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A WOMAN SOLDIER'S RIGHT TO COMBAT:  
EQUAL PROTECTION IN THE MILITARY

TIM BAKKEN\*

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INTRODUCTION: DE JURE DISCRIMINATION IN THE MILITARY

Through federal policy and its own rules and culture, the U.S. military has been, and to some extent remains, especially in regard to women, the last government institution accepting of de jure discrimination.<sup>1</sup> Over the past several years, this policy has been eroded, first with Congress's decision in 2010 to reverse itself and allow gays and lesbians to serve openly in the military.<sup>2</sup> Then, in 2013, the Supreme Court struck down the Defense of Marriage Act, effectively allowing same-sex marriages.<sup>3</sup> The military had no choice but to provide gay and lesbian soldiers the unlimited right to military service and, for married homosexual soldiers, rights and benefits that are equal to those available to married heterosexual couples.<sup>4</sup>

However, neither Congress nor the Supreme Court has acted to ensure that women have the right to hold all jobs in the military for which they are qualified. Most prominently, the military prohibited all women from serving in combat units.<sup>5</sup> But, in January of 2013, the

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1. DEP'T OF DEFENSE, REPORT TO CONGRESS ON THE REVIEW OF LAWS POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES, at i (Feb. 2012), *available at* [http://www.defense.gov/news/wisr\\_report\\_to\\_congress.pdf](http://www.defense.gov/news/wisr_report_to_congress.pdf) [hereinafter DEPARTMENT OF DEFENSE, REPORT TO CONGRESS].

2. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-111publ321/pdf/PLAW-111publ321.pdf>.

3. United States v. Windsor, 133 S.Ct. 2675 (2013).

4. Leo Shane III, *DOD Announces Full Benefits to Married Same-Sex Couples*, STARS AND STRIPES (Aug. 14, 2013), <http://www.stripes.com/news/us/dod-announces-full-benefits-to-married-same-sex-couples-1.235284>.

5. Memorandum from the Chairman of the Joint Chiefs of Staff and the Secretary of Defense to the Secretaries of the Military Departments (Jan. 24, 2013), *available at* <http://www.defense.gov/news/WISRJointMemo.pdf> [hereinafter Department of Defense, *Elimination*] (declaring the elimination of the 1994 Direct Ground Combat Definition and Assignment Role).

military lifted its blanket exclusion of women from combat.<sup>6</sup> Nonetheless, the military reserved for its commanders the continued right to exclude women from combat if the commanders could assert a particular military necessity as a justification.<sup>7</sup> The justification that continues to be asserted is one based on the physical differences between men and women.<sup>8</sup> Thus, because it is unlikely that military rules will provide equal opportunity to women unless higher law mandates it, this Article focuses on women soldiers' Equal Protection rights to all jobs in the military, especially in the combat arms branches.

The combat opportunities for women soldiers might not be as numerous or attainable as recent events and media reports seem to indicate. Despite progress, women soldiers should remember the Equal Protection guarantees of the Constitution and not rely only on military commanders' discretionary decisions for equal opportunity.<sup>9</sup> On January 24, 2013, a Department of Defense press release headline read, *Defense Department Expands Women's Combat Role*.<sup>10</sup> Not indicating the full integration of women, the headline was more accurate than the headlines of prominent news outlets. A *New York Times* headline read, *Pentagon Is Set to Lift Combat Ban for Women*.<sup>11</sup> A Reuters headline read, *Pentagon Lifts Ban on Women in Combat*.<sup>12</sup> A *U.S. News* headline read, *'Valor Knows No Gender': Pentagon Lifts Ban on Women in Combat*.<sup>13</sup> The responses to these media outlets' headlines should be "not yet, not completely, and maybe a long time from now."

As the Defense Department's headline read, a women's right to combat has been expanded, but it is not a stable right, and the right is not complete. The new rule provides broad discretion for the military to exclude women from combat upon a sufficient factual basis,

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6. *Id.*

7. *Id.*

8. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i–ii.

9. See U.S. CONST. amend. V (providing equal protection for individuals in their relations with the federal government in the Due Process Clause); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (affirming the "due process of law guaranteed by the Fifth Amendment to the Constitution" and the federal government's duty to respect that protection).

10. Claudette Roulo, *Defense Department Expands Women's Combat Role*, DEP'T OF DEFENSE (Jan. 24, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=119098>.

11. Elisabeth Bumiller & Thom Shanker, *Pentagon Is Set to Lift Combat Ban for Women*, N.Y. TIMES (Jan. 23, 2013), <http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html?pagewanted=all>.

12. Phil Stewart & David Alexander, *Pentagon Lifts Ban on Women in Combat*, REUTERS (Jan. 24, 2013), <http://www.reuters.com/article/2013/01/24/us-usa-military-women-pentagon-idUSBRE90N0SI20130124>.

13. Erin McClam, *'Valor Knows No Gender': Pentagon Lifts Ban on Women in Combat*, NBC NEWS (Jan. 24, 2013), [http://usnews.nbcnews.com/\\_news/2013/01/24/16681072-valor-knows-no-gender-pentagon-lifts-ban-on-women-in-combat?lite](http://usnews.nbcnews.com/_news/2013/01/24/16681072-valor-knows-no-gender-pentagon-lifts-ban-on-women-in-combat?lite).

which is not defined.<sup>14</sup> Given the hidebound culture of the military, tradition often prevails over law because with its vast discretion the military will define *law* to permit a preordained result.<sup>15</sup> In effect, the military qualifies every rule with “depending on mission needs,” which converts law, if military *rules* can be called that, into the discretionary decisions of military commanders.<sup>16</sup>

Less than a month after the Pentagon announced the new rule, the Commandant of the Marines explained vaguely why women could be excluded from the infantry, the largest combat unit:

I think there is absolutely no reason to think our females can't be tankers, or be amtrackers, or be artillery Marines . . . . The infantry is different . . . . You could reach the point where you say “[the integration of women soldiers is] not worth it” . . . . The numbers [of qualified women] are so infinitesimally small, it's not worth it.<sup>17</sup>

In one respect, the commandant has a point if the qualification for a combat unit is defined narrowly, such as performance on a physical fitness test. One physical fitness test for all soldiers might result in only a relatively few women qualifying for combat.

However, the commandant's argument that a uniform physical fitness test would not be “worth it,” presumably on a cost-benefit basis, has been faulty and dated for many years. The Army's basic physical fitness test for all soldiers, male and female, already permits women to perform fewer pushups and sit-ups and to run a two-mile course more slowly than men to qualify for duty.<sup>18</sup> Even among men, the test permits older soldiers to remain on duty by performing at a lower level than younger soldiers.<sup>19</sup> The Army permits an older

14. Department of Defense, *Elimination*, *supra* note 5.

15. Chris Madsen, *Military Justice, the Anglo-American Tradition*, OXFORD BIBLIOGRAPHIES, available at <http://www.oxfordbibliographies.com/view/document/obo-9780199791279/obo-9780199791279-0045.xml?print>.

16. *Id.*

17. James Dao, *In Arduous Officer Course, Women Offer Clues to Their Future in Infantry*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/us/marines-look-to-infantry-course-for-insight-on-women.html?ref=us>.

18. See *Male Pushup Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/male-pushup-standards>; *Male Situp Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/male-situp-standards>; *Male 2 Mile Run Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/male-2-mile-run-standards>; *Female Pushup Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/female-pushup-standards>; *Female Situp Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/female-situp-standards>; *Female 2 Mile Run Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/female-2-mile-run-standards>.

19. *Male Pushup Standards*, *supra* note 18; *Male Situp Standards*, *supra* note 18; *Male 2 Mile Run Standards*, *supra* note 18.

male soldier to complete fewer pushups and sit-ups and run the two-mile course more slowly than a younger male soldier and still receive the same score.<sup>20</sup> To illustrate, to qualify for the maximum number of points on pushups, a male soldier in the twenty-seven to thirty-one age range must do seventy-seven pushups in two minutes, but a male soldier in the forty-two to forty-six age range must do only sixty-six.<sup>21</sup> For female soldiers to qualify for the maximum number of pushup points, in the twenty-seven to thirty-one age range they must do fifty pushups, and in the forty-two to forty-six range female soldiers must do thirty-seven pushups in two minutes.<sup>22</sup>

In response to the commandant, a colonel in the Army argues that the physical fitness test used by the military should be modified to emphasize endurance over strength and that tests for combat inclusion should be broadened to include non-physical qualifications, such as emotional strength.<sup>23</sup> The author uses Audie Murphy as an example.<sup>24</sup> He was the most decorated soldier in U.S. history.<sup>25</sup> But, during World War II, the Marines and Army paratroopers rejected him for his physical stature, five feet, five inches and 120 pounds.<sup>26</sup> The colonel found wanting the military's size and strength justification to exclude women from combat.<sup>27</sup> During the Vietnam War, the Vietnamese soldiers were five inches shorter and fifty pounds lighter than United States soldiers.<sup>28</sup>

The colonel concluded that the problem with "our current emphasis on physical strength is that it celebrates the use of violence at the expense of other methods of gaining power and influence."<sup>29</sup> To illustrate, she uses the example of a commander in Iraq in 2003 who ordered the soldiers in his unit to backpedal and take a knee when approached by an angry group of Iraqis.<sup>30</sup> The commander put his open hand over his heart to indicate the Islamic gesture "peace be with you."<sup>31</sup> There was no fight or violence, but "this act of courage . . . did not garner awards and widespread recognition in the military."<sup>32</sup>

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20. *Id.*

21. *Male Pushup Standards*, *supra* note 18.

22. *Female Pushup Standards*, U.S. ARMY (2013), <http://usarmybasic.com/army-physical-fitness/female-pushup-standards>.

23. Ellen Haring, *Women and the Audie Murphy Model*, ARMED FORCES JOURNAL (Aug. 2013), <http://armedforcesjournal.com/article/2013/08/14067070>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Haring, *supra* note 23.

30. *Id.*

31. *Id.*

32. *Id.*

Through the new policy, the Pentagon has preserved its right to exclude women and, in the meantime, has preserved its autonomy and broad discretion by effectively deflating any congressional impetus to legislate on the matter of women in combat. Thus, this Article discusses why women soldiers should not avert their eyes from constitutional challenges to their exclusion from jobs within the military. Although through its expansive deference-to-the-military jurisprudence, the Supreme Court has largely prevented all soldiers from using the Constitution to question military policies, women soldiers should nevertheless continue to assert Equal Protection claims if they expect to obtain jobs based on their individual qualifications.<sup>33</sup> On January 24, 2013, the Secretary of Defense and Chairman of the Joint Chiefs of Staff signed a Memorandum whose title promised more than it gave: "Elimination of the 1994 Direct Ground Combat Definition and Assignment Role."<sup>34</sup> The media and commentators interpreted this to mean the elimination of the ban on women serving in combat.<sup>35</sup> This interpretation is not correct.

The Pentagon Memorandum did rescind the presumption that women may not serve in combat, but it preserved the authority of the military to continue "to keep an occupational specialty or unit closed to women" if the exclusion is "narrowly tailored, and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position."<sup>36</sup> Since then, one member of Congress questioned whether the inclusion of women in combat units would increase the number of sexual assaults in the military.<sup>37</sup> While the number of sexual assaults in the military is significant, about 26,000 in 2012, it seems that a better remedy to the problem than eliminating opportunities for potential women victims would be to focus on preventing assailants' from assaulting women.<sup>38</sup> The culture of exclusion

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33. See *United States v. Virginia*, 518 U.S. 515, 557 (1996) (holding that women have an equal protection right to equal opportunities); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (holding that female gender must be irrelevant in employment decisions due to equal protection).

34. Department of Defense, *Elimination*, *supra* note 5; Stewart & Alexander, *supra* note 12; McClam, *supra* note 13.

35. Bumiller & Shanker, *supra* note 11.

36. Department of Defense, *Elimination*, *supra* note 5.

37. Anna Mulrine, *Women in Combat No Later than 2016, Pentagon Says*, CHRISTIAN SCIENCE MONITOR (July 25, 2013), <http://www.csmonitor.com/USA/Military/2013/0725/Women-in-combat-no-later-than-2016-Pentagon-says>.

38. Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES (May 7, 2013), <http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html?pagewanted=all>. But see DEP'T OF DEFENSE, *Department of Defense Annual Report on Sexual Assault in the Military* 3 (Vol. 1, 2012), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

in the military will not erode quickly. One 2013 book details what the author believes will be the implications of women in combat.<sup>39</sup> Titled *Deadly Consequences: How Cowards are Pushing Women into Combat*, the book's online summary concludes:

But there is no evidence women are clamoring for ground combat assignments. Worse yet, there is significant reason to believe that women in combat will lead to a wide range of devastating consequences, many unforeseen and unintended by proponents, but no less dangerous.<sup>40</sup>

Especially in the military, a new rule will not soon change an old culture. The military receives a vast amount of deference from the courts, and the "occupational specialty" exception in the Memorandum provides a clear basis for continued exclusion.<sup>41</sup> Less than a year before the new rule, the Department of Defense, in February 2012, had reinforced the old rule, excluding women from combat.<sup>42</sup> The Pentagon reported to Congress that it would continue its formal, de jure policy of excluding women from combat units.<sup>43</sup> The 2012 Pentagon Report reinforced its exclusion policy despite a report a year earlier by the Military Leadership Diversity Commission, created by Congress, finding that the bar against women in combat should be lifted.<sup>44</sup>

But, in its February 2012 announcement, based on a brief, lightly reasoned summary, the Pentagon said that it would permit women to serve in units that *supported* combat operations but continue a policy of excluding women from traditional combat units, such as infantry, armor, and reconnaissance and special operations.<sup>45</sup> In effect, the "new" Pentagon policy, in 2012, provided no real benefit to women soldiers because they had already been functionally serving in combat support units for years, given the needs created by the wars in Iraq and Afghanistan.<sup>46</sup> Serving in combat "support-related jobs" offers far less career advancement than serving in combat

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39. ROBERT L. MAGINNIS, *DEADLY CONSEQUENCES: HOW COWARDS ARE PUSHING WOMEN INTO COMBAT* 99–100 (2013) (listing as examples an increase in sexual assaults, physical suffering, and subjecting women to the draft).

40. Robert L. Maginnis, *Deadly Consequences: How Cowards are Pushing Women into Combat*, AMAZON, [http://www.amazon.com/Deadly-Consequences-Cowards-Pushing-Combat/dp/1621571904/ref=cm\\_cr\\_pr\\_product\\_top#](http://www.amazon.com/Deadly-Consequences-Cowards-Pushing-Combat/dp/1621571904/ref=cm_cr_pr_product_top#).

41. Department of Defense, *Elimination*, *supra* note 5.

42. *Id.*

43. *See* DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i, 16.

44. *Id.*

45. *Id.* at 7.

46. Elisabeth Bumiller, *Pentagon Allows Women Closer to Combat, but Not Close Enough for Some*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/10/us/pentagon-to-loosen-restrictions-on-women-in-combat.html>.

units, such as infantry, artillery, and special forces, because promotion in the military to higher ranks often depends on having served in a combat unit.<sup>47</sup>

Sounding the kind of rationale used in the past to exclude from the military persons who were black or homosexual, a Marine Captain responded to the 2012 Pentagon policy, which continued the combat exclusion:

I think the infantry in me will have a very hard time ever accepting that I'm going to rush against the enemy and there's going to be a female right next to me. . . . Can she do it? Some might. I don't know if this sounds bad, but I kind of look at everything through my wife. Is that my wife's job? No. My job is to make sure my wife is safe.<sup>48</sup>

Pervasive within the military, such stereotypical thinking is what the Supreme Court rejected in *Price Waterhouse v. Hopkins*, in 1989, as a rationale for treating women differently in the workplace.<sup>49</sup> Yet, as discussed in this Article, the Court has found that the military is a separate society.<sup>50</sup> "This [Supreme] Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."<sup>51</sup> It possesses the right, uniformly and with little scrutiny, to discriminate to ensure "good order and discipline."<sup>52</sup>

Such reasoning exists at the highest levels of the Pentagon. On the day she introduced the revised combat-exclusion policy, in February of 2012, Vee Penrod, the Deputy Assistant Under Secretary of Defense for Military Personnel Policy, was asked how the Pentagon knew, from the previous 1994 policy, that women could not meet the physical demands of combat.<sup>53</sup> She said that the 1994 ruling was "based on experience with the leadership and experience in combat."<sup>54</sup> The Pentagon relies on such peremptory reasoning and has never offered any empirical evidence for excluding women from combat.<sup>55</sup> Taking into consideration such old presumptions and

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47. See James Dao, *Servicewomen File Suit Over Direct Combat Ban*, N.Y. TIMES (Nov. 27, 2012), [http://www.nytimes.com/2012/11/28/us/servicewomen-file-suit-over-direct-combat-ban.html?\\_r=0](http://www.nytimes.com/2012/11/28/us/servicewomen-file-suit-over-direct-combat-ban.html?_r=0) ("In the Army, the suit says, 80 percent of general officers come from combat arms positions, which women are barred from holding.").

48. *Id.*

49. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

50. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

51. *Id.*

52. *Id.* at 734.

53. Bumiller, *supra* note 46.

54. *Id.*

55. *Id.*

stereotyping, and in applying the *United States v. Virginia* exceedingly persuasive standard, which the government must satisfy to sustain sex or gender discrimination, the conclusion in this Article is that the military's combat exclusion policy is not consistent with concepts of equality or Equal Protection.<sup>56</sup> The only way the combat-exclusion policy could be saved constitutionally would be if the Supreme Court continued to provide extreme deference to military judgment, even where the military infringes significantly on fundamental rights. Similarly, the Supreme Court's extreme deference policy toward military judgment is obsolete.

The January 2013 Pentagon policy provided that women need not be integrated into combat units until 2016.<sup>57</sup> The Pentagon retained the right to permanently keep an occupational specialty or unit "closed to women" if the Pentagon can assert a sufficient factual basis.<sup>58</sup> Such relatively broad authority, which the Defense Department has granted to itself, will continue to permit arbitrary exclusion policies. The extreme deference that courts have for the military means that judicial review of even de jure exclusion policies in the military will be rare, and the basis for excluding women from combat in the future will probably be similar to the slim basis for excluding them in the past, with a narrow focus on physical strength.<sup>59</sup>

The 2012 combat-exclusion policy was not new, and it was not neutral even in regard to an examination of physical ability.<sup>60</sup> The 2012 policy contained what it called a "vision statement," which read: "[t]he Department of Defense is committed to removing all barriers that would prevent Service members from rising to the highest level of responsibility that their talents and capabilities warrant."<sup>61</sup> That vision statement was so broad as to be meaningless; nobody believes that there should be barriers that prevent anyone from rising based on her or his "talents and capabilities." The 2013 policy is narrower, allowing combat exclusion if the exclusion is "narrowly tailored, and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position."<sup>62</sup> Still, if the new policy were not premised on stereotypical thinking, one would expect a more neutral statement, such as "every soldier, male and female, may serve in combat if he or she meets the prescribed mental and physical standards."<sup>63</sup>

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

57. Department of Defense, *Elimination*, *supra* note 5.

58. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i.

59. *See id.*

60. *See id.*

61. *Id.* at i.

62. Department of Defense, *Elimination*, *supra* note 5, at 2.

63. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i.

Apart from a general physical fitness test for all soldiers and some specialized unit tests for only men, the Pentagon has not tested soldiers to determine their capability for combat.<sup>64</sup> It has simply included men and excluded women.<sup>65</sup> The 2012 Pentagon Report contained virtually the only remaining federal or state policy of de jure discrimination against women:

*DoD policy prohibits women from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground. The direct ground combat assignment exclusion prohibits the assignment of women to ground combat units below the brigade level . . . [P]ositions at the battalion level of direct ground combat units, in select occupational specialties . . . [are] open to women. These positions . . . do not include occupational specialties closed to women, such as infantry.*<sup>66</sup>

The 2013 policy limits the instances when women can be excluded, but it does not provide for a neutral basis on which to exclude all soldiers, male and female, who are unfit for combat.

Although women may routinely serve in combat support branches, the 2013 Pentagon policy thus retains a modified exclusion rationale for women who want to serve in combat units (armor, artillery, infantry, and special forces).<sup>67</sup> The Army is the largest military service.<sup>68</sup> More general officers come from Infantry than from any other branch.<sup>69</sup> Women comprise only thirteen percent of the Army.<sup>70</sup> Facing exclusion from Infantry and the other combat branches, from which a large proportion of the remaining generals advance, women will necessarily comprise a far lower percentage of top positions in the Army than their percentage (thirteen percent) in the Army population.<sup>71</sup>

Congress has not acted with any urgency in opposition to the Pentagon's combat exclusion policy. For instance, "Congress has repeatedly balked at allowing women in combat and has in recent years asked the Pentagon sometimes sharp questions when it became obvious through news reports that women were serving in combat in Iraq and Afghanistan."<sup>72</sup> In 1980, Congress opposed President Jimmy Carter's recommendation that women be required to register

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64. *APFT Standards*, U.S. ARMY (2013), available at <http://usarmybasic.com/army-physical-fitness/apft-standards>.

65. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i.

66. *Id.*

67. *Id.* at 7.

68. *Id.* at 2.

69. *Id.*

70. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at 2.

71. *Id.*

72. Bumiller, *supra* note 46.

for the selective service.<sup>73</sup> Instead, Congress limited registration to “every male citizen [of the United States] . . . between the ages of 18 and 26.”<sup>74</sup>

In *Rostker v. Goldberg*, the statute limiting draft registration to males was challenged by a male registrant who claimed that the statute violated the Equal Protection guarantees of the Constitution.<sup>75</sup> In upholding the statute, in 1981, the Supreme Court found that “Congress concluded that [women] would not be needed in the event of a draft, and therefore decided not to register them . . . . [W]e conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.”<sup>76</sup> Finding no Equal Protection violation in *Rostker*, the Court has similarly concluded that Congress and the military have broad authority to regulate military affairs, even where that means providing military personnel with limited constitutional protections.<sup>77</sup>

#### I. THE SUPREME COURT’S DEFERENCE TO THE MILITARY

Beginning in the 1970s, the Supreme Court, spurred by Associate Justice William Rehnquist, began a policy of extreme deference toward the military.<sup>78</sup> The Court’s deference was at its zenith when any individual attacked a statute concerning the military, such as the draft registration statute in *Rostker*.<sup>79</sup> In requiring only men to register for the draft in *Rostker*, the Court refused to disapprove what was, and continues to be, de jure discrimination.<sup>80</sup> In other instances, the Executive Branch has acted alone to restrict the rights of military personnel. In *Parker v. Levy*, the Army prohibited an officer from making negative comments about the Vietnam War.<sup>81</sup> The Court upheld the officer’s criminal conviction and three-year prison sentence as punishment for his expression (arguing against the war).<sup>82</sup> Had he not been in the military, his speech would have had the utmost First Amendment protection.<sup>83</sup>

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73. *Rostker v. Goldberg*, 453 U.S. 57, 60 (1981).

74. 50 U.S.C. § 453 (1981).

75. *Rostker*, 453 U.S. at 63.

76. *Id.* at 77, 83.

77. *Id.* at 57, 64–67.

78. *See id.* at 59.

79. *Id.* at 83.

80. *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

81. *Parker v. Levy*, 417 U.S. 733 (1974) (upholding a conviction under the Uniform Code of Military Justice where an Army officer tried to dissuade soldiers from going to Vietnam).

82. *Id.* at 760–61.

83. *See Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011); *Texas v. Johnson*, 491 U.S. 397, 408 (1989) (holding that the government may not prohibit political speech unless the speech tends to cause immediate violence).

The Constitution, mainly in Article II, provides the President with express authority in only several instances, such as in regard to vetoing bills or pardoning persons convicted of crimes.<sup>84</sup> Even though in regard to his control over the military the President has only Commander-in-Chief authority, a vague power, the Supreme Court has deferred to the military's treatment of its individual soldiers.<sup>85</sup> Usually, when acting alone with only implied power, Executive authority can be limited by congressional action.<sup>86</sup> When acting with implied authority, which is often, the President's authority depends on whether Congress has concurred, demurred, or remained silent.

The constitutional structure behind determining the extent of the President's authority was constructed in *Youngstown Sheet & Tube v. Sawyer*, in 1952, through Justice Jackson's concurring opinion.<sup>87</sup> Justice Jackson wrote:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty . . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.<sup>88</sup>

In *Youngstown*, the Court was not clear as to whether it believed Congress had disapproved or remained silent about President Truman's attempt to take over the steel mills. Regardless, the Court concluded that President Truman did not have adequate implied authority in the absence of congressional approval to expropriate the steel mills, even for the benefit of the U.S. war effort in Korea.<sup>89</sup> As in *Youngstown*

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84. U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 1.

85. *Id.* art. II, § 2, cl. 1. *See Parker*, 417 U.S. at 758.

86. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

87. *Id.*

88. *Id.* at 635–38.

89. *Id.* at 588.

*Steel*, regarding an Executive policy, the Pentagon's combat-exclusion policy is an Executive Branch rule.<sup>90</sup> For women soldiers, the best reading of the circumstances surrounding the 2013 Pentagon rule (abolishing the blanket exclusion of women from combat units) is that Congress remained silent.<sup>91</sup> Given that in *Rostker* the Court upheld a statute limiting draft registration to men, it seems more likely that today's Court would find that Congress is more supportive of women outside, rather than in, combat.<sup>92</sup> Such a reading means that a woman soldier is wholly dependent on Pentagon policy for her job opportunities.

The Constitution expressly delegates authority over military affairs to Congress and, to a lesser extent, the President as Commander-in-Chief.<sup>93</sup> Article I provides that Congress shall have the power to "raise and support Armies," "make Rules for the Government and Regulation of the land and naval Forces," "provide for calling forth the Militia to execute the Laws of the Union," and "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."<sup>94</sup> A female soldier could argue that Articles I and II concern the structure controlling the military, but not the individual rights of soldiers within the military. She could argue that there is nothing in the Constitution to indicate soldiers are not entitled to Bill of Rights' protections. The first ten amendments were ratified in 1791, after the ratification of Article I in 1789.

The Fifth Amendment is the only Amendment that enumerates a limit on a soldier's civil rights.<sup>95</sup> Given this express limitation, all soldiers could argue that they are entitled to all the remaining protections contained within the Bill of Rights, specifically Amendments I, II, IV, V, VI, and VIII. The Fifth Amendment provides that a soldier is not entitled to a grand jury indictment before being accused of a crime: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.*"<sup>96</sup> But even this provision leaves open the possibility that a soldier is

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90. Department of Defense, *Elimination*, *supra* note 5.

91. *Id.*

92. *Rostker v. Goldberg*, 453 U.S. 57, 66–67 (1981).

93. U.S. CONST. art. II, § 2, cl. 1.

94. *Id.* art. I, § 8, cl. 12; *id.* cl. 14; *id.* cl. 15; *id.* cl. 16.

95. *Id.* amend. V.

96. U.S. CONST. amend V (emphasis added).

entitled to an indictment when there is no war or public danger. In the Fifth Amendment, there is no other limitation on soldiers' rights.<sup>97</sup> Significantly, the Fifth Amendment includes the due process clause, which, under *Bolling v. Sharpe*, encompasses the federal Equal Protection clause, the provision on which a female soldier would rely in a claim against any policy that prohibited her from combat.<sup>98</sup>

The only other amendment that references soldiers is the Third Amendment. It provides that "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."<sup>99</sup> None of the other amendments, specifically those that implicate expressive and religious freedom and criminal cases (Amendments I, IV, V, VI, and VIII), has any exception or limitation for a specific person. From this, it may be argued that because only the Fifth Amendment contained an exception disadvantageous to soldiers (no grand jury indictment required) that the other amendments, including the Equal Protection clause in the Fifth Amendment, apply equally to soldiers and non-soldiers.

Article II makes the President "Commander in Chief," but it contains no express authority for the President to limit the rights of soldiers.<sup>100</sup> Still, the Supreme Court seems uncomfortable reviewing military matters and, when fundamental rights are at issue, defers to the military's assertion of the need for good order and discipline. *Parker v. Levy*, decided in 1974, is probably the most significant military-deference case because it outlines the reasoning behind the Court's "separate society" doctrine.<sup>101</sup> *Levy* was an Army doctor who, after a court martial, was convicted and sentenced to three years imprisonment for telling soldiers that Vietnam was a war that took a disproportionate number of black soldiers.<sup>102</sup> In writing for the majority and upholding the conviction, Justice Rehnquist concluded: "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."<sup>103</sup> Military personnel would not be afforded full First Amendment rights.

The *Parker v. Levy* separate-from-society doctrine became more entrenched through later Supreme Court decisions. Again writing for the majority in 1981, in *Rostker v. Goldberg*, finding that Congress had the right to exclude women from draft registration, Justice

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97. *Id.*

98. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

99. U.S. CONST. amend. III.

100. *Id.* art. II, § 2, cl. 1.

101. *Parker v. Levy*, 417 U.S. 733, 743–53 (1974).

102. *Id.* at 735–37.

103. *Id.* at 743.

Rehnquist cited with approval the Congressional testimony of General Bernard Rogers:

One thing which is often lost sight of, Senator, is that in an emergency during war, the Army has often had to reach back into the support base . . . and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks . . . . Now, if that support base and that operating base to the rear consists [sic] in large measure of women, then we don't have that opportunity to reach back and pull them forward, because women should not be placed in a forward fighting position or in a tank, in my opinion. So that, too, enters the equation when one considers the subject of the utility of women under contingency conditions.<sup>104</sup>

In light of an approach like that of General Rogers' from 1979, women today are still excluded from thirty-four percent of the Army's authorized positions.<sup>105</sup> The 2013 Pentagon policy should reduce this percentage, but the extent of the reduction is unclear given that the policy provides for female exclusion if the military makes a sufficient factual showing.<sup>106</sup> A formal, de jure exclusion rate of thirty-four percent based on any characteristic—race, sex, gender, sexual orientation, religion, or even non-protected classifications—would seem irrational and unacceptable elsewhere in American society. But, that might be exactly the point, because, according to Justice Rehnquist, the military is a separate society.

Outside the military, the demise of de jure sex and gender discrimination was assured with the Supreme Court's decision in *Frontiero v. Richardson*, in 1973.<sup>107</sup> *Frontiero* was a case arising from a military policy that provided automatic benefits to the wives of male soldiers but not to the husbands of female soldiers.<sup>108</sup> Although a plurality of the Court believed that gender-based discrimination should be examined with strict scrutiny, the Court in *Frontiero* decided to review gender cases under an "intermediate scrutiny" standard, which it further addressed in *Craig v. Boren*,<sup>109</sup> and which ultimately developed into the exceedingly persuasive standard the Court announced in *United States v. Virginia (VMI)*.<sup>110</sup> In *Frontiero*, the Court found that

what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized

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104. *Rostker v. Goldberg*, 453 U.S. 55, 82–83 n.17 (1981).

105. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at 2.

106. Roulo, *supra* note 10.

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

108. *Id.* at 680.

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

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

suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.<sup>111</sup>

The soldier in *Frontiero* prevailed because the military could not justify discriminating for administrative ease (presuming that the husbands of female soldiers were less dependent than the wives of male soldiers).<sup>112</sup>

## II. THE COMBAT-EXCLUSION OF WOMAN SOLDIERS

There is probably some truth behind the reasons why the military excluded male spouses of female soldiers from the automatic receipt of benefits in *Frontiero* and the exclusion of women soldiers from combat today.<sup>113</sup> That is, male spouses of female soldiers probably needed benefits less frequently than female spouses of male soldiers, and, generally, women soldiers are not as physically strong as male soldiers.<sup>114</sup> But, in the case of the combat exclusion policy, it does not seem remotely possible that administrative ease could be the military's real reason for excluding half the population from combat. The combat exclusion seems based more on social and cultural remnants than on a merit-based determination of an individual soldier's combat readiness.

Surely, if it wanted to fully utilize women as a resource, as well as increase its combat capability overall, the military could have created a test for all male and female soldiers to determine each soldier's fitness for combat. Even if it did not want to test any male soldiers because it presumed every one of them was fit for combat, which seems impossible, the military could have created a combat fitness test for only women. Moreover, even if its rationale were that it did not want to use additional resources for a new combat readiness test ("administrative ease"), the military could have used the basic Army physical fitness test, which all males and females take currently, as the only criterion to determine combat fitness.<sup>115</sup> The military could simply determine that a certain minimum score—the same minimum for male and female soldiers—is required to be eligible for combat. Even if it resisted full combat inclusion for women on the grounds that it would

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111. *Frontiero*, 411 U.S. at 686–87.

112. *Id.* at 690.

113. *Id.* at 681–82.

114. *See id.*

115. *APFT Standards*, *supra* note 64.

have to devise a costly new combat-readiness test, the military's exclusion would still be based on gender and, if tested in the courts, the exclusion would have to be justified by an exceedingly persuasive government interest.<sup>116</sup> The Supreme Court rejected this kind of administrative-ease rationale in *Frontiero*.

The irony is that the end of the combat exclusion policy for women would be that the soldiers in combat units would be the most physically strong overall in the military. But, trying to determine what constitutes "physically strong" is a hazardous endeavor. Almost certainly, on every American football team, the quarterback, the most important and highest paid player, is far weaker physically than linemen who weigh a hundred pounds more.<sup>117</sup> The linemen's arms can lift more weight than the quarterback's arms.<sup>118</sup> Similarly, the legs of the football team's fleet ball carriers and pass receivers allow them to run much faster than the quarterback.<sup>119</sup> But, not one football team would win a game having its "strongest" player serve as quarterback. Obviously, "strength" embodies far more than brute physical attributes and includes mental and emotional ability.

Aside from strength considerations, or the average woman's lesser strength when compared with men, the military's combat-exclusion policy for women is based, at least facially, on two other primary reasons—the need for "privacy" for soldiers and "berthing" considerations, according to the 2012 Pentagon policy.<sup>120</sup> In its Report on combat restrictions for women, the Pentagon argued that many older ships, for example, did not provide adequate sleeping quarters for women.<sup>121</sup> The obvious response is that, if this is the case, and if separate sleeping quarters is a military necessity, and even if everyone wants separate sleeping quarters for men and women and everyone agrees that the military should not spend money retrofitting ships for women's quarters, women should simply not serve on those ships. But the lack of female quarters on some ships is not a reason to prohibit all women from serving in all combat units.

The female soldier in *Frontiero* had a relatively strong case because both she and her civilian husband suffered discrimination based on the military's rationale of administrative ease, a relatively weak

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116. *United States v. Virginia*, 518 U.S. 515, 529 (1996).

117. See generally Austin Reinsch, *QB Pressure: Defensive Lineman Vs. Linebackers*, BLEACHERREPORT.COM (Jan. 10, 2010), <http://www.bleacherreport.com/articles/323396-qb-pressure-defensive-linemen-vs-linebackers> ("[L]inemen are usually bigger and stronger than the rest of the team.").

118. *Id.*

119. *Id.*

120. DEPT OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i–ii.

121. *Id.* at 12.

basis for discrimination.<sup>122</sup> The policy mandated that dependents' benefits would be automatically provided to wives of male soldiers but not to husbands of female soldiers.<sup>123</sup> In *Frontiero*, there was no question about the strength or merit of an individual person, a determination that can be discretionary or arbitrary. A different situation is presented in the military's combat exclusion policy.<sup>124</sup> This discrimination is based on an individual's characteristic (gender as a proxy for strength), and it occurs among the same subset of people, that is, among all soldiers, as opposed to also a civilian spouse in *Frontiero*.<sup>125</sup>

Within its "separate society," as Justice Rehnquist termed it in *Parker v. Levy*, the military has allowed discrimination against black, homosexual, and female soldiers so as to respect the sensitivities of other soldiers and thus make a stronger fighting force.<sup>126</sup> The irony in this argument is that in the 1950s, individuals within civil society obtained greater individual rights.<sup>127</sup> By the end of the 1970s, most de jure discrimination in civil society had been held unconstitutional or eliminated, and was almost completely eliminated by the Court's decision in *VMI*, in 1996.<sup>128</sup> In contrast, by the end of the 1980s, U.S. soldiers possessed fewer constitutional rights than they had possessed in the 1950s.<sup>129</sup> Moreover, the 2012 Pentagon policy further entrenched the combat-exclusion policy for women, before the policy was relaxed in 2013.<sup>130</sup>

In the 1950s, the military tried to extend its reach into civilian society.<sup>131</sup> But it lost the case that would have provided it with almost complete control over all people who have significant contact with the military. In *Reid v. Covert*, decided by the Supreme Court in 1957, the Army convicted two civilian wives of murder for killing their husbands, who had been soldiers when they died.<sup>132</sup> Through treaties, the

122. The "soldier" in *Frontiero* was a lieutenant in the Air Force. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

123. *Id.*

124. Compare *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that classifications based on sex violate the due process clause if they are implemented solely for administrative ease), with *Rostker v. Goldberg*, 453 U.S. 57, 76–77 (1981) ("Women as a group, however, unlike men as a group, are not eligible for combat.").

125. *Frontiero*, 411 U.S. at 792.

126. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

127. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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

129. See generally *Rostker v. Goldberg*, 453 U.S. 57 (1981) (discussing the changes in soldiers' constitutional rights made by the President and Congress in the late 1970s).

130. See DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at i; Roulo, *supra* note 10.

131. See generally *Reid v. Covert*, 354 U.S. 1, 3, 4 (1957) (discussing military attempts to subject civilians to trial by military tribunals instead of civilian courts).

132. *Reid*, 354 U.S. at 3–4.

United Kingdom and Japan, where the killings occurred, had agreed previously that they would waive jurisdiction over such cases and permit the U.S. military to intercede and prosecute.<sup>133</sup> However, finding that civilians had Fifth and Sixth Amendment protections greater than those possessed by soldiers and what the civilian wives received in their military trials, the Supreme Court reversed the convictions of the wives.<sup>134</sup> However, aside from concluding that civilians cannot be tried in a military court martial, the Court implicitly concluded that Congress may create a military justice system that does not contain a full menu of constitutional rights for soldiers.<sup>135</sup>

In later cases, relying on Congressional and Executive authority in Articles I and II of the Constitution, the Supreme Court carved out the separate-society doctrine that is now the primary legal justification preventing Equal Protection claims within the military, or making them difficult to sustain. In a 1968 decision in a criminal case involving a defendant on the periphery of the military, *United States v. O'Brien*, the Court rejected a First Amendment claim and affirmed a civilian defendant's conviction for burning his draft card.<sup>136</sup> In 1974, in *Parker v. Levy*, the Court rejected an Army captain's First Amendment claim that he had a right to tell soldiers the Vietnam War was wrong.<sup>137</sup> In *Greer v. Spock*, in 1976, the Court approved the removal of civilian protesters from a public road that ran through a military base.<sup>138</sup> In 1980, in *Brown v. Glines*, the Court rejected the First Amendment claim of a soldier who wanted to collect signatures for a petition objecting to military grooming standards.<sup>139</sup> In 1981, in upholding male-only draft registration in *Rostker v. Goldberg*, the Court rejected a male registrant's Equal Protection claim.<sup>140</sup> In 1987, in *Solorio v. United States*,<sup>141</sup> the Court found that the Uniform Code of Military Justice (UCMJ) applied to soldiers at all times, thereby overruling a 1969 case, *O'Callahan v. Parker*, in which the Court had held that the military could exert personal jurisdiction over a soldier only in regard to the soldier's service-related activity.<sup>142</sup> Finally, in 1986, in *Goldman v. Weinberger*, the Court rejected a Free Exercise claim by an officer who wanted to wear a yarmulke while on duty.<sup>143</sup>

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133. *Id.* at 15–16.

134. *Id.* at 49.

135. *See id.* at 1–4.

136. *United States v. O'Brien*, 391 U.S. 367, 367 (1968).

137. *Parker v. Levy*, 417 U.S. 733, 733 (1974).

138. *Greer v. Spock*, 424 U.S. 828, 828 (1976).

139. *Brown v. Glines*, 444 U.S. 348, 349 (1980).

140. *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981).

141. *Solorio v. United States*, 483 U.S. 435, 436 (1987).

142. *O'Callahan v. Parker*, 395 U.S. 258, 272 (1969).

143. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

While civilian society has obtained far greater civil liberties over the past sixty years, soldiers within the U.S. military have seen their civil liberties vastly diminished.

### III. THE BOUNDARY OF JUDICIAL DEFERENCE TOWARD THE MILITARY

Under traditional constitutional analysis, before the government can curb a fundamental right, such as Free Expression or Free Exercise under the First Amendment, the government must have a compelling interest and a narrowly tailored means to achieve the interest.<sup>144</sup> The Supreme Court's military cases do not apply this test.<sup>145</sup> Instead, the Court almost always defers to the military's assertion of what is necessary and has allowed virtually any restriction on a soldier's civil liberty.<sup>146</sup> One commentator concluded that the Court's deference is recent and unfounded:

[J]udicial deference to the military, at least as the principle is understood in contemporary decisions of the Court, is surprisingly recent and not at all constitutionally established. In fact, this deference departs from constitutional text and from a line of Supreme Court precedent concerning civilian-military relations extending back before the Civil War. Broad judicial deference to military discretion is only a creation of the post-Vietnam, all-volunteer military and, more specifically, only a creation of one single Justice of the Supreme Court, William H. Rehnquist [who authored the majority opinions in *Rostker*, *Levy*, and *Solorio*].<sup>147</sup>

The Court has been most restrictive where Free Expression rights are concerned. In *O'Brien* and *Spock*, respectively concerning a civilian who burned his draft card in a public setting far outside a military base and civilians who protested on a public road inside a military base, the Court found that administrative needs could be the basis for inhibiting what would otherwise be expression firmly protected by the First Amendment.<sup>148</sup> In *O'Brien* and *Spock*, the speech restrictions

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144. See *Roe v. Wade*, 410 U.S. 113, 155–56 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (citations omitted).

145. Diane Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth of Martial Law*, 77 IND. L.J. 701, 705 (2002).

146. *Id.*

147. *Id.* at 704 (emphasis added).

148. *United States v. O'Brien*, 391 U.S. 367, 367 (1968); *Greer v. Spock* 424 U.S. 828, 828 (1976).

concerned civilians, illustrating that the military is not only free to regulate behavior inside the military but also civilians' behavior conducted at the periphery of the military.<sup>149</sup>

Inside military society, regardless whether in combat or during peacetime, the Supreme Court provided almost no room for an individual soldier's Free Expression or Free Exercise claims. In *Parker v. Levy*, from 1974, *Brown v. Glines*, from 1980, and *Goldman v. Weinberger*, from 1986, the Court found that a military doctor's right to speak about the Vietnam War, a soldier's right to circulate petitions, and an officer's right to wear a yarmulke had to be subordinated to the military's claim of the need for good order and discipline.<sup>150</sup> The Court did not require the military in even one case, whether involving soldiers or civilians, to provide empirical evidence to support its claims that the suppression of individual rights fostered good order and discipline within the military.<sup>151</sup> The Court has not so much created a new standard by which to judge constitutional claims within the military as it has delegated all constitutional decision-making solely to the military. In the process, the Court has lessened civilian control over and civil society's connection to the military.

Curiously when viewed in a civil rights context, but consistent with the Court's deference toward the military, the two most recent important race and gender Equal Protection cases favoring individuals, *Grutter v. Bollinger* and *United States v. Virginia*, are, in part, grounded in military necessity.<sup>152</sup> In sustaining a racial affirmative action policy at a public university in *Grutter* as a means to create a critical learning mass, the Court gave significant credit to the *amici* arguments of retired generals.<sup>153</sup> The generals indicated that affirmative action is necessary to ensure that the officer corps in the military reflects the racial composition of enlisted soldiers.<sup>154</sup> For the Court in *Grutter*, Justice O'Connor credited this reasoning:

[H]igh-ranking retired officers and civilian leaders of the United States military [wrote] . . . that . . . "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the Nation's

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149. *O'Brien*, 391 U.S. at 367–69; *Spock*, 424 U.S. at 831–32.

150. *Parker v. Levy*, 417 U.S. 733, 733 (1974); *Brown v. Glines*, 444 U.S. 348, 349 (1980); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

151. *Id.*

152. *Grutter v. Bollinger*, 539 U.S. 306, 308, 331 (2003); *United States v. Virginia*, 518 U.S. 515 (1996).

153. *Grutter*, 539 U.S. at 308, 331.

154. *Id.* at 331.

officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.”<sup>155</sup>

The Court’s reference to the necessity of affirmative action would normally auger well for females, who comprise only nineteen percent, thirteen percent, seven percent, and sixteen percent of the military personnel in the Air Force, Army, Marines, and Navy, respectively.<sup>156</sup>

However, looked at more narrowly in regard to the combat-exclusion rule, the military today, to the extent that it will continue to limit women in combat, is making an argument that is different from the affirmative-action arguments that retired generals and civilian authorities made in *Grutter*. Rather than supporting affirmative action for women in combat positions, the military, in effect, is arguing that affirmative action should not be used to select combat soldiers.<sup>157</sup> In essence, the retired generals and the government are arguing that “less qualified” candidates should be admitted to military academies to ensure racial diversity in the military. On the other hand, through the combat-exclusion policy, the military is arguing that gender diversity should not be a basis on which to admit women to combat units, even where the women can show that they are more qualified in combat than particular men.<sup>158</sup> Presumably, this argument will lose steam with the implementation of the 2013 Pentagon rule, but that rule, nonetheless, permits the exclusion of women from combat upon a factual showing by the military, the definition of which is not contained in the rule.<sup>159</sup>

While retaining the right to limit women in combat under the 2013 rule, the military is claiming that racial affirmative action is acceptable but that gender affirmative action is not.<sup>160</sup> Looked at most

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155. *Id.* (citations omitted) (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5).

156. DEP’T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at 2.

157. *See id.* at 15–16 (discussing the removal of gender-restrictive policies but adding nothing like affirmative action to fix the harm).

158. *See* Bumiller, *supra* note 46.

159. Department of Defense, *Elimination*, *supra* note 5.

160. *Id.*

favorably from the perspective of the military, banning affirmative action policies in regard to combat units might be acceptable if combat is somehow unique or women are poor practitioners of combat arts. However, female soldiers who want to be in combat units do not argue for affirmative action, which involves admitting some persons who might be considered less qualified on some scale to ensure a particular racial or gender composition.<sup>161</sup> The female soldiers are arguing that they should be permitted to serve in combat units because they are as qualified as male soldiers.<sup>162</sup>

The military's argument for excluding women from combat has been inconsistent on another level. In arguing for racial affirmative action in *Grutter*, the generals knew that *individual* law students, whose race the university took into consideration in the admissions decision, had lower test scores and grades than some white students who were rejected.<sup>163</sup> In contrast, the military's combat-exclusion policy is based on an accurate presumption that *generally* women are not as physically strong as men.<sup>164</sup> Perhaps this does not rise to the level of the objectionable stereotyping (delaying the promotion of women to partner) in *Price Waterhouse v. Hopkins* because the proposition about strength seems to be generally accurate.<sup>165</sup> But the military's focus on strength is too narrow and limited. The focus on average strength as a basis for discrimination is the same as the discredited height and weight requirements that police and fire departments used previously to hire police officers and firefighters, often to the exclusion of women.<sup>166</sup> Moreover, unlike the generals' knowledge of the "objectively less qualified" law students in *Grutter*, or objectively less qualified students at military academies, the military has no idea what individual female soldiers are qualified or unqualified for combat because it does not permit them to compete for spots in combat units.<sup>167</sup>

The military's exclusion of women from combat has been similar or identical to Virginia's exclusion of women from the Virginia Military Academy. In *VMI*,<sup>168</sup> the military academy did not admit women because it presumed that they could not succeed as well as men in the "adversative" method, which features "physical rigor, mental stress,

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161. See Bumiller, *supra* note 46.

162. See Dao, *supra* note 17.

163. *Grutter*, 539 U.S. at 337–38.

164. See Haring, *supra* note 23.

165. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

166. For a summary of issues concerning firefighters, see *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672–73 (2009).

167. DEP'T OF DEFENSE, REPORT TO CONGRESS, *supra* note 1, at 2, 7.

168. *United States v. Virginia*, 518 U.S. 515, 520 (1996).

absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”<sup>169</sup> Despite Virginia’s claims that women were not capable of adapting to this method, the Court, with Justice Ginsberg writing for the majority, found to the contrary: “Neither the goal of producing citizen-soldiers nor VMI’s implementing methodology is inherently unsuitable to women. And the school’s impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.”<sup>170</sup>

Rejecting VMI’s exclusion of women on Equal Protection grounds, the Court noted that in the federal military academies women had graduated at the top of their classes.<sup>171</sup> Other than institutionalizing the exceedingly persuasive standard in Equal Protection gender cases, the Court in *VMI* rejected blanket exclusions of women, possibly in all cases.<sup>172</sup>

In trying to preserve VMI as an all-male institution, Virginia proposed the Virginia Women’s Institute for Leadership (VWMI), a four-year, state-supported undergraduate program at Mary Baldwin College, a private liberal arts school for women.<sup>173</sup> The Court rejected this alternative, finding that, compared with VMI, the VWMI experience provided inferior educational opportunity, and that the prestige of VMI and opportunities that accompanied it could not be duplicated at VWMI.<sup>174</sup> The combat-exclusion policy for women seems no more rational or constitutional than the VWMI option for women in the VMI case. Even the Pentagon’s 2013 policy, eliminating the blanket exclusion of women from combat, creates a different system for combat inclusion for men and women.<sup>175</sup> All men are presumptively fit for combat. Women are eligible for combat, but they may continue to be excluded upon an undefined factual basis.

#### CONCLUSION: THE OBSOLESCENCE OF A COMBAT-EXCLUSION POLICY FOR WOMEN

The military’s only remaining arguments for excluding women are that combat is different from all other activity and, procedurally, the

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169. *Id.* at 522 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986) (citing *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D.Va. 1991)).

170. *Id.* at 520.

171. *Id.* at 545 n.13.

172. *See id.* at 515 (holding that Virginia failed to show an exceedingly persuasive justification for excluding women at VMI and that a separate but equal program did not survive the court’s equal protection evaluation).

173. *United States v. Virginia*, 518 U.S. 515, 526 (1996).

174. *Id.* at 551–54.

175. Department of Defense, *Elimination*, *supra* note 5.

military should be granted the discretion to make all judgments about who may participate in combat. It is true that combat is a dangerous activity, but so are fire fighting and patrolling dangerous neighborhoods in America. Most famously, in *California v. Bakke*, the Supreme Court approved affirmative action in medical school admissions.<sup>176</sup> Surely, many doctors, especially surgeons or physicians who work in emergency rooms, face as many and probably more life and death situations in a career with injured patients as do soldiers in combat.

Affirmative action is as applicable in medical schools as it is in the military. But, women soldiers who want to participate in combat are not even arguing for affirmative action. They simply want the opportunity to prove themselves capable of combat based on a neutral and equal standard. Moreover, the Supreme Court's military-is-a-separate-society rationale is obsolete.<sup>177</sup> It is a fiction that only male soldiers participate successfully in combat, as illustrated by female soldiers' widespread participation in combat in Iraq and Afghanistan.<sup>178</sup>

The Court decided *United States v. Virginia* in 1996 and held that a military college could not exclude qualified women.<sup>179</sup> In 2003, in *Grutter*, the Court approved affirmative action, in part, because retired generals claimed it was necessary to support diversity and create a critical mass of minority students, and thus affirmative action contributed to national security.<sup>180</sup> From 2001 to 2012, 140 women were killed in the wars in Afghanistan and Iraq.<sup>181</sup> Absent the Supreme Court's continued willingness to extend the military-is-a-separate-society rationale from *Goldman*,<sup>182</sup> limiting religious practice in the military, and *Levy*,<sup>183</sup> limiting free expression in the military, cases from 26 and 38 years ago, the combat-exclusion policy for women cannot withstand Equal Protection scrutiny.

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176. *California v. Bakke*, 438 U.S. 265, 320 (1978).

177. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

178. Bumiller, *supra* note 46.

179. *United States v. Virginia*, 518 U.S. 515 (2003).

180. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

181. Bumiller, *supra* note 46.

182. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

183. *Parker v. Levy*, 417 U.S. 733, 743 (1974).