responsible for childcare.[140] In addition, opponents argue that women should be able to decide how they will handle their own personal commitments.

E. Methods of Change

Three possible methods for changing the combat exclusion rules exist.[141] First, the President could nullify the laws by Executive Order. For example, in 1948, President Truman desegregated the Armed Forces by Executive Order.[142] Although Former President Bush is an ardent supporter of combat exclusion,[143] President Clinton has not set forth his position on women in combat.[144] He did commit, however, to reviewing the issue after the Presidential Commission officially reports its findings to Congress.[145]

Second, Congress could repeal or modify the combat exclusion laws. In fact, Congress did modify the laws by allowing the Armed Forces, at their discretion, to permit female pilots to fly on combat missions.[146] Congress also created a Presidential Commission to

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135 Iraqi soldiers captured two female soliders during the Persian Gulf War. CHICAGO TRIBUNE, Dec. 29, 1991, at C1.

136 *See, e.g.*, Jeannie Ralston, *We liberated Kuwait in six weeks. How long will it take to liberate the military?*, LIFE, May 1991, at 52 (reporting that female soliders, such as Lt. Jeter who worked at a Patriot missile control trailer, were subjected to scud missile attacks the same as men).

137 Thirteen women were killed in the Gulf War.

138 *See* Goodman, *supra* note 26, at 260 ("Women defending the home is an acceptable idea; women conquering the world is not."); Kornblum, *supra* note 26, at 397-98.

139 *See* Gemmette, *supra* note 40, at 98.

140 *See, e.g.*, Kornblum, *supra* note 26, at 420 ("Misguided attitudes towards childbearing itself distort reality and perpetuate myths about military women's effectiveness.").

141 *See generally* Michael F. Noone, Jr., *Women in Combat: Changing the Rules*, 39 NAVAL L. REV. 187 (1990) (analyzing the strategies that each branch could use to change the combat exclusion rule).

142 Exec. Order No. 9981 (1948).

143 *See* Gellman, *Senate Panel*, *supra* note 9, at A4.

144 *See* Barton Gellman, *Panel Seeks to Limit Women in Combat*, WASH. POST, Nov. 4, 1992, at A3.

145 *Id.*

146 *See* S. Res. 8549, *supra* note 6, at S12417 (expressing the intent of Congress to permit women to fly combat missions).

study the possible effects on combat readiness if women were allowed into combat units.[147]

Third, the Supreme Court could declare the combat exclusion rules unconstitutional. Though many scholars have contended that the rules are unconstitutional, they are skeptical that the Supreme Court would actually declare them so.[148] In order to analyze properly the Supreme Court's probable reaction to the combat exclusion issue, it is important to review military-related gender discrimination cases that the Court decided.

II
ANALYSIS OF MILITARY-RELATED GENDER DISCRIMINATION CASES

A. *Frontiero*, *Schlesinger*, and *Rostker*

One of the first military-related gender discrimination cases that the Supreme Court decided was *Frontiero v. Richardson*.[149] In *Frontiero*, the Court declared that a federal statute was unconstitutional because it violated the Equal Protection Clause.[150] The statute at issue allowed male soldiers automatic approval of dependent status for their wives. For female soldiers, however, approval of the dependent status for their husbands was subject to a determination of actual dependency. The Court held that gender was a suspect class, requiring heightened judicial scrutiny when courts reviewed the rationales behind laws based on gender classifications.[151]

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147 The recommendations of the Commission came as a major disappointment to many supporters of women in combat. Although the recommendations of the nine-man, six-women panel are nonbinding, the six-month, four million dollar study may adversely affect the campaign towards women in combat. The fifteen-member commission, mainly comprised of conservative members, recommended that Congress should reinstate the ban on women in combat. Although it stated that women should be allowed to serve on some combatant ships, the commission believed that women should not be allowed to fly combat aircrafts. The commission's rationales mirror exclusionists justifications for the combat exclusion rules. *See generally* Michael R. Gordon, *Panel is Against Letting Women Fly in Combat: Commission also Rejects Ground-Fighting Role*, N.Y. TIMES, Nov. 4, 1992, at A24 (reporting that "in a debate that often appeared to turn more on social policy than military considerations, conservative panel members argued that it was wrong to allow women to kill"); Thomas E. Ricks, *Panel Recommends Women Not Serve on Combat Duty*, WALL ST. J., Nov. 4, 1992, at A4 (quoting one of the female commissioners who oppose women in combat: "There are women who are willing to kill or be killed to achieve so-called equal opportunity. . . . That is degrading to women and to society at large.").

148 "There are three possible conditions that would cause the combat exclusion laws to be changed. The *least* probable of these is that the Supreme Court will change its views regarding the permissible ways that Congress and the Executive may regulate the internal affairs of the armed forces." Noone, *supra* note 141, at 195.

149 411 U.S. 677 (1973).

150 *Id.* at 688.

151 *Id.*

Many commentators believed that *Frontiero* was a triumph for women and that it would lead to a new wave of recognition of women's rights.[152] This euphoria, however, was short-lived. The case has had no real precedential value in determining other gender discrimination cases for two reasons.[153] First, the political makeup of the Court's membership changed. *Frontiero* was "the last gasp of the Warren majority."[154] As the Court became more conservative, the view of gender as a suspect class became less influential.[155] Second, in cases subsequent to *Frontiero*, the Supreme Court began deferring more to Congress and to internal military regulation in military affairs.[156] In *Frontiero*, the Court did not discuss the degree of deference to be granted to Congress on military matters. Though at that time the concept of granting deference to Congress in military matters was not new,[157] it garnered less influence than it would in subsequent years.

The next Supreme Court case on military-related gender discrimination was *Schlesinger v. Ballard*.[158] Unlike *Frontiero*, *Schlesinger* involved a male plaintiff who claimed that the Navy's promotion policy was discriminatory.[159] Ballard was a lieutenant in the Navy for nine years before he became subject to mandatory discharge under section 6382 of title 10 of the United States Code.[160] Female naval officers, however, are not subject to section 6382.[161] Instead, under section 6401, female officers may hold the grade of lieutenant for thirteen years before becoming subject to mandatory discharge.[162]

The Court held that section 6382 does not violate due process by discriminating in favor of women.[163] The majority applied a rational relation test in analyzing the governmental interests involved:

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152 *See, e.g.*, Noone, *supra* note 141, at 192 ("Frontiero never achieved the precedential value that supporters of equal rights of females in the armed forces had hoped.").

153 *Id.*

154 *Id.* at 192.

155 *Id.* at 193.

156 *Id.*

157 For example, Chief Justice Warren also supported granting wide deference to the military. In a speech, he stated that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." Barney F. Bilello, Note, *Judicial Review and Soliders' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 477 (1989) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

158 419 U.S. 498 (1975).

159 *Id.* at 499-500.

160 10 U.S.C. 6382 (1956) (repealed 1980).

161 10 U.S.C. 6401 (1956) (repealed 1980).

162 *Id.*

163 *Schlesinger*, 419 U.S. at 508-10.

> Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite *rationally* have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."[164]

The dissent in *Schlesinger* was comprised of most of *Frontiero*'s majority.[165] The dissent argued that no legislative history existed which demonstrated Congress' intention to eliminate inequities that female officers suffer because of the promotional system.[166] The dissent also objected to the deference that the Court granted to the military. Justice Brennan argued:

> As *Frontiero v. Richardson* illustrates, the fact that an equal protection claim arises from statutes concerning military personnel policy does not itself mandate deference to the congressional determination, at least if the sex-based classification is not itself relevant to and justified by the military purposes.[167]

In 1981, the Court decided the next military-related gender discrimination case, *Rostker v. Goldberg*.[168] *Rostker* differs from *Frontiero* and *Schlesinger* in three important ways. First, *Rostker* was the first military-related gender discrimination case decided after *Craig v. Boren*.[169] In *Craig v. Boren*, the Supreme Court declared an Oklahoma law unconstitutional because it authorized the sale of beer to eighteen year-old women but not to eighteen year-old men.[170] The *Craig* decision established the current test used in analyzing gender classifications: the important governmental interest/substantial relationship test.[171] Though not as strict as the standard used in analyzing racial and other suspect classifications, the intermediate level of review requires that the government prove that gender classifications "serve important governmental objectives and [are] substantially related to the achievement of those objectives."[172]

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164 *Id.* at 508 (emphasis added) (citations omitted).

165 Justices Brennan, Douglas, White, and Marshall dissented from the judgment in *Schlesinger*.

166 *Schlesinger*, 419 U.S. 520 (Brennan, J., dissenting).

167 *Id.* (citation omitted).

168 453 U.S. 57 (1981).

169 429 U.S. 190 (1976).

170 *Id.* at 204, 210.

171 *See generally* JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 670 (3rd ed. 1986) ("A majority of the justices now had agreed upon a specific definition for the intermediate level of review applied in gender discrimination cases.").

172 *Id.* at 670.

Second, *Rostker* involved traditional military issues whereas *Frontiero* and *Schlesinger* dealt with nonmilitary, administrative employment issues.[173] Because the Court viewed the conscription issue as involving a military decision as opposed to a bureaucratic decision, the focus of its opinion is different.[174] Ann Scales notes that there is a distinction "between war-making decisions and non-war-making decisions. Civilian judges can review the latter but *very seldom* the former."[175]

Third, the *Rostker* majority granted a higher degree of deference to Congress than either *Frontiero* or *Schlesinger*.[176] Before *Rostker*, the Court had never stated its position on the amount of deference courts should grant to Congress when analyzing constitutional claims regarding the military.[177] In *Rostker*, however, the Court states its position in clear terms:

> Nor can it be denied that the imposing number of cases from this Court . . . suggest that judicial deference to . . . congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.[178]

Notwithstanding its position that Congress should be granted maximum deference in military affairs, the Court did note that congressional actions involving the military are not above review:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . [b]ut the tests and limitations to be applied may differ because of the military context.[179]

The issue in *Rostker* was whether requiring only men to register for the draft violated the Fifth Amendment.[180] The male plaintiffs brought an action following Congress' refusal to allow females to register under the Military Selective Service Act (MSSA).[181] The

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173 *See, e.g.*, Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron*, 12 HARV. WOMEN'S L.J. 25, 38-39 (1989).

174 *Id.* at 39.

175 *Id.* (emphasis added).

176 *See* Lieberman, *supra* note 40, at 216-17.

177 Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 390 (1984) ("Judicial treatment of military claims has not followed one consistent path. The Supreme Court has not offered explicit guidance as to the appropriate standard to be used to determine when the merits of a claim against the military should be reached.").

178 *Rostker*, 453 U.S. at 70.

179 *Id.* at 67 (citations omitted).

180 *Id.* at 59.

181 *Id.* at 61.

district court, applying the *Craig* test, held that the Act was unconstitutional and enjoined its implementation.[182]

The Supreme Court reversed, relying heavily upon three factors. First, the Court used the combat exclusion rules to justify its opinion.[183] Being careful to avoid the constitutionality issue of the combat exclusion rules, the Court reasoned that the government's interest in not including women in the draft was related to its goal of manning the Armed Forces; the purpose of the draft was to ensure that the military had enough soldiers to fight.[184] The Court, agreeing with Congress, stated that "registration serves no purpose beyond providing a pool for the draft."[185] Because of the combat exclusion rules, the Court reasoned that no need existed to register women.[186] Second, the Court noted that Congress had held several hearings on this subject and had reached its decision after a reasoned analysis of the best alternative.[187] Third, the Court granted maximum deference to the military. The Court noted that although it usually grants "customary deference" to Congress, when the issue involves military affairs, deference is magnified.[188] Deference, coupled with a weakened *Craig* test, enabled the Court to hold the MSSA constitutional.[189]

Although the Court emphasized that it was not abdicating its judicial role by deferring to Congress,[190] the dissent thought otherwise.[191] As Justice Marshall pointed out in his dissent, allowing females to register would not substantially impede the goal of manning the Armed Forces.[192] He concluded that "the Court substitutes hollow shibboleths about 'deference to legislative decisions' for constitutional analysis. It is as if the majority has lost sight of the fact that 'it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.' "[193]

B. Comparison of the Combat Exclusion Issue to Military-Related Gender Discrimination Cases

With the analysis of the preceding cases as a background, the next step is to demonstrate how the combat exclusion issue differs

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182 *Id.* at 63.
183 *Id.* at 78.
184 *Id.* at 75-76.
185 *Id.* at 75.
186 *Id.* at 78.
187 *Id.* at 81-82.
188 *Id.* at 70.
189 *Id.* at 78-79, 83.
190 *Id.* at 70.
191 *Id.* at 112 (Marshall, J., dissenting).
192 *Id.*
193 *Id.* (citations omitted).

from those addressed by the Court in other military-related gender discrimination cases. The difference between the issue of whether combat exclusion is unconstitutional and the issues discussed above is one of context. Both *Frontiero* and *Schlesinger* dealt with constitutional issues that were essentially of a nonmilitary, employment-related nature.[194] As stated earlier, *Rostker* was, to some extent, dealing with a traditional military issue.[195] *Rostker*, however, is distinguishable from the combat exclusion issue. Although the *Rostker* judgment may affect the military, the issue of whether women should register for the draft was *mainly* an administrative matter. Even the plaintiffs in that case acknowledged that the *Rostker* issue was not a military matter but rather one of administrative convenience.[196] One might argue that the combat exclusion issue is also an administrative matter because it involves employment discrimination. This argument, however, is weak because the issue involves not only the composition of the Armed Forces, but also training and sensitive military matters. Jill Goodman, in discussing the combat exclusion issue, writes:

> A challenge to the combat exclusion would present more difficulties than other military cases might. The question of who should fight wars can be seen as going to the heart of military concerns in a way the allocation of military benefits or rules concerning tenure of officers do not. *If a court is at all inclined to treat military cases differently, a challenge to combat assignments is likely to be singled out for special treatment.*[197]

The combat exclusion issue is unique. The issue entails direct concerns about national security and equal opportunity.[198] Although exclusionists would find the two concepts incompatible,[199] if the issue were brought before the Court, it would have to balance these competing interests.[200] However, a question remains as to whether the Court would, or should, review this issue.

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194 *See supra* part II.A.

195 *See* Gemmette, *supra* note 40, at 99.

196 *Rostker*, 453 U.S. at 68.

197 Goodman, *supra* note 26, at 267 (emphasis added).

198 *See* Gemmette, *supra* note 40, at 98.

199 *See supra* note 54 and accompanying text.

200 *See, e.g.*, Gemmette, *supra* note 40, at 98 ("[T]he Supreme Court will have to balance the competing interests of combat-desiring women on the one hand with the overriding military concerns for national safety. . . .").

III
THE PRINCIPLE OF DEFERENCE VERSUS THE POLITICAL QUESTION DOCTRINE

A. The Principle of Deference

The military occupies an important part in our nation's history. In drafting the Constitution, the founding fathers sought to incorporate safeguards to prevent the type of abuse and oppression they had previously experienced with the British Army.[201] Article I, Section 8 of the Constitution grants Congress the power to govern the Armed Forces.[202] The prevailing view at the time was that Congress should have wide power in this area.[203]

Given this history, courts have considered it their constitutional duty not to interfere with the military's operations.[204] This self-imposed judicial restraint resulted in the principle of deference, a limited standard of judicial review aimed at providing a balance of power between the government's branches.[205] The principle of deference is also known as the doctrine of military necessity, the separate community doctrine, or the nonreviewability doctrine.[206] Because of the principle of deference, a successful constitutional military-related challenge is difficult to mount if the military can provide *any type* of reasoning for its actions.[207] In a sense, the effect is sometimes a form of judicial abdication under the guise of judicial review.

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201 *See, e.g.*, Bilello, *supra* note 157, at 468-71 (discussing how the American Revolution and the public distrust of a standing army influence the Framer's decision to establish safeguards). *See generally* WALTER MILLIS, THE CONSTITUTION AND THE COMMON DEFENSE 5 (1959) ("The authors of the Constitution had all been brought on the axiom, endlessly reiterated since the days of the Revolution and before, that 'standing armies are ever a menace to the liberties of the people.' ") (citation omitted).

202 U.S. CONST. art. I, § 8. The relevant text is as follows: "To raise and support Armies . . .," "To provide and maintain a Navy . . .," and "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."

203 *See* Bilello, *supra* note 157, at 470-71.

204 *Id.* at 476 ("[A] majority of the Court contends that an over-intrusive judicial role in this context would constitute an unjustified encroachment upon an inherently legislative function.").

205 *Id.* at 465.

206 *See* Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2095 n.78 (1987).

207 *See* Bilello, *supra* note 157, at 476.

> The legal consequence of the military's unique mission is that governmental action which might otherwise infringe upon a constitutionally protected interest if undertaken in a civilian context may be deemed constitutional in the military context because "there is simply not the same autonomy as there is in the larger civilian community."

Id. (citations omitted).

> Whether labeled the "separate community" doctrine, the doctrine of "military necessity," or the principle of deference, the effect of the Court's military jurisprudence for members of the armed forces asserting constitutional violations is the same—the likelihood of success on the merits, given the significantly limited form of "review," is quite remote.[208]

The extent to which the Court will defer to Congress on military matters varies with each case. The result, however, remains constant: deference lessens the standard of review for military-related constitutional claims.[209] First Amendment military-related claims illustrate the Court's excessive application of the principle of deference. Justice Rehnquist conceded that the Court's "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[210] Two military-related First Amendment cases demonstrate how deference affects the constitutional claims of military soldiers.

In *Brown v. Glines*,[211] the Air Force removed the respondent, a Captain in the Air Force Reserves, from active duty because he violated an order prohibiting service members from distributing petitions on bases without the base commander's prior approval.[212] The respondent argued that the regulations unconstitutionally violated his First Amendment right to free speech.[213] Both the District Court and the Court of Appeals ruled that the regulations were facially invalid.[214] On the First Amendment issue, the appellate court held that the regulations were overbroad in that "they might allow commanders to suppress 'virtually all controversial written material.' "[215]

The Supreme Court reversed. It reasoned that the government had a legitimate interest in seeking to maintain discipline,[216] and that because the military is unlike civilian society, "[t]he rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.' "[217]

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208 *Id.* at 466.

209 *See, e.g.*, Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 865 (1987) (arguing that the Court's deference in military cases amounts to "virtually no review at all.").

210 Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

211 Brown v. Glines, 444 U.S. 348 (1980).

212 *Id.* at 351.

213 *Id.*

214 Glines v. Wade, 401 F. Supp. 127, 132 (N.D. Cal. 1975); Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978).

215 *Glines*, 444 U.S. at 353 (quoting Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978)).

216 *Id.* at 354.

217 *Id.* (citations omitted).

In contrast, Justice Brennan, writing for the dissent, supplied three reasons the regulations violated the First Amendment. First, the regulations imposed a prior restraint on free speech.[218] Second, no procedures were implemented with the regulations to ensure that the commander's decisionmaking process would not be arbitrary.[219] Third, the regulations did not adequately satisfy the military's interest in maintaining discipline.[220] After concluding that the military regulations did infringe on the soldier's right to free speech, Justice Brennan criticized the Court's deference to the military. He argued that:

> Military (or national) security is a weighty interest . . . [b]ut the concept of military necessity is seductively broad, and has a *dangerous plasticity.* Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. . . . The Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity.[221]

A widely publicized military case involving First Amendment rights is *Goldman v. Weinberger*.[222] In *Goldman*, the petitioner claimed the Air Force infringed on his right to exercise his religion freely by prohibiting him from wearing a yarmulke.[223] An orthodox Jew and a rabbi, Goldman worked as a psychologist at the base hospital. According to Air Force regulation 35-10, service personnel cannot wear headgear inside any building while on duty.[224] After Goldman refused to comply with the order, the Air Force threatened to court-martial him. The district court ruled that the regulation was unconstitutional and enjoined the Air Force from enforcing the order.[225] The court of appeals reversed.[226] The appellate court reasoned that the appropriate standard of review for military regulations was not strict scrutiny or even the rational relation test, but whether "legitimate military ends are sought to be achieved . . . ."[227] The court held that the government regulations passed this standard because the Armed Forces need uniformity in order to maintain discipline.[228]

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218 *Id.* at 364.
219 *Id.* at 366.
220 *Id.* at 367.
221 *Id.* at 369-70 (emphasis added) (citations omitted).
222 475 U.S. 503 (1986).
223 *Id.* at 504.
224 *Id.* at 505.
225 *Id.* at 506.
226 Goldman v. Secretary of Defense, 734 F.2d 1531, 1532 (D.C. Cir. 1984).
227 *Id.* at 1535-36.
228 *Id.* at 1540.

The Supreme Court affirmed, reasoning that because the Air Force drew a line between prohibiting religious wear that was visible and allowing religious wear that was not visible, the regulation was "reasonabl[e] and evenhanded[]."[229] Four justices dissented.[230] Each of the dissenting justices was troubled by the majority's failure to articulate a controlling standard of review. Justice O'Connor wrote in dissent that "[t]he Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force . . . . No test for free exercise claims in the military contest is even articulated, much less applied."[231]

B. Application of the Principle of Deference to the Combat Exclusion Issue

If confronted with the combat exclusion issue, the current Supreme Court would probably hold that combat exclusion was constitutional.[232] If opponents of combat exclusion rules were to present the issue to the Court, they could make the following arguments. First, that the Court should apply the standard articulated in *Craig v. Boren*, under which a gender-based classification is constitutional if it is substantially related to an important governmental interest.[233] Second, while acknowledging that raising and supporting armies are important governmental interests,[234] opponents could argue that allowing women into combat would not "substantially impede" these governmental interests.[235] The success of these arguments, however, is based on two premises: (1) that the Court would use the *Craig v. Boren* standard;[236] and (2) that the Court would find civilian gender discrimination cases persuasive.[237] Based on the preceding analysis of military-related constitutional cases, however, it is unlikely that the Court would do either. For example, in *Goldman* the Court's analytical framework centers not on an ar-

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229 *Goldman*, 475 U.S. at 510.

230 Justices Brennan, Blackmun, O'Connor, and Marshall wrote dissenting opinions.

231 *Goldman*, 475 U.S. at 528 (O'Connor, J., dissenting).

232 *See supra* note 148 and accompanying text.

233 *See supra* notes 169-73 and accompanying text.

234 *See* Buchanan, *supra* note 40, at 512-16.

235 *Id.* at 516.

236 *Id.* at 506-07 (applying the *Craig v. Boren* analysis to determine that the combat exclusion rules are unconstitutional); *see* Gordon & Ludvigson, *supra* note 87, at 179-80 ("If the Supreme Court were to review the constitutionality of the combat exclusion laws, it would likely apply the intermediate level of scrutiny. . . ."); Kornblum, *supra* note 26, at 433 (applying the *Craig v. Boren* analysis).

237 *See, e.g.*, Buchanan, *supra* note 40, at 519-45 (relying on several civilian gender discrimination cases to support her argument that the combat exclusion rules are unconstitutional).

ticulated standard of review[238] but on the perceived differences between military and civilian life that necessitate a "far more deferential [review of military constitutional claims] than constitutional review of similar laws or regulations designed for civilian society."[239]

If the government were to argne for the constitutionality of the combat exclusion rules, it could pose the following argnments. First, the government has an important interest in maintaining national security through combat readiness and combat effectiveness.[240] Second, combat exclusion rules are substantially related to maintaining national security.[241] The government would probably reiterate exclusionists' justifications for the rules to bolster this argument.[242] Third, it could argue that opponents of the combat exclusion rnles have no affirmative data to disprove the assumption that women in combat would degrade combat effectiveness.[243] Finally, it could argne that because of military necessity, the Court should defer to Congress on these matters.[244] The language concerning deference would probably be convincing. If the main principle behind deference is non-interference with congressional oversight of military affairs, deference would be an important consideration when examining national security.[245]

Faced with the preceding arguments, the Court would probably declare the rules constitutional. Contrasted with other military cases, one could argne that the government does have considerably stronger arguments with the combat exclusion issue.[246] In *Brown* and *Goldman*, the government argned that restrictions on free speech were necessary to maintain discipline but failed to explain how the soldiers' actions undermined that discipline.[247] Justice

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238 *See, e.g.*, C. Thomas Dienes, *When the First Amendment is not Preferred: The Military and Other "Special Contexts"*, 56 U. CINN. L. REV. 779, 801 (1988) ("Then-Justice Rehnquist, writing for the Court, never formally articulated and applied a standard of judicial review.").

239 *See supra* notes 210-31 and accompanying text.

240 *See, e.g.*, Gemmette, *supra* note 40, at 98.

241 *See id.* at 98 ("[N]ational security demands that the armed services be efficient and prepared to defend the nation if necessary.").

242 *See supra* part I.D.

243 *See* Tuten, *supra* note 43, at 261.

244 *See generally* James M. Hirschorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (arguing that judicial deference should be given to the military because of its unique role).

245 *See supra* note 188 and accompany text.

246 *See* discussion *supra* part II.B.

247 Goldman v. Weinberger, 475 U.S. 503, 506 (1986); Brown v. Glines, 444 U.S. 348, 354 (1980). *See* Dienes, *supra* note 238, at 803. *See also Goldman*, 475 U.S. at 516. Justice Brennan wrote in dissent that:

> A deferential standard of review . . . need not, and should not, mean that the Court must credit arguments that defy common sense. When a mili-

Blackmun, in his dissent in *Goldman*, argued that " '[r]ules are rules' is not by itself a sufficient justification for infringing religious liberty."[248] In contrast, even opponents of the combat exclusion rules concede that the government does have credible arguments regarding the combat exclusion issue.[249] They uniformly agree that the government's arguments would not be pretextual because national security is an important governmental interest.[250] It would be difficult to argue that "the Government has failed to make any meaningful showing" regarding the combat exclusion issue.[251]

Commentators have argued that the Supreme Court has adopted an anayltical framework by which it accepts review of military constitutional issues, then proceeds to rubber-stamp the policies and laws implemented by Congress and the military under the guise of separation of powers. This approach treats military issues as being essentially nonjusticiable.[252] For example, Professor Dienes stated that the *Goldman* case "presents a patent example of extreme deference to the military bordering on non-justiciability."[253] For this reason, if the Court does confront the combat exclusion issue, it would be preferable to decline review under the political question doctrine instead of accepting review and then applying the principle of heightened deference.[254] The reasons for this preference will be explained in the following section.

C. An Historical Overview of the Political Question Doctrine

The political question doctrine is a judicially self-imposed limitation on the powers of judicial review.[255] The Supreme Court will review a case only if the claim is justiciable. Political questions are only one of several doctrines of justiciability. A claim is justiciable if it is not subject to one of the following exceptions: advisory opin-

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> tary service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.

Id.

248 *Goldman*, 475 U.S. at 525 (Blackmun, J., dissenting).

249 *See, e.g.*, Buchanan, *supra* note 40, at 514-16; Goodman, *supra* note 26, at 264.

250 *See, e.g.*, Buchanan, *supra* note 40, at 515 ("[I]t would be unwise and unrealistic from a constitutional perspective to characterize the exclusion of women from military combat as a device designed to establish male supremacy to suppress women.").

251 *Goldman*, 475 U.S. at 524-25 (Blackmun, J., dissenting).

252 *See* Dienes, *supra* note 238, at 815.

253 *Id.* at 808.

254 *See, e.g.*, Goodman, *supra* note 26, at 266. ("[T]he toughest problem facing an equal protection challenge is not showing the combat exclusion fails the the test; rather, it is the 'great deference" courts show the military and their reluctance to interfere in military matters.').

255 *See* NOWAK, *supra* note 171, at 102.

ions, mootness, collusive or friendly opinions, lack of ripeness, lack of standing, or political questions.[256]

The political question doctrine differs from other justiciability doctrines in three ways. First, "[u]nlike the other justiciability doctrines, the political question doctrine is not derived from Article III's limitation of judicial power to 'cases' and 'controversies.' "[257] In contrast, the political question doctrine is grounded in the principle of judicial review, which was judicially created in *Marbury v. Madison*.[258] Second, other justiciability exceptions are procedural in nature; whereas the political question doctrine addresses the substantive content of the case.[259] Third, the Court's decision as to whether a category of cases constitutes a political question "is absolute in its foreclosure of judicial scrutiny."[260] With other justiciability exceptions, however, if certain facts changed, the Court can review the case without overturuing precedent.[261]

The political question doctrine is perplexing for several reasons. First, many scholars cannot agree on several aspects of the doctrine: its definition, its scope, its validity, or even its existence.[262] The end result is an intricate maze of convoluted ideas and arguments that perpetually clash. Second, the Court has applied the doctrine inconsistently.[263] No clear Court guidelines exist

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256 *Id.* at 55-87; *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (1962) (defining the exceptions to justiciability as the "passive virtues" of the Court).

257 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 130 (1989). *See* U.S. CONST. art. III, § 2, cl. 1.

258 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.") (Marshall, C.J.).

259 *See* CHEMERINSKY, *supra* note 257, at 124; NOWAK, *supra* note 171, at 102.

260 *See* Nowak, *supra* note 171, at 102.

261 *Id.*

262 *See, e.g.*, Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985) (pointing out that many commentators have "disagreed about its wisdom and validity . . . [and] the doctrine's scope and rationale"). There are several articles criticizing the political question doctrine. Some of these authors believe that the political question doctrine does not exist. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Other commentators argue that the political question doctrine is dangerous to the concept of judicial review. *See* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989). *But see* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 175 (1988) (arguing that "the political question doctrine is an integral part of [our constitutional] tradition.").

263 *See, e.g.*, CHEMERINSKY, *supra* note 257, at 125 ("[T]he political question doctrine is particularly confusing because the Court has defined it differently over the course of American history."); Redish, *supra* note 262, at 1031 ("At least part of the explanation for this confusion is the unpredictable method in which the Supreme Court has chosen to invoke the doctrine over the years."); *see also* Mulhern, *supra* note 262, at 101 (arguing that the Supreme Court has not adequately articulated the parameters of the political question doctrine).

to determine if a case falls under the political question doctrine.[264] For example, some have argued that the Court's criteria regarding the parameters of a political question serve no useful purpose.[265] Third, the term "political question" is a "misnomer."[266] Commentators argue that since most cases carry some elements of a political nature, it is impossible to distinguish justiciable cases from nonjusticiable ones.[267] No bright line rules exist for the political question doctrine.

> The definition of a political question can be expanded or contracted in accordion-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions.[268]

D. The Theories of the Political Question Doctrine

The theories used to justify the political question doctrine range from strict constructionism to that of unchecked discretion. All these theories aspire to demonstrate how the concepts of judicial decisionmaking and its principles interrelate. "The academic debate has centered primarily over how 'principled' use of the doctrine must be."[269]

1. *Political Question Doctrine: Classical Theory*

The classical theorist's goal in utilizing a restrictive political question doctrine is to maintain a regard for neutral decisionmaking.[270] The crux of the classical theory is that the political question doctrine, like judicial review, is "of constitutional interpretation"[271] rather than judicial discretion. The classicists believe that a "bright-

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264 *See* CHEMERINSKY, *supra* note 257, at 126.

265 *Id.* at 126-27.

266 *See generally* NOWAK, *supra* note 171, at 102 (suggesting that the political question doctrine should be called the "doctrine of nonjusticiability").

267 *See* CHEMERINSKY, *supra* note 257, at 125; Henkin, *supra* note 262, at 598-99.

268 *See* PHILIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION 1-2 (1974) (quoting John P. Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955)).

269 *See* Redish, *supra* note 262, at 1031.

270 *See* HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

271 *See* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538 (1966). Many have noted that the classical theory is a form of judicial review, not a form of abstinence. For discussion, see Henkin, *supra* note 262, at 600-01. *See also* WECHSLER, *supra* note 270, at 12 (agreeing that a determination that an issue is textually committed to another branch is "a finding that itself requires an interpretation"); *cf.* Redish, *supra* note 262, at 1032 n.11, 1042 nn.67-68 (disagreeing that the classical theory is just another form of the "traditional principles of judicial review").

line rule" will enable justices to make neutral decisions as to whether the political question doctrine applies in a given case.[272] In *Baker v. Carr*, Justice Brennan noted that the doctrine reflects the principle of separation of powers.[273]

Herbert Wechsler, a leading classicist, writes that the political question doctrine should only apply when the Constitution has committed the *resolution of the issue* in controversy to another branch of government.[274] The benefits of this theory are that it would maintain judicial neutrality in decisionmaking and alleviate much of the confusion regarding when the political question doctrine should be invoked.[275]

2. *Political Question Doctrine: Prudential Theories*

Three versions to the prudential theory of the political question doctrine exist.[276] The premise that interconnects these versions is that the political question doctrine is not rigid, as classicists claim, but is a flexible doctrine that allows judicial discretion in decisionmaking.[277]

a. *Opportunistic Theory*

The opportunistic theory of the political question doctrine entails two assumptions: that justices are not neutral decisionmakers, and that they often take into account their political survival.[278] The opportunistic theorists argue that the political question doctrine consists of two factors: the impossibility of enforcement and the

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272 *See, e.g.*, Redish, *supra* note 262, at 1039 ("This substantially narrowed version of the doctrine is thought to have the benefit of confining the Court's determinations to truly principled exercises.").

273 Scharpf, *supra* note 271, at 538. *See generally* CHEMERINSKY, *supra* note 257, at 130 ("The political question doctrine might be treated as constitutional if it is thought to be based on separation of powers or textual commitments to other branches of government.").

274 *See* WECHSLER, *supra* note 270. Wechsler argued that "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised . . . ." *Id.* at 11-12. Wechsler further argues that the judiciary has no power to abstain from review. *Id.* at 9. For critical responses to Wechsler's theory, see Redish, *supra* note 262, at 1039-41, 1044-45 ("His point . . . appears to be that the accepted role of the judiciary and of its authority of judicial review render the judiciary powerless to establish such a doctrine."); Scharpf, *supra* note 271, at 539-40. *See also* BICKEL, *supra* note 256, at 125-26 (writing about the classical theory, Bickel argued that "[t]he political question doctrine simply resists being domesticated in this fashion. There is . . . something different about it, in kind not in degrees something greatly more flexible, something of prudence, not construction and not principle."). *Id.* at 46.

275 *See* WECHSLER, *supra* note 270, at 11-15.

276 *See* Scharpf, *supra* note 271, at 548-66.

277 *Id.* at 548-49.

278 *Id.* at 549-55.

lack of social consensus.[279] The impossibility of enforcement is the most important factor in determining whether the Court will label an issue political.[280] Enforcement correlates to the power of the Court. The Court has no means to enforce its decisions; it is the Court's prestige that carries the weight of its decisions.[281] Were this prestige lost, the Court's opinions would be merely political commentaries. "[I]t is an axiom of constitutional justice that any decision which the Court thinks will not be enforced will probably not be made."[282]

In addition to enforcement problems, political questions also involve a lack of social consensus.[283] Courts are wary of refusing to review cases that the public feels strongly about. This, of course, relates to the issue of executive enforceability. Though the court is not politically responsible, the other branches of government are.[284] If the Court decides an issue about which a strong social consensus exists, the consensus will compel the other branches to enforce it.[285] In contrast, when a lack of social consensus exists, the Court must closely evaluate the problem of executive enforceability. This problem enhances the "judicial dilemma."[286]

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279 *See* STRUM, *supra* note 268, at 4-5. *But see* Scharpf, *supra* note 271, at 549 n.110 (describing Strum's theory as a "hot potato theory." Scharpf believes that the opportunistic theory is unpersuasive because there are many other judicial methods available that judges could use to maneuver around "unpopular" decisions.).

280 *See* Strum, *supra* note 268, at 4-6.

281 *See* Redish, *supra* note 262, at 1053 ("[The] rationale is the fear that the judiciary's authority and legitimacy will be significantly undermined if the political branches ignore the judicial decision . . . ."). *But cf.* CHEMERINSKY, *supra* note 257, at 129 ("[C]ritics contend that the federal courts' credibility is quite robust, that there is no evidence that particular rulings have any effect on the judiciary's legitimacy. . . .").

282 *See* STRUM, *supra* note 268, at 4.

283 *Id.* at 4-6 ("[J]udicial dilemma cannot exist where there is a strong societal consensus. . . ."). *Cf.* Scharpf, *supra* note 271, at 553 ("I submit that a Court . . . will not seek shelter under the political question doctrine merely because it fears that its determination of an issue might be unpopular, or even extremely unpopular."). Note that this criticism might actually reinforce the opportunistic theory. Strum argnes that it is *only* where there is a lack of social consensus, coupled with enforcement problems, that the Court will utilize the political question doctrine.

284 *See generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 48 (1980) ("[I]n comparison to the political branches, the Court . . . must be found to be the loser in terms of political responsibility.").

285 *See* STRUM, *supra* note 268, at 6.

286 One must remember that these factors are present in cases in which a true judicial dilemma exists. It should not be inferred that the Court is preoccupied with their own prestige. The Court has ruled on several controversial issues that were unpopular with either the public or the other branches of government. *See* Scharpf, *supra* note 271, at 552-53.

b. *Cognitive Theory*

The cognitive theory of the political question doctrine posits that it is appropriate for the court to abstain from review when "a lack of legal principles to apply [exists]."[287] Justice Frankfurter illustrates the "absence of standard rationale"[288] in his dissent in *Baker v. Carr*.[289] In reasoning that apportionment cases are political questions, he wrote: "A controlling factor in [political question] cases is that . . . there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged."[290] In *Baker*, even though Justice Brennan disagreed that all apportionment cases are nonjusticiable, he did include the cognitive theory into his definition of the political question doctrine.[291]

c. *Normative Theory*

The normative theory of the political question doctrine argues that the main goal in judicial review is for justices to make decisions that comport with principle.[292] As Professor Bickel, the main proponent of this theory, stated: "The role of the Court . . . [is] to preserve, protect and defend principle."[293] This theory is premised on ascertaining "what the Court ought to do."[294] According to Bickel, a discretionary political question doctrine enables the Court to protect its legitimacy while concentrating on making "correct" decisions.[295] Commentators point to two main components of this theory: that certain federal actions should not be governed by legal

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287 *Id.* at 555 (quoting Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924)).

288 *See* Redish, *supra* note 262, at 1046.

289 369 US. 186 (1962).

290 *Id.* at 322-23.

291 *Id.* at 217.

292 *See* Redish, *supra* note 262, at 1049. Redish noted that the normativist is concerned with principled decisionmaking. He then argues that using this concern to justify the political question doctrine presents a "narrow, short-sighted and even solipsistic view of the judiciary's function in a constitutional system." *Id.* Normativists emphasize, however, that judges must be allowed discretion in order to formulate opinions that will "be the outgrowth of logic and reason. . . ." *Id.* at 1032.

293 *See* BICKEL, *supra* note 256, at 188.

294 *See* Scharpf, *supra* note 271, at 562.

295 *Compare* Nagel, *supra* note 262, at 653 ("[Bickel] admired what he feared, and it is clear that he intended the exercise of political discretion on avoidance issues to protect the prestige and integrity of the judiciary and its vital role in the enunciation of principle.") *with* Herbert Wechsler, *Book Review*, 75 YALE L.J. 672, 674 (1966) (reviewing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) and POLITICS AND THE WARREN COURT (1965)) (arguing that Bickel's endorsement of "discretionary avoidance devices [would] divorce the Court entirely from the text that it interprets.").

principles,[296] and that "certain issues simply do not lend themselves to principled judicial resolution."[297]

Bickel and other normativists are concerned that the Court will legitimize, on the merits, actions by the legislative and executive branches that go against principle.[298] "If the political institutions at last insist upon a course of action that can not be accommodated to principle, it is no part of the function of the Court to bless it however double-negatively."[299]

3. *Political Question Doctrine: Functional Theory*

The functional theory posits that, in instances when the judicial system limits the Court, it is appropriate for the Court to decline review.[300] Professor Scharpf listed three situations in which the political question doctrine is appropriate: when it would be difficult for the Court to obtain adequate information;[301] when the Court would be called upon to question, and possibly dispute, the government's position on issues abroad;[302] or when the Court's resolution of the issue would hamper a specific political department entrusted with that responsibility.[303] Thus, this theory frames the political question doctrine as a way to remedy the inadequacies of the judicial system.[304] Adjudication in cases where inadequacies exist "would overreach the limits of [the Court's] responsibility."[305]

E. Theoretical Analysis of Political Question Cases

As stated earlier, due to the Court's inconsistent application, few specific categories of decisions fall wholly under the political question doctrine. The following section, however, illustrates some areas that the Court considered, at one time, to be political. This

296 The normativist believes that "the Court must survive in an often hostile political world, and the best way to accomplish that feat and simultaneously maintain its legitimacy is to pick its fights." Redish, *supra* note 262, at 1032. Note how the normativist's views overlap, to a certain degree, with the philosophies incorporated into the opportunistic theory. *See supra* notes 278-86 and accompanying text.

297 *See* Redish, *supra* note 262, at 1032.

298 *See* Nagel, *supra* note 262, at 652-53.

299 *See* BICKEL, *supra* note 256, at 188.

300 *See* Scharpf, *supra* note 271, at 566-97. *But cf.* Redish, *supra* note 262, at 1043 (arguing that Scharpf's functional theory is really a part of the prudential theory "in a broad conceptual sense.").

301 *See* Scharpf, *supra* note 271, at 567-73.

302 *Id.* at 573-83.

303 *Id.* at 583-87.

304 *Id.* at 566 ("[M]uch, if not all, of the Court's political question practice should, like the procedural and jurisdictional techniques of avoidance, be explained in functional terms, as the Court's acknowledgment of the limitations of the American judicial process.").

305 *Id.* at 567.

section will analyze each case using one or more of the preceding political question theories.

1. *Guaranty Clause*

The Guaranty Clause of the Constitution assures that: "[t]he United States shall guarantee to every State in [the] Union a Republican Form of Government."[306] The Court has applied the political question doctrine in cases arising under this clause.[307] The most famous Guaranty Clause case is *Luther v. Borden*,[308] in which the plaintiff sued the defendant for trespass.[309] In *Luther*, the defendant broke into the plaintiff's house and arrested the plaintiff for organizing an uprising against the government of Rhode Island. At the time, Rhode Island had two governments: the Freedmen's Constitution and the People's Constitution.[310] The People's Constitution was formed when citizens of Rhode Island revolted against the Freedmen's Constitution and formed their own government. The issue in the case was whether the defendant, a citizen under the Freedman's Constitution, had the authority to act.[311] His authority depended on which government was the legitimate government of Rhode Island. The Court ruled that the issue was political and declined to review the case.[312]

Luther v. Borden can be applied to the classical theory of the political question doctrine. In *Luther*, the Court reasoned that "[u]nder [the Guaranty Clause] of the Constitution it rests with Congress to decide what government is the established one in a State."[313] According to the classical theory, the determination of which government was the legitimate government of Rhode Island was textually committed to Congress. Therefore, the Court abstained from judicial review.[314]

Both factors of the opportunistic theory of the political question doctrine were present in *Luther*. First, no social consensus existed at the time of this highly publicized case. The nation was divided over which government was the legitimate government of Rhode Island.[315] In addition, two other states, Michigan and Maryland, had formed their governments in the same way as the "new"

306 U.S. CONST. art. IV, § 4.
307 *See* CHEMERINSKY, *supra* note 257, at 131; STRUM, *supra* note 268, at 11.
308 48 U.S. (7 How.) 1 (1849).
309 *Id.* at 34.
310 *See* STRUM, *supra* note 268, at 14.
311 *Luther*, 48 U.S. (7 How.) at 35.
312 *Id.* at 46-47.
313 *Id.* at 42.
314 *See* STRUM, *supra* note 268, at 12.
315 *Id.* at 14-15.

Rhode Island government.[316] The outcome of this case would also affect their present governments. The Court was concerned that the "wrong" decision could lead to enforcement problems, perhaps through a revolt.[317] To favor one government over the other would have been highly political, and the Court wanted to maintain neutrality.[318]

2. *Reapportionment*

In order to have proper representation in Congress, the Constitution requires states to reapportion themselves after every national census.[319] States accomplish this through redistricting. The Court has heen very inconsistent in reapportionment cases. In *Colgrove v. Green*,[320] Illinois plaintiffs sued to have congressional elections delayed until after the state completed the process of redistricting. The plaintiffs claimed that the state was malapportioned because the district's boundaries were based on an outdated census. As a result, the plaintiffs claimed that they were not adequately represented in the House of Representatives.[321] The legislators had repeatedly voted against resolutions to reapportion the state, largely because many of them would be redistricting themselves out of office.[322] The Court ruled that the issue was nonjusticiable.[323] Justice Frankfurter, writing for the majority, reasoned that "the appellants ask[ed] of th[e] Court what [was] beyond its competence to grant."[324]

Frankfurter's reasoning illustrates the cognitive theory of the political question doctrine. This theory supports the acquiescence of the judiciary on issues that the Court cannot determine.[325] In contrast, Bickel argued that the result in *Colgrove* represents the normative theory. He believed that, when reviewing the case, the Court considered a number of factors and concluded that the case could not be resolved through legal principles.[326]

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316 *Id.* at 22.

317 *Id.* at 21-22.

318 *Id.* at 22 ("Many writers have pointed out that the Supreme Court's most important asset is its high prestige. It would take gamblers less prudent than Supreme Court justices to risk the loss of this prestige in a highly-charged partisan atmosphere.").

319 U.S. CONST. art. I, § 2.

320 328 U.S. 549 (1946).

321 *Id.* at 552.

322 *See* STRUM, *supra* note 268, at 41-42.

323 *Colgrove*, 328 U.S. at 552.

324 *Id.*

325 *See, e.g.*, Scharpf, *supra* note 271, at 555 (quoting Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924) ("Where no rules exist the court is powerless to act.")).

326 *See* BICKEL, *supra* note 256, at 190-92. Bickel wrote that:

Sixteen years later, in *Baker v. Carr*, the Court decided that reapportionment cases did not always involve political questions and, at times, could be justiciable.[327] The plaintiffs, residents of Tennessee, claimed that the Tennessee General Assembly had violated the Equal Protection Clause of the Fourteenth Amendment by holding elections with malapportioned districts.[328] The last reapportionment in Tennessee was based on the 1901 census, almost sixty years before the plaintiffs filed their claim. Justice Brennan, writing for the majority, held that this issue was not political.[329] The Court rejected the argument that the "lack of satisfactory criteria for a judicial determination,"[330] which may make an issue political, applied to this case. Brennan reasoned that the equal protection issue possessed judicially manageable standards that were "well developed and familiar."[331]

The opportunistic theory, however, could also explain the decision in *Baker*. One could argue that the Court changed its mind on the reapportionment issue because there was no longer a lack of social consensus nor an enforcement problem.[332] First, since *Colgrove*, the demographics of the country were changing. States were becoming more urban and social consensus was growing on the desirability of equal representation.[333] Second, President Kennedy was a supporter of increased representation in urban areas and for

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> *Colgrove* is a political-question case, and the only remaining inquiry is whether it holds that apportionment . . . is a matter of the sort for which we have no rules . . . or that it is of the sort to which rules are applicable, although they "should be only among the numerous relevant considerations." There is nothing in the opinion or in our political and legal traditions to support the first proposition; there is everything to affirm the second.

Id. at 191-92.

327 369 U.S. 186 (1962).

328 *Id.* at 194.

329 *Id.* at 209. Justice Brennan, in *Baker v. Carr*, defined political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

330 *Id.* at 210.

331 *Id.* at 226.

332 *See* STRUM, *supra* note 268, at 65-66.

333 *Id.* at 66.

minorities, thus making the enforcement problem unlikely.[334] "The Court's realization that a societal majority and its Presidential representative would be sufficient insurance against enforcement difficulties caused the reapportionment issue to be dusted off and removed from the political question shelf."[335]

3. *Military*

Gilligan v. Morgan[336] is the only military case in which the Supreme Court refused review under the political question doctrine. The plaintiffs in *Gilligan* were full-time students at Kent State University who sought relief after the Governor of Ohio ordered the National Guard to quell a disturbance that arose during political protests.[337] Several students were injured and some were killed when the Guard fired upon protesting students. The plaintiffs sought three types of relief: an injunction against the governor to stop premature ordering of troops; an injunction against the National Guard for future violations of student rights; and a declaration that section 2933.55 of the Ohio code was unconstitutional.[338] The district court dismissed the suit, holding that the plaintiffs failed to state a claim.[339] The court of appeals affirmed the district court's decision with the exception of the issue concerning the National Guard. The court remanded for consideration of the following issue:

> Whether there is a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?[340]

The Supreme Court reversed the Court of Appeals' decision.[341] The Court held that the respondents sought judicial evaluation of the composition of the Guard in terms of "training, weaponry, and orders."[342] In response to their request, Chief Justice Burger, writing for the majority, stated:

> [T]he nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government

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334 *Id.*
335 *Id.*
336 413 U.S. 1 (1973).
337 *Id.* at 2-3.
338 *Id.* at 3.
339 Morgan v. Rhodes, 456 F.2d 608, 615 (6th Cir. 1972), *rev'd*, 413 U.S. 1 (1973).
340 *Id.* at 608.
341 *Gilligan*, 413 U.S. at 4.
342 *Id.* at 5.

> . . . . The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[343]

Several of the political question doctrine theories could be used to explain the Court's decision in *Gilligan*. First, *Gilligan*'s analysis reflects the classical theory of the political question doctrine.[344] The critical issue in *Gilligan* was whether the training of the National Guard was adequate. The Court ruled that Congress possesses the power to make those determinations.[345] They stressed that the nature of the issue was textually committed to Congress. This illustrates Wechsler's view that "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts."[346]

Second, under the opportunistic theory, *Gilligan* involved a substantial enforcement problem. The plaintiffs wanted the Court to supervise the National Guard. Neither the National Guard nor the state of Ohio wanted the courts to run its vital military force.[347] The Court realized that continual judicial surveillance of the National Guard would lead to tension and inevitable conflict between the branches of government, which could result in a loss of prestige to the Court. The politically expedient answer was to decline review.

Third, under the cognitive theory, the Court was concerned about whether adequate standards exist for determining the sufficiency of National Guard training.[348] As Chief Justice Burger stated, "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches . . . [or] an area of governmental activity in which the courts have *less competence*"[349]

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343 *Id.* at 10.

344 *See* R. Brooke Jackson, *The Political Question Doctrine: Where Does it Stand After* Powell v. McCormack, O'Brien v. Brown *and* Gilligan v. Morgan?, 44 U. COLO. L. REV. 477, 485-86 (1973) ("The primary basis for this decision was that the supervision of the National Guard is textually committed by the Constitution to Congress."); *cf.* Henkin, *supra* note 262, at 619-20 (arguing that the ruling in *Gilligan* was based more on denying relief than the utilization of the political question doctrine). *But cf.* Redish, *supra* note 262, at 1035, 1056 ("Even if, as Henkin argues, *Gilligan* could have been resolved in the same manner by narrower means, it must be noted that the Court itself clearly did not view its rationale as so narrowly confined."). *Id.* at 1035.

345 *Gilligan*, 413 U.S. at 10.

346 WECHSLER, *supra* note 270, at 13.

347 *See* Jackson, *supra* note 344, at 486-87.

348 *See id.* at 488; *cf.* Redish, *supra* note 262, at 1056-57 (arguing that the ruling in *Gilligan* represented more of a prudential analysis).

349 *Gilligan*, 413 U.S. at 10 (emphasis added).

Fourth, under the functional theory, the Court was concerned that to provide the relief sought would be usurping the authority of another branch of government.[350] The relief sought was continual judicial supervision of Ohio's National Guard, a role which the Court considered to be "[e]xcessive interference with [a] coordinate[d] branch[] of government."[351]

E. Application of the Political Question Doctrine to the Combat Exclusion Rules

Although each of the political question doctrine theories have varied in significance over the years, they offer a composite view of the doctrine. By applying each of these theories to the combat exclusion issue, it can be seen that the combat exclusion issue could constitute a political question.

1. *Application of the Classical Theory to the Combat Exclusion Issue*

The combat exclusion issue could constitute a political question under the classical theory. Article I, Section 8 of the Constitution gives Congress the authority to regulate the Armed Forces.[352] Under the combat exclusion issue, the question is whether women in combat would degrade combat effectiveness.[353] At the time of the framing of the Constitution, many thought that the national government should "have unlimited powers to defend the free sovereigu state."[354] To ensure that Congress would not abuse its power, the founding fathers incorporated a series of checks and balances on both Congress and the President regarding the use of military power.[355] From the legislative history, it is apparent that the framers of the Constitution desired to leave military training issues regarding national security exclusively to Congress. Thus, under the classical theory, the Court should decline review of a claim requiring the resolution of the combat exclusion issue. The danger, as some have argued, is that if the Constitution gave Congress the exclusive authority to regnlate all military affairs, the Court would have to decline review of *any* constitutional issue involving the military.[356]

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350 *See* CHEMERINSKY, *supra* note 257, at 143-44.

351 *Id.* at 143.

352 U.S. CONST. art. I, § 8, cl. 12, 13.

353 *See supra* notes 240-45 and accompanying text.

354 *See, e.g.*, MILLIS, *supra* note 201, at 7 (quoting Hamilton, who wrote that military powers "ought to exist without limitation *because it is impossible to forsee or define the extent and variety of national exigencies.*").

355 *Id.* at 8.

356 *See* Redish, *supra* note 262, at 1041 (arguing that even a restricted view of the political question doctrine is dangerous. "The important point . . . is that under traditional judicial review theory, the absence of a limitation on the exercise of legislative or

Such an argument is unwarranted, however, because the justiciability of a case depends upon the context in which it arises.[357] The vast majority of military cases that raise constitutional issues concern administrative matters. The combat exclusion rule is the exception to the typical military case.[358] Utilization of the political question doctrine in this context is the rare exception, not the general rule. Therefore, the overwhelming majority of military constitutional cases would still be justiciable.[359]

2. *Application of the Cognitive Theory of the Political Question Doctrine*

Under the cognitive theory, the Court must decide if it is able to resolve the combat exclusion issue by relying on its own level of judicial expertise.[360] While it is true that the Court often decides highly complex or specialized issues,[361] the combat issue presents a special challenge.[362]

> [W]e must examine the physical requirements for combat roles and design honest performance standards . . . to evaluate whether women can meet the demands of a variety of combat roles. . . . [M]any other questions must be answered thoroughly so the United States can be certain that changes in the current policy would not occur at the expense of defense preparedness or the safety of military personnel. It will take time to satisfy these imperatives and it will involve the judgments of a great many people.[363]

Congress and the military must address several topics when deciding whether integrating women into combat units would affect national security.[364] If the Court were to examine the constitution-

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executive authority . . . should not preclude judicial application of the standards embodied in relevant constitutional amendments.").

357 *See* Scharpf, *supra* note 271, at 562.

358 *See* discussion *supra* part II.B.

359 *See, e.g.*, Scharpf, *supra* note 271, at 583 ("[T]he political question doctrine has found only very limited application in the war and [national] security cases.").

360 *Id.* at 560 ("In a political question decision, the Court does not hold that legal rules do not apply; it holds that competence to apply them should rest with the political departments.").

361 *See* Gemmette, *supra* note 40, at 98-101.

362 *See* Goodman, *supra* note 26, at 264; Kornblum, *supra* note 26, at 430-31.

363 *See Women in Combat Hearings*, supra note 5 (Christopher Jehn, Assistant Secretary of Defense).

364 For example, Congress requested that the Presidential Commission study numerous issues regarding women in combat:

> The Commission shall conduct a thorough study of all matters relating to the assignments of women in the Armed Forces and make findings on . . . the following matters . . . combat readiness . . . physical readiness . . . pregnancy and . . . childcare needs . . . unit morale and cohesion . . . advisability of permitting only voluntary assignments of women to com-

ality of the combat exclusion rules, it would have to determine whether the combat exclusion rules further the government's interest in national security.[365] The Court's task would center on determining whether female combatants would "substantially impede" combat effectiveness.[366] This task is arguably not judicially manageable, as both Congress and the Armed Forces have not yet determined the effects that women in combat would have on national security.[367] However, Congress' and the military's inability to address this issue adequately may be a compelling argument for the Court's intervention. The probative cost of judicial error, however, makes this solution unlikely. Without women actually serving in combat, it is difficult to ascertain their effectiveness.[368]

The Court has neither addressed the constitutionality of the combat exclusion rules nor assessed its level of expertise in analyzing this issue. The *Rostker* opinion illustrates the Court's discomfort in discussing the combat exclusion issue.[369] Justice Rehnquist, writing for the majority, stated that the *Rostker* issue only concerned registration and that the constitutionality of the combat exclusion rules would remain unreviewed. He stressed that this "should dispel any concern that we are *injecting ourselves in an inappropriate manner into military affairs*."[370]

3. *Application of the Functional Theory of the Political Question Doctrine*

The functional theory recoguizes the special characteristics of military actions that affect national security.[371] As Professor Scharpf points out: "[c]ases which deal[] with military measures in war or, more generally, with measures taken in the interest of national security would seem to have presented functional difficulties . . . ."[372]

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bat positions . . . advisability of requiring women to register for conscription . . . legal and policy implications . . . costs of meeting [modifications] . . . [and] effects of existing laws.

For greater detail on the Commission's topics for study, see 138 CONG. REC. S12416 (daily ed. Aug. 15, 1991).

365 *See supra* notes 240-41 and accompanying text.

366 *See supra* note 243 and accompanying text.

367 *See supra* notes 28-34 and accompanying text.

368 *See* Hirschorn, *supra* note 244, at 240 ("The primary function of a military organization is to wage war, and the only true measurement of its effectiveness is how well it performs in war. Anything else is an approximation: training and exercises cannot approach the actual danger, dislocation, fear, and uncertainty of war itself.").

369 *See supra* notes 168-93 and accompanying text.

370 Rostker v. Goldberg, 453 U.S. 57, 63 (1981) (emphasis added).

371 *See, e.g.*, Redish, *supra* note 262, at 1051 (conceding that certain rare issues concerning foreign policy and national security may justify the political question doctrine).

372 *See* Scharpf, *supra* note 271, at 583.

a. *Lack of Information*

Under the functional theory, one of the justifications for using the political question doctrine is when an information problem exists.[373] An information problem occurs when "the Court is not assured of full clarification of all relevant questions of fact and law."[374] The combat exclusion issue suffers from such a dearth of information. As previously stated, there are many unresolved questions regarding women in combat.[375] Without an actual combat situation, it would be impossible to determine the effectiveness of female combatants. Such issues are "delicate, complex, and involve large elements of prophecy."[376]

b. *Intrusion on Another Branch of Government*

The Court could create a remedy for the combat exclusion issue if it declared the rule unconstitutional. The concern is not that a remedy is impossible, but rather with the difficulty of creating an effective remedy without impeding the effectiveness of another branch. There are three possible outcomes if the Court were to review the combat exclusion issue.

i. *Remedy One*

If the Court declared the rules constitutional, no remedy would be required.

ii. *Remedy Two*

If the Court declared the rules unconstitutional, it would have to fashion a remedy that would protect an individual's rights without diminishing military effectiveness. The Court, in essence, must balance the interests to determine an appropriate remedy. Due to the speculative nature of female combatants' effects on national security, balancing interests would be difficult. The cost of judicial error is high. Furthermore, the Court might be deterred because of its reluctance to intrude on another branch. If the remedy is similar to

373 *Id.* at 567 ("When an absolute solution is not acceptable, an information problem which is inherent in an issue may justify the application of the political question doctrine.").

374 *Id.*

375 *See, e.g.*, Tuten, *supra* note 43, at 261-62.

376 *See* Scharpf, *supra* note 271, at 578 (quoting Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)). *See generally* Hirschorn, *supra* note 244, at 240 ("If judicial intervention does impair the effectiveness of [the] military . . . there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of failure.").

that in *Gilligan*, then the Court may regard any remedy as intruding upon another branch.[377]

iii. *Remedy Three*

The Court could also declare the laws unconstitutional but refuse to grant a remedy for "want of equity."[378] Professor Henkin argued that denying a remedy on equitable grounds comports more with the concept of judicial review and constitutional interpretation.[379] Commentators have criticized this argument.[380] "Characterizing [a] Court's rationale as a matter of equity, rather than of the political question doctrine, does not render the decision any more defensible as a constitutional matter, and can only have the counterproductive effect of obscuring the real issues."[381]

4. *Application Under the Opportunistic Theory*

a. *Social Consensus*

Under the opportunistic theory, the two factors present in most political question cases are also present in the combat exclusion issue. Over the years, the social consensus concerning women in combat has changed dramatically.[382] During the Persian Gulf War,

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377 *See supra* notes 342-43 and accompanying text.

378 *See* Henkin, *supra* note 262, at 617. Henkin argued:

> The equity practice of the federal courts has largely retained its historic scope, its historic exceptions, and its tradition of broad discretion and flexibility, leaving large room for "wisdom" and "prudence." There is no reason why these should not include considerations of federalism or the separation of powers, of institutional integrity and the inter-institutional harmony implied in the nature of judicial power and the character of judicial institutions in their relation to political power and political institutions.

Id. at 618-19 (footnotes omitted).

379 *Id.* at 622 (arguing that "[t]o deny a remedy on equitable grounds does not carve an exception in *Marbury v. Madison* for which there is no basis in constitutional text or in anything else relevant to constitutional interpretation."). *But see* Mulhern, *supra* note 262, at 99 ("Commentators attack the doctrine as inconsistent with basic principles of our constitutional practice, but these attacks are unsuccessful. Their failure reveals flaws in the critics' assumptions about the role of the judiciary in our constitutional system.").

380 There are two main criticisms of Henkin's theory. First, the concept of judicial review has no textual basis in the Constitution. Second, Chief Justice Marshall acknowledged the political question doctrine in *Marbury v. Madison*. Therefore, political questions were "carved out" as an exception to judicial review. For further criticism, see Nagel, *supra* note 262, at 654-55; Redish, *supra* note 262, at 1055-57.

381 *See* Redish, *supra* note 262, at 1056.

382 *See, e.g.*, BINKIN & BACH, *supra* note 13, at 39 (reporting on two polls taken in the 1970's. In the first study, 24% of those polled agreed that women should have equal treatment regarding the draft, while 71% disagreed. In the second study, 65% reacted unfavorably when asked to note their attitude toward women's military service, while 17% reacted favorably.

polls indicated that America is divided over the issue.[383] In fact, even women in the military are divided over their role in combat.[384] One reason for the lack of social consensus is that the issue involves heated conflicts over concerns of inequality versus national security.[385]

b. *Enforcement*

If the Court declares the combat exclusion rules and policies unconstitutional, enforcement problems are likely to emerge. Neither Congress, the President, nor the Armed Forces seem prepared to lift the combat exclusion rules completely.[386] For example, even Representative Beverly Brown, who supports increasing opportunities for women in the military, rejects a "[w]holesale lifting of the combat exclusion rules."[387]

5. *Application of the Normative Theory of the Political Question Doctrine*

Again, the normative theory consists of two components: that certain governmental actions should be immune from judicial review and that certain issues cannot be resolved by legal principles. Under the first premise, normativists argue that in some cases "the job is better done without rules, or that even though there are applicable rules, these rules should be among the numerous relevant considerations."[388] One could argue that the combat exclusion issue presents a need for such a balancing test because it involves considerations of equal protection and national security.

Under the second premise, Professor Bickel argues that some decisions cannot be resolved when they involve the following factors: "lack of capacity; . . . strangeness of the issue; . . . sheer momentousness of [the issue]; . . . anxiety . . . that the judicial judgment will be ignored, [or] . . . should be; . . . [and] inner vulnerability, the self-doubt of an institution which is electorally irresponsible."[389] From the previous theoretical applications, one can make a strong

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383 *See, e.g.*, Kantrowitz, *supra* note 59, at 23 (public split on women in ground combat: 52% for to 44% against); USA TODAY, Sept. 20, 1991, at 1A (public split on women in combat issue 53% for and 45% against).

384 *See* Kantrowitz, *supra* note 59, at 23 ("There's also some doubt among military women themselves about ground fighting.").

385 *See supra* notes 51-56 and accompanying text.

386 *See* discussion *supra* part I.E.

387 *See* Hamit, *supra* note 56, at 31.

388 *See* Scharpf, *supra* note 271, at 559 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961)).

389 *See* BICKEL, *supra* note 256, at 184.

argument that the combat exclusion issue is not judicially resolveable.[390]

F. The Political Question Doctrine is the Better Opinion for the Combat Exclusion Rules

The Court should use the political question doctrine if confronted with the constitutionality of the combat exclusion rules for two reasons. First, a high cost of judicial error exists in relation to this issue. As previously stated, the actual effect of women in combat will not be known until after integration.[391] "Full combat status should not be granted . . . until we have had the opportunity to experiment using various mixes of women in selected combat units under actual combat conditions."[392] Congress or the President is the best political institution to oversee this experiment. Besides being politically responsible, they can correct judgmental errors more expeditiously.[393] For example, if a war breaks out and women are integrated into combat units and, for whatever reason, the integration is not effective, Congress or the President could act more quickly to remedy the situation. This is not the case with the Court. "If judicial intervention does impair the effectiveness of [the] military . . . there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of failure."[394] Even individuals supporting the abolition of combat exclusion rules acknowledge that modification of the rules would be more appropriate: "[A]n immediate and full-scale integration in spite of the uncertainty would be inappropriate and irresponsible."[395]

Second, by applying the political question doctrine to the exclusion rules, the Court would reverse a growing trend towards unbridled deference. "In the military context, the deference is often so extensive as to raise the question whether judicial review is even applicable."[396] As previously explained, recent cases illustrate the Court's willingness to accept virtually *any* justification for which the "military perceives a need."[397] Some have argned that such deference is "de facto nonjusticiability."[398] However, the judicial consequences of the two doctrines differ significantly.[399] Under "de facto

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390 *See* discusssion *supra* part III.D.

391 *See supra* note 75 and accompanying text.

392 *See* Tuten, *supra* note 43, at 261.

393 *See* Hirschorn, *supra* note 244, at 240.

394 *Id.*

395 *See* Jody M. Cramsie, Note, *Gender Discrimination in the Military: The Unconstitutional Exclusion of Women From Combat*, 17 VAL. U. L. REV. 547, 586 (1983).

396 *See* Dienes, *supra* note 238, at 799.

397 Goldman v. Weinberger, 475 U.S. 503, 528 (1986) (O'Connor, J., dissenting).

398 *See* Dienes, *supra* note 238, at 820.

399 Redish offers an interesting distinction between deference and political question:

nonjusticiability," the Court makes a decision on the merits. Under the political question doctrine, however, the Court does not make a decision on the merits. Though one could argue that the net effect may be the same, two important distinctions exist. First, under the political question rubric, the Court does not explicitly approve the acts or regulations of the military or Congress.[400] Second, the Court will not apply the political question doctrine in *every* military case.[401] Justice Brennan noted in *Baker v. Carr* that political questions do not apply to whole categories.[402] Instead of applying maximum deference in every military case, the Court could use nonjusticiability sparingly and apply a limited amount of deference in other military-related constitutional cases.

CONCLUSION

In conclusion, the combat exclusion rules fit into the framework of a political question. The Court, in accepting the issue, can do three things: decide the issue as it would any other constitutional issue; decide the issue in the light of extreme deference to the military; or decline to review the issue because it involves a political question. If the Court feels uncomfortable deciding this issue on the merits, it would be better to decline review. Our political system has safeguards to ensure the resolution of this issue in another arena.

Many commentators have criticized the political question doctrine. Although the criticisms vary, they comprise of two major arguments. First, commentators consider the political question doctrine dangerous to the concept of judicial review because of its

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> [I]t is vital to distinguish between appropriate "substantive" deference—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action—and unacceptable total "procedural" deference, where the court concludes simply that resort to the judiciary constitutes the wrong "procedure," because the decision is exclusively that of the political branches.

Redish, *supra* note 262, at 1048-49.

Redish's argument, however, fails to consider when "appropriate deference," as he calls it, is replaced by the absolute deference, such as that used in military cases. Although Redish concedes that the difference "may be only one of degree," *id.* at 1049 n.96, when looking at his argument from a narrow perspective, the "substantive" and "procedural" deference are indistinguishable. *See* Mulhern, *supra* note 262, at 133 n.142 ("Commentators who would make the political question doctrine appear aberrant must explain the prominence of judicial deference in our legal culture as evidence of something other than division of responsibility for constitutional interpretation.").

400 *See* BICKEL, *supra* note 256, at 188.

401 *See supra* notes 356-59 and accompanying text.

402 *See* Baker v. Carr, 369 U.S. 186, 210-11 (1962).

potential for abuse.[403] Second, commentators argue that the principle of deference obviates the need for the doctrine.[404] In the vast majority of civilian cases, "ordinary" deference is preferable to complete abstinence from judicial review. The Court, however, does not apply "ordinary" deference to military cases. When deference is given to the point of "de facto nonjusticiability," the principle becomes more dangerous than the political question doctrine itself. If the concern among commentators is the compromise of the concept of judicial review, then the principle of absolute deference needs to be reevaluated.[405] Currently, the political question doctrine offers greater protection for judicial review in military cases than the principle of deference.

Recent legislation offers some female soldiers an opportunity to serve in combat. The question of broadening their opportunities in the future remains. If Congress believes that combat exclusion is more an issue of national security rather than of equal opportunity, chances for women to expand their role in combat decrease. Much depends on President Clinton's reactions to the findings of the Presidential Commission. Despite recent setbacks concerning the Presidential Commission's findings, the legislation, nevertheless, reflects a major change in congressional and public opinion regarding women in combat.

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403 *See* Mulhern, *supra* note 262, at 117-18 (terming the criticism as the "cataclysmic consequences" argument).

404 *See* Redish, *supra* note 262, at 1051.

405 As Professor Mulhern aptly argues, "[i]n law, as in science, a phenomenon that refuses to conform with orthodox theory should inspire reexamination of the theory." Mulhern, *supra* note 262, at 98 (citation omitted).

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