

# SIMILARLY SITUATED?: THE EVOLUTION OF GENDER EQUALITY JURISPRUDENCE AND THE ROLE OF WOMEN IN COMBAT

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## CHAPTER ONE

### Rational Relation Review: Reflecting Women's Role in Society 1823-1971

In *Pride and Prejudice*, Jane Austen's Elizabeth Bennet declares, "Do not consider me now as an elegant female intending to plague you, but as a rational creature speaking the truth from her heart."<sup>1</sup> Elizabeth begs her suitor to strip away the guise that women are consumed with snaring a husband and to look past her gender so that he can see her as a human being capable of making reasonable decisions. Two hundred years after Austen exposed the complication of gender relations, American culture has made significant progress toward gender equality. After the feminist revolution popularized birth control, pants suits, and sexual freedom, women continue to edge away from gender conformity and to enjoy a broadening workforce with a shrinking wage gap.

Although society has made giant strides toward equality since the time when women were banned from the workplace and the voting booth, even modern culture

has not finalized its understanding of the equality of the sexes. The law's difficulty defining how equality applies to gender seems to mirror society's gender confusion. Both political activists and legal scholars debate the proper application of the law to past and present gender inequality and discrimination. Some modern feminists champion the stance that the Constitution should be gender blind, while other feminists contend that the law should favor women over men in order to account for past gender disparity. Contention arises when the law treats men and women differently, implying that different is somehow unequal or degrading. In order to understand and clarify this dilemma one must determine when, if ever, the Constitution permits the government to see differences between men and women.

In the midst of a narrow interpretation of the Fourteenth Amendment, the Court began hearing cases that questioned the equality of the sexes. In 1874, the case of *Minor v. Happersett* challenged a Missouri law that allowed every male citizen of the United States to vote. Virginia Minor, a native-born American citizen, wished to participate in the presidential election but was prevented from registering to vote because she was not male. This circumstance motivated her to claim that her right to vote had been unconstitutionally denied. In the unanimous opinion of the Court, Justice Waite declared that "citizen" meant a member of a

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<sup>1</sup> *Pride and Prejudice*, chapter 19

nation and that women had always been considered members of the United States even before the adoption of the Fourteenth Amendment. The right to vote, however, was not one of Privileges or Immunities in existence before the Fourteenth Amendment, and the amendment did not grant it. The Court stated, "It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."<sup>2</sup> The Court ruled that the Fourteenth Amendment protected only the privileges or immunities already possessed by citizens.

State citizenship did not guarantee suffrage, and neither the Constitution nor the Fourteenth Amendment made all males voters. Justice Waite provided an expansive listing of the various state voting policies and noted that certain qualifications such as age could also prevent a citizen from voting. He reasoned that if the Constitution had intended to transform all citizens into voters, "[T]he framers of the Constitution would not have left it to implication."<sup>3</sup> Since no word or phrase in the Constitution expressly dictated that suffrage is a right of citizenship, Justice Waite found no precedent supporting the notion. Rather, because the right to vote was not necessarily a privilege or immunity of citizens, women had no right to vote if the state's law declared that suffrage was reserved to male citizens.

Justice Waite also raised the question of the Fifteenth Amendment's granting suffrage to African Americans. He inquired, "If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.?"<sup>4</sup> Perhaps the egregious history of slavery prompted the Fifteenth Amendment to include the explicit prohibition of the dis-

enfranchisement of African Americans. Many southern states had adopted qualifications such as grandfather clauses or property requirements, which created insurmountable barriers for former-slaves who desired to be legal voters. Although facially neutral, these provisions continued to allow racial discrimination, prompting the Fifteenth Amendment to ensure undeniably that African Americans were able to exercise their suffrage rights.

In 1908, the Supreme Court confronted another constitutional challenge to gender inequality in the law. This law, however, was contested because it favored women. During the Progressive Movement of the early Twentieth Century, many organizations such as the National Consumers' League championed the need for legislation to regulate maximum working hours and wage minimums. When Curt Muller disputed the constitutionality of his conviction for violating Oregon's law limiting women's working hours to ten hours per day, the labor reform advocates had the ideal case to test Americans' position on labor laws. The Court's unanimous opinion in *Muller v. Oregon* confirmed the notion that women were a protected class of citizens and that employers were bound to uphold any additional legal limits on women's working hours. The Court declared that Oregon's law limiting the number of hours women could work in a factory was constitutional due to women's physical structure. Oregon's legislation served the purpose of relieving some of the burden placed on women because healthy mothers were essential for vigorous children, placing the physical well being of women within the scope of public interest. The regulation of women's labor, therefore, fell into the states' police powers. Justice Brewer stated,

Still again, history discloses the fact that woman has always been dependent upon man ... in the struggle for

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<sup>2</sup> *Minor v. Happersett* (1874)

<sup>3</sup> *Minor v. Happersett* (1874)

<sup>4</sup> *Minor v. Happersett* (1874)

subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.<sup>5</sup>

The Court declared that the right of a state to preserve the health of the women by regulating the number of hours that they could work did not conflict with due process or equal protection because the individual liberty to create contracts was subject to the state's police powers.

The law's recognizing this difference between men and women embodied the idea that all women were physically incapable of accomplishing the same tasks as men without having different and generally adverse effects on their bodies. The law purported to place women in a special category due to their extremely valuable function in society, justifying the government's interest to preserve the health of its wives and mothers. The Court understood its application of the law as a reflection of society's conception of the role of women. Although some women in the early 1900s did work, women filled their primary function in the home. The Court did not see its understanding of Oregon's law as discriminatory toward women because it was a social fact that women's chief responsibility was to be the anchor of the home, a valuable task that the government had an interest to preserve.

The law as applied to women continued to mirror the social understanding of gender roles, but the sexual revolution and the feminist movement of the 1960s raised several challenges to the constitutionality of a protected female classification based on

traditional gender roles. In 1961, a Florida woman challenged the constitutionality of a state law that stipulated that no woman could be selected for jury duty unless she volunteered. After an all-male jury convicted a Florida woman of killing her husband, the defendant claimed that the unconstitutional exclusion of women from juries violated the Fourteenth Amendment's protection against arbitrary class exclusions and any exclusion that singles out a class of citizens for different treatment not based on a reasonable classification.

In *Hoyt v. Florida*, the Court unanimously held that the statute excluding women from jury duty was constitutional on its face and as applied in this case because the right to a trial by jury did not mean the right to tailor the jury individually. Justice Harlan wrote, "It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by an arbitrary and systematic exclusions."<sup>6</sup> The Court found that Florida's law did not seek arbitrarily to exclude women. Rather, the statute presented each woman with a choice – unless she determined she was capable of service, a woman would not be forced to participate in the jury process. The Court addressed the accusations that it had created an arbitrary exclusion by asserting that the law "gives to women the privilege to serve but does not impose service as a duty."<sup>7</sup> Florida's law admittedly distinguished between the sexes by providing an exemption to women based solely on their gender. Men, on the other hand, had to file a written claim of exemption in order to be excluded from jury service. The Court reasoned, "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of

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<sup>5</sup> *Muller v. Oregon* (1908)

<sup>6</sup> *Hoyt v. Florida* (1961)

<sup>7</sup> *Fay v. New York* (1947)

community life formerly considered to be reserved to men, woman is still regarded as the center of the home and family life.”<sup>8</sup> Due to the fact that most women’s primary role was in the home, the Court found that allowing a woman to choose whether she participated in this civic responsibility was within a state’s constitutional power to act for the general welfare.

This justification of a gender distinction repeated *Muller*’s rational basis test. If it were not completely unreasonable or irrational for the government to see a difference between men and women, the Court did not perceive an unconstitutional distinction. The state’s legislature reasonably concluded that it would be impractical to consider whether women should serve on a jury on a case-by-case basis, so the law crafted a broad exemption with narrow exceptions. Women were not prohibited from serving on juries due to their special, but not exclusive, role in society as wives and mothers. Rather, this distinction between men and women recognized women’s vital role of preserving the family structure. As the Court noted, women were still considered to be the center of the home and family, providing the government with an interest to guarantee that women were not unnecessarily burdened or prevented from accomplishing their familial duties.

With *Muller* and *Hoyt*’s standard of upholding a reflection of society’s understanding of gender equality, in 1971, the Court issued an opinion striking down an Idaho law that created an unconstitutional gender distinction. Sally and Cecil Reed both filed to be the executor of their adoptive son’s estate after his death. Although they fell into the same category of father or mother of the deceased individual, Idaho’s law stated that when several persons were equally entitled to administer an estate, males were preferred to females because

males traditionally had more experience administrating estates. Sally Reed appealed the probate court’s decision in favor of Cecil, claiming that this section of Idaho’s law violated the Equal Protection Clause. In *Reed v. Reed*, the Court found that Idaho’s law violated the Constitution because the Equal Protection Clause denies states the power to legislate different treatment based on criteria unrelated to the statute. According to precedent, a gender classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>9</sup> Rather than examining a woman’s individual qualifications to be an estate administrator, Idaho argued that the government’s interest in eliminating controversies when two equal individuals seek administration justified the sex-based distinction that assumed that men were more likely to have the experience necessary to administer an estate.

The Court, however, identified this distinction as the exact type of arbitrary classification prohibited by the Fourteenth Amendment. Although the Court recognized the desire to reduce the probate court’s workload, giving preference to one gender over the other for the sake of eliminating hearings “is the very kind of arbitrary legislation forbidden by the Fourteenth Amendment.”<sup>10</sup> Because the statute provided different treatment to men and women who were similarly situated, it violated the Equal Protection Clause. The Court upheld the same constitutional standard established in *Muller* and *Hoyt*. These cases had established that the government could recognize instances in which men and women were not similarly situated if these differences were reasonable and if the government had an

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<sup>8</sup> *Hoyt v. Florida* (1961)

<sup>9</sup> *Royster Guano Co. v. Virginia* (1920)

<sup>10</sup> *Reed v. Reed* (1971)

interest in preserving the distinction. *Reed* provided an example of an instance in which men and women were similarly situated, making them equal before the law.

## CHAPTER TWO

### Intermediate Scrutiny: Biological and Psychological Distinctions 1976-1982

In the cases preceding *Reed*, the Court's view of gender equality established that the law could not create arbitrary classes of distinction or treat men and women differently when they are similarly situated. The Court displayed this understanding of equality in the 1976 case *Craig v. Boren*. Craig, a male between 18 and 21 years of age, claimed that an Oklahoma statute prohibiting the sale of "nonintoxicating" 3.2% beer created a sex-based distinction that denied him the equal protection of the law. The Court departed from rational basis review and held that a gender-based distinction must substantially further important government objectives in order to be constitutionally sound. Because the statute was based on "loose-fitting generalities" about the drinking habits of men and women in the aggregate, the majority of the Court did not see the substantial relationship between the government's interest in promoting road safety and young men's drinking habits.

The Court's opinion repeatedly turned to the standard for equality established in *Reed*. Justice Brennan wrote,

Hence, "archaic and overbroad" generalizations (*Schlesinger v. Ballard*) could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions

concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.<sup>11</sup>

With *Reed* as a guide, the Court concluded that Oklahoma's classification between men and women could not be maintained because it embodied antiquated gender stereotypes, and in Brennan's view, the Court must substitute the new concept of equal access to the market place of ideas for the legislature's outdated view of the sexes. Although the Court recognized that public health and safety is an important government interest, the traffic statistics cited as proof that a gender-based distinction achieved the government's goal of improving road safety did not persuade the majority. The Court did not dispute that the statistics establish that .18% of females and 2% of males in the 18 to 21 age group were arrested for driving under the influence of alcohol. Although not statistically irrelevant, the Court was unwilling to cite this data as the basis for a gender-based classification because the majority declared that the statistics did not support the conclusion that a gender distinction achieved the government's goal of improving highway safety.

Justice Brennan asserted that the rationale behind Oklahoma's use of statistics to justify a gender-conscious law would also support the use of similar statistics to apply race-based distinctions. "Social science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would

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<sup>11</sup> *Craig v. Boren* (1976)

be perceived as invidious.”<sup>12</sup> This understanding of the Equal Protection Clause moved toward a universal application of the strict scrutiny test, which had previously been reserved for race. Although Brennan did not openly declare that race and gender classifications should be viewed as equally odious by the law, his interpretation of the facts of this case opened the door for such an application of the Equal Protection Clause.

Not all members of the Court, however, were willing to make such a broad declaration about the Fourteenth Amendment. In his concurrence, Justice Powell reserved a more critical assessment of the Equal Protection Clause to cases concerning “fundamental” constitutional rights and “suspect classes.” Powell stated that this case was “relatively easy”<sup>13</sup> because no one doubted the government’s interest to promote highway safety. The Court’s objective, therefore, was to determine whether the law bore a fair and substantial relation to this goal. A major area of contention for Powell was the fact that the law was easily circumvented because it prohibited only the sale of 3.2% beer to men between the ages of 18 and 21 but did not explicitly prohibit young men from consuming this “nonintoxicating” beer. Powell declared that although the gender classification was not totally irrational, the Equal Protection Clause requires states to govern impartially.

[T]he classification is...objectionable because it is based on an accident of birth, because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket, and because, to the extent it reflects any

physical difference between males and females, it is actually perverse.<sup>14</sup>

Although he admitted that physical difference between men and women may be legally recognized, Powell claimed that by enforcing this classification, the government not only would be enforcing gender stereotypes, but it would also unjustly punish the vast majority of young men who would not abuse the privilege to drink 3.2% beer. Powell concluded that this “insult to all of the young men of the State”<sup>15</sup> did not validate placing the sins of two percent of the population of the other ninety-eight percent.

Although the majority found Oklahoma’s law to be an unconstitutional denial of the equal protection of the law, Justice Rehnquist’s fiery dissent demonstrated that this issue was by no means settled. Rehnquist first criticized the Court for invoking a more stringent standard for gender classifications to a law that adversely affected men, a group primarily free from a history of discrimination. No one denied that women were subjected to a “long and unfortunate history of sex discrimination,”<sup>16</sup> but the Court made no suggestion that males of this age group were “peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solitude from the courts.”<sup>17</sup> Before this decision, the Court had been suspect of gender discrimination claims made by men, and Rehnquist asserted that the Equal Protection Clause did not contain any language that would support a heavier burden of judicial review. Justice Rehnquist also contested the majority’s interpretation of the statistics about the percentage of men

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<sup>12</sup> *Craig v. Boren* (1976)

<sup>13</sup> *Craig v. Boren* (1976)

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<sup>14</sup> *Craig v. Boren* (1976)

<sup>15</sup> *Craig v. Boren* (1976)

<sup>16</sup> *Frontiero v. Richardson* (1973)

<sup>17</sup> *Craig v. Boren* (1976)

and women who drive after consuming alcohol. Rehnquist stated,

The rationality of a statutory classification for equal protection purposes does not depend upon the statistical “fit” between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment.<sup>18</sup>

Rehnquist agreed with Oklahoma’s conclusion about the drinking habits of young men and women and concluded that the statute met the proper constitutional standard of rationality. In his final strike against the Court, Rehnquist mocked the suggestion that stereotypes are extremely pervasive and that the statistics were warped by this false characterization. Rehnquist cautioned the majority that their focus on these allegedly pervasive stereotypes might influence men and women “to conform to the wild and reckless image which is their stereotype.”<sup>19</sup>

In spite of Justice Rehnquist’s chastisement, the Court’s view of equality continued to plot a course away from the rational basis test and toward a more strict interpretation of the Equal Protection Clause. In the 1980 case *Wengler v. Druggist Mutual Insurance Co.*, the Court examined a provision of the Missouri worker’s compensation laws which denied a widower benefits on his wife’s work-related death unless he was physically or mentally incapacitated or if he proved dependence on his wife’s earnings. The law, however, granted death benefits to widows without their proving dependence on their husband’s

earning. Although the Missouri Supreme Court found that the difference between the economic standing of working men and women justified automatically giving benefits to women, the Court found that the law discriminated against both genders because a woman’s spouse was provided less protection after her work-related death. A man, on the other hand, was only awarded benefits if he proved his incapacity or dependency. Justice White stated, “It is this kind of discrimination against working women that our cases have identified and in circumstances found unjustified.”<sup>20</sup> The Court reasoned that the generalizations about the gender roles of men and women in providing financially for their families could not be the basis of a sex-based distinction.

The Court declared that to be constitutional, a sex-based distinction must serve an important government objective and the discriminatory means employed must be substantially related to achieving the objective. The Missouri Supreme Court claimed that the intent of the law was to favor widows, and although the Supreme Court recognized the important government interest of providing for needy widows, the Court declared that the claim that women are more likely to be dependent on a male wage earner could not be the basis for Missouri’s gender-based statute. Because the burden of proof belongs to those defending gender distinctions, the Court stated that presuming dependency in the case of women might be more efficient, but this administrative convenience did not meet the standard of being substantially related to the government’s objective. This 8-1 decision presented a more uniform understanding of gender equality. Although Justice Stevens did not agree with the Court’s declaring that Missouri’s law discriminated against both men and women, he

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<sup>18</sup> *Craig v. Boren* (1976)

<sup>19</sup> *Craig v. Boren* (1976)

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<sup>20</sup> *Wengler v. Druggist Mutual Insurance Co.* (1980)

still concluded that the statute unconstitutionally disadvantaged husbands. Justice Rehnquist, the lone dissenter, continued to maintain his view that the Equal Protection Clauses should be interpreted through the doctrine of *stare decisis*, particularly the rational relation test.

The Court's congruence, however, was fleeting. In the controversial 1981 case, *Michael M. v. Superior Court of Sonoma County*, the Court's previous division disappeared and a new coalition emerged with Justice Rehnquist leading the plurality as the Court examined whether California's statutory rape law violated the Equal Protection Clause. The law defined unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," making only males criminally liable for rape. The petitioner, a 17 ½ year-old male, began kissing a 16 ½ year-old female, who had been drinking. After being struck in the face for refusing his advances, the female submitted to sexual intercourse. Prior to the initial trial, the petitioner argued that California's law unlawfully discriminated against him based on his gender.

Although Justice Rehnquist was unwilling to extend the approach of analyzing the Equal Protection Clause to intermediate scrutiny, he did hold that the basic rationality test must employ *Craig's* "sharper focus" when judging gender-based distinctions. The Court upheld the law's constitutionality because only females may be victims and only males can violate this section of the law. The Court declared that the law was not based on mere social convention but on the fact that only women can become pregnant, and the State has a compelling interest to prevent illegitimate teenage pregnancies. Undoubtedly, the Court reasoned, men and women are not similarly situated with respect to the risks of sexual

intercourse. "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."<sup>21</sup> The Court ruled that a state could attack the problem associated with teenage pregnancy by placing criminal sanctions on males who had sexual intercourse with underage females.

Because pregnancy is the primary deterrent to sexual intercourse for young females, the Court found it constitutionally permissible for a statute to equalize the deterrents on the sexes due to the fact that physical difference may produce different social consequences. The Court admitted that a gender-neutral law might be able to achieve the same end, but the relevant issue was whether California's law violated the Constitution. California contended that a gender-neutral law would frustrate the statute's enforcement by creating a disincentive for a female to report violations because she would be subjecting herself to potential criminal prosecution. The Court also found that the statute did not assume that men are the generally aggressors, but rather, it sought to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The Court seemed to suggest that if the law assumed that men were the aggressors, it would be unconstitutional because such psychological assumptions about the genders are a product of society rather than nature, unlike immutable physical differences. Although the statute placed this additional burden on men, the law "reasonably reflects" the fact that women face more natural consequences of sexual intercourse. The Court, however, disagreed on how it should determine if a law makes an unconstitutional gender-based classification. Although they did not establish a new test, the justices declared that a law

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<sup>21</sup> *Michael M. v. Superior Court of Sonoma County* (1981)



may not “make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.”<sup>22</sup> The Court upheld California’s statute because the gender classification recognized the fact that women and men are not similarly situated in certain physical circumstances, so the legislature could make laws that “provide for the special problems of women.”<sup>23</sup>

In his concurrence, Justice Stewart, joined by Justice Blackmun, clarified this understanding of the Equal Protection Clause. He stated that constitutional violations occur when a government “invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born.”<sup>24</sup> This standard, however, does not prevent the government from recognizing situations in which men and women are not similarly situated, namely the fact that women can become pregnant as a result of sexual intercourse and men cannot. Justice Stewart stated, “In short, the Equal Protection Clause does not mean that physiological differences between men and women must be disregarded...The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not exist.”<sup>25</sup> Where differences actually exist, Stewart reasoned that the Constitution did not prohibit the law from recognizing physical and psychological distinctions between men and women.

The dissent, however, did not find California’s law to be substantially related to

achieving the government’s objective. Justice Brennan, joined by Justices White and Marshall, claimed that California’s burden of proof included not only demonstrating an important government objective and a substantial relationship between the distinction and the objective, but a state must also show that a gender-neutral statute would be a less-effective way to accomplish this goal. Brennan wrote, “To meet this burden, the State must show that because its statutory rape law punishes only males, and not females, it more effectively deters minor females from having sexual intercourse.”<sup>26</sup> According to Brennan, a law should be gender-neutral unless the government has proved that it had a compelling interest in recognizing a sex-based statute. The dissent insisted that common sense suggests that a gender-neutral law would be a greater deterrent of sexual activity because both young men and women would be criminally liable, shifting the desired deterrent effect to twice as many potential violators.

In addition, Brennan found California’s statute to be based on “outmoded sexual stereotypes.” He asserted that the origins of the law prove that it is inconsistent with modern thought.

[T]he law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State’s protection.<sup>27</sup>

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<sup>22</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>23</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>24</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>25</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

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<sup>26</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>27</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

Brennan claimed that the law's true intent was to protect the virtue of innocent, naïve girls due to the popular conception that young women should abstain from sexual indulgences. He concluded his dissent by charging that majority with ignoring the 130-year history of the law and fabricating pregnancy prevention as one of the statute's purposes.

Justice Stevens' dissent, on the other hand, attempted to determine whether this physical difference between males and females justified a legal distinction based entirely on sex. He asked if rational parents would set different rules for twin children of the opposite sex, forbidding the son to engage in a particular conduct but permitting the daughter to engage in that conduct, despite the potential for harmful consequences to both children. Stevens concluded, "In my opinion, the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other."<sup>28</sup> Because California's law punished only one of the equally guilty parties, Stevens found that the statute violated the "essence of the constitutional requirement that the sovereign must govern impartially."<sup>29</sup> Although he focused on the legal ramifications of this gender classification, Justice Stevens' view of equality seemed to mirror Justice Brennan's – men and women are presumed to be equal until the government proves that a compelling interest justifies recognizing a gender classification.

The Court seemed to be divided into two separate camps – the justices led by Rehnquist who recognized a constitutionally valid distinction when it was reasonable to conclude that the sexes were not similarly

situated and the justices led by Brennan who maintained that constitutionally permissible gender distinctions include only those distinctions which are substantially related to an important government interest. This Rehnquist-Brennan division continued into the next term when the Court decided the 1981 case *Rostker v. Goldberg*, which challenged the constitutionality of the Military Selective Service Act (MSSA). This statute authorized the President to require males but not females to register for possible military service. Although registration for the draft was discontinued in 1975, President Carter determined in early 1980 that it was necessary to reinstitute the mandatory military registration and recommended funds be transferred from the Department of Defense to the Selective Service System. President Carter also suggested that Congress amend the act so that both women and men could be drafted. Congress, however, allocated the necessary funds to allow men to register but declined to amend the act to require women to register. A group of young men challenged the act's constitutionality about ten years earlier in a district court, claiming that it violated the Due Process clause of the Fifth Amendment. A district court held that the act's gender-based discrimination was unconstitutional, but the case was not granted further appeal until its direct appeal to the Supreme Court in 1981 because it became moot upon deactivation of the Selective Service System.

Justice Rehnquist, writing for the majority, found that Congress had acted within its power to raise and regulate armies and navies by requiring only men to register for the draft. The majority rejected that plaintiff's suggestion that equal protection claims should be judged with strict scrutiny because they determined that Congress' decision to exclude women from the draft was not based on the traditional view of women or the same view of women that

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<sup>28</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>29</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

Congress had in 1948 when the act was written. Instead, the Court gave customary deference to Congress' law because the majority recognized that the area of military judgment is one in which they were less competent than Congress. Citing *Gilligan v. Morgan*, Justice Rehnquist concluded that decisions concerning military force were "subject *always* to civilian control of the Legislative and Executive Branches." Due to the deference owed to Congress and the President, Justice Rehnquist acknowledged the need to be particularly careful so that the Court did not substitute its own evaluation of evidence for the reasonable conclusion reached by Congress.

The majority reasoned that Congress considered the need for combat troops when permitting this gender distinction. The issue at hand was not whether Congress should have chosen to conscript both men and women but rather whether the method chosen by Congress denied either men or women the equal protection of the law. The majority concluded that because of Congress' broad constitutional authority to raise and support armies and navies, Congress did not violate the Due Process Clause. The Court noted that Congress did not make its decision without due consideration. The question of registering women for the draft was a not only debated in Congress, but it was also the subject of a nation-wide public debate. Justice Rehnquist reasoned that the House and Senate debates and the public nature of the issue established that the decision to exempt women from registering for the draft was not the "accidental by-product of a traditional way of thinking about females."<sup>30</sup> The majority stated that this legislative history proved vital to the constitutionality of the exemption because equality does not permit laws to be based solely on traditional gender roles.

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<sup>30</sup> *Califano v. Webster* (1977)

The Court also focused on the role of women in the military. Since women are excluded from combat service due to military policy, the majority also reasoned that need for women and men in the military is different. Both Senate and House reports stated that the primary purpose of a wartime mobilization order would be to acquire combat replacements. Because the primary purpose of selective service registration was to draft combat troops, Congress acted constitutionally by only authorizing the registration of men since women are ineligible for combat. Congress reasonably concluded that drafting women would be unnecessary due to the fact that the military positions that women fill are not combat related and, therefore, not the positions that a draft would fill. Although the District Court argued that permitting such a distinction opened the possibility for requiring the registration of only black citizens or only certain political or religious groups, Rehnquist dismissed this assertion, stating,

The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women are simply not similarly situated for purposes of a draft or registration for a draft.<sup>31</sup>

The majority found that Congress's recognizing gender distinctions was not purposefully discriminatory. Rather, the law reflects the Congress's reasonable judgment of the reality that men and women are not similarly

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<sup>31</sup> *Rostker v. Goldberg* (1981)

situated to combat positions and, therefore, the draft. Rehnquist concluded by stating that the Constitution requires laws to treat similarly situated individuals equally, not that Congress “engages in gestures of superficial equity.”<sup>32</sup>

Citing the Senate report of the testimony before the committee, Rehnquist declared that the President’s request for the authority to register women as well as men was based on a desire for equality, not military necessity. Due to its constitutional power to raise and regulate armies and navies, Congress is entitled to focus on the issue of military necessity rather than the secondary issue of equality. Because the committee did not find a military necessity to register women to be drafted, Congress did not have to amend the MSSA to include women. Congress did not see the value of the additional burden of including women in registration and drafts as well as the other administrative problems such as housing or physical standards. The Court declared that because it was not in the position to determine the use of women volunteers in noncombat positions, it would rely on Congress’s knowledge about whether volunteers would fill the noncombat vacancies.

Justice White, joined in dissent by Justice Brennan, concluded that in order for Congress’s exclusion of women from draft registration to be constitutional, Congress would have to demonstrate that there were not a substantial number of noncombat military positions that could be filled by women during peacetime or mobilization. Justice White disagreed with the majority’s interpretation of the congressional testimony. He and Justice Brennan concluded that “the number of women who could be used in the military without sacrificing combat readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for

the kind of outright gender-based discrimination involved in registering and conscripting men but not women at all.”<sup>33</sup> Because of this disagreement among the justices about how to interpret the testimony and reports, Justice White contended that the judgment should be vacated and remanded for further hearings.

Justice Marshall’s dissent, on the other hand, reprimanded the Court for “placing its imprimatur on one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’”<sup>34</sup> Marshall, joined by Justice Brennan, declared that by upholding a law that requires only males to register for the draft, the Court categorically excluded women from a fundamental civic obligation. For Marshall and Brennan, the Equal Protection Clause defends against such infringements of civil obligations because equality requires recognizing the equal dignity of all citizens. By excluding women from registering for service, women’s dignity is demeaned because they are not able to be full participants in society. The dissenting justices believed that the majority ignored the primary contention of this case because the fundamental constitutional question was not whether the draft was constitutional or whether men and women must be drafted in equal numbers. For Marshall and Brennan, the case revolved around their understanding of equality as an aspect of human dignity. Every citizen controls her private life and participates equally in public life, and the law must begin from this basis.

Citing *Craig*, Marshall stated that statutes such as the Military Selective Service Act, which discriminate based on gender, must be examined using heightened scrutiny because men and women are not fundamentally different. “Under this test, a gender-based classification cannot withstand

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<sup>32</sup> *Rostker v. Goldberg* (1981)

<sup>33</sup> *Rostker v. Goldberg* (1981)

<sup>34</sup> *Rostker v. Goldberg* (1981)

constitutional challenge unless the classification is substantially related to the achievement of an important government objective.”<sup>35</sup> Justices Marshall and Brennan agreed that the first part of the heightened scrutiny test had been met because no one could deny that the government had an important interest in raising and regulating armies and navies. Although the first prong of this test had been satisfied, Marshall emphasized that the real issue was whether the discriminatory means employed in the statute were substantially related to achieving that end.

Although stating that he had no quarrel with the majority’s opinions about the additional deference owed to congressional decisions about military affairs, Justice Marshall added that this deference did not license an abdication of the Court’s responsibility to answer constitutional questions. Marshall maintained that when a federal law violated an essential liberty such as the Fifth Amendment’s guarantee of equal protection of the law, it is the Court, not Congress, which decides whether the heightened scrutiny test’s substantial relationship requirement is fulfilled. Marshall asserted that the government had never held the position that excluding women from registration was substantially related to the success of the military. In addition, Congress did not voice disagreement with military experts who stated that women had made significant contributions to military effectiveness.

Marshall’s dissent also contested the majority’s interpretation of the Senate reports about the necessity of women to fill noncombat positions. Although the committee report stated that assigning women to combat positions could affect national morale and strain national resources, Marshall concluded that since other laws

and military policies prevent women from serving in combat positions, registering and drafting women would not result in their being placed in combat positions. “Thus, even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal.”<sup>36</sup> The Court reasoned that the gender classification in the MSSA was permissible because nondiscrimination was not necessary to fulfill Congress’s constitutional obligation to raise and regulate troops. Marshall, however, stated that the more important inquiry was whether the gender classification was substantially related to the government’s interest because it was the Court’s duty to interpret the fundamental constitutional issue. Marshall stated that in order for this distinction to be constitutional, the government would have to demonstrate that registering women would substantially hinder the preparation of a draft.

Sexual stereotypes were also an issue of contention for Marshall and Brennan because they declared that the government could not perpetuate sexual stereotypes. Citing *Orr v. Orr*, Marshall wrote, “Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing sexual stereotypes about the ‘proper place’ of women and their need for special protection.”<sup>37</sup> For Marshall, the distinction between a gender classification for the purpose of registration and a classification for the purpose a draft was an impermissible administrative convenience because of the risk for sexual stereotyping and because the distinction violated *Craig*’s heightened scrutiny test. The minority refused to give

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<sup>35</sup> *Rostker v. Goldberg* (1981)

<sup>36</sup> *Rostker v. Goldberg* (1981)

<sup>37</sup> *Rostker v. Goldberg* (1981)

deference to Congress because this elected body was not representative of the American people, causing the law to be a product of social attitudes that the government cannot legitimately maintain without violating the Equal Protection Clause.

Although he admitted that the military had no need for women to participate in a draft, Marshall still maintained that the government must prove that excluding women was substantially related to the government's important interest. Marshall focused on the Senate report that concluded that drafting "very large numbers" of women would impede military flexibility. He concluded that Congress could simply draft only a limited number of women and preserve the desired military flexibility. Although a provision of the MSSA stated that induction into service had to be done on a random basis, Congress could amend that provision after it amended the provision excluding women from registration. Marshall concluded his dissent by stating, "The Court substitutes hollow shibboleths about 'deference to legislative decision' for constitutional analysis."<sup>38</sup> In Marshall's opinion, the majority had neglected its duty as the ultimate constitutional authority and had avoided the genuine equal protection issue by paying homage to congressional war power.

The interpretation that *Craig* established a heightened scrutiny test reveals aspects of Justices Marshall and Brennan's understanding of equality. All outmoded, traditional gender stereotypes were presumed to be unconstitutional because men and women are fundamentally the same. Brennan rejected Rehnquist's similarly situated standard and embraced a view that equality is a component of human dignity. In his "Address to the Text and Teaching Symposium" in 1985, Brennan explained his understanding of the Constitution as the em-

bodiment of "the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."<sup>39</sup> With the addition of the Bill of Rights, the amended Constitution protects the rights and dignity of the nation's citizens. The text of the Constitution, however, is broad and unclear, so judges must attempt to resolve the tension and ambiguity rather than avoid it. Brennan stated that the judicial power gives justices the authority to give meaning to the words of the Constitution. The primary debate, therefore, is how a justice should interpret the Constitution. In his rejection of the original intent argument, Brennan declared that it would be arrogant for a justice to assume that he knows the Founders' understanding of the Constitution's text because the Founders themselves did not agree about the meaning of certain provisions. In his concurrence in the 1978 racial affirmative action case *Regents of the University of California v. Bakke*, Brennan stated, "Our Nation was founded on the principle that 'all Men are created equal.' Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery."<sup>40</sup> This case questioned the constitutionality of the University of California's race-based affirmative action admissions policy that had allegedly caused Allen Bakke's rejection from the school's medical program. Although the Court found that racial quotas, not affirmative action policies, violated the Equal Protection Clause, Brennan concurred with the judgment but dissented in part because he disagreed with the strict, literal interpretation of Title VI. He concluded that the Fourteenth

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<sup>38</sup> *Rostker v. Goldberg* (1981)

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<sup>39</sup> "Address to the Text and Teaching Symposium," Georgetown University, October 12, 1985, Washington, D.C.

<sup>40</sup> *Regents of the University of California v. Bakke* (1978)

Amendment embodied the true spirit of the Constitution and human equality because it recognized the modern understanding of human dignity regardless of race. Congressional statutes, particularly the Civil Rights Act of 1964, must evolve with the changing interpretation of the Constitution and must not be limited by the authors' intent.

With this understanding of the obscurity of constitutional language as a framework, Brennan's concluded, "Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstances."<sup>41</sup> According to Brennan, the purpose of the Constitution is to transcend particular opinions and to establish a value system that adapts to the modern political world. He reasoned that the genius of the Constitution is that its meaning is malleable and its principles adjust to current problems and needs. Interpretation, therefore, allows this transformation to take place within the meaning of the text.

Brennan asserted that the original text of the Constitution, void of amendments, did not concern the rights of man but rather the powers of government. With the addition of the Bill of Rights and the Civil War Amendments, the Constitution embodied the "sparkling vision of the supremacy of the human dignity of every individual."<sup>42</sup> The purpose of the Constitution, Brennan declared, is to protect human dignity, allowing the laws and the meaning of the Constitution to evolve and transform to meet varying social conditions as well as the changing concept of dignity. The need to

protect human dignity reflects what Brennan viewed as the proper role of the relationship between citizens and the government. As the government's power increases, the probability that this power will interfere with an individual's rights also increasing, prompting the need to monitor cautiously the points at which the government's power and the individual's rights collide. Brennan stated, "If our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage."<sup>43</sup> Brennan's view of constitutional interpretation shaped his understanding of equality. Since equality is a fundamental part of human dignity, the laws must uphold equality and must protect it from governmental intrusion.

Just one year after the *Goldberg* decision, the Court's division shifted slightly. Justice Sandra Day O'Connor, the first female Supreme Court justice, replaced Justice Stewart, and a new majority emerged in the 1982 case *Mississippi University for Women v. Hogan*. The Mississippi University for Women (MUW), a state-supported university, limited its enrollment to women. Due to this policy, MUW denied Joe Hogan, a registered nurse, admission to the School of Nursing. School officials informed Hogan that he could audit classes but could not enroll for credit. Hogan filed an action in a district court, claiming that by denying equally qualified men the right to enroll, the school violated the Equal Protection Clause. The District Court denied Hogan's injunction, finding that the maintenance of single-sex schools bore a rational relationship to a

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<sup>41</sup> "Address to the Text and Teaching Symposium," Georgetown University, October 12, 1985, Washington, D.C.

<sup>42</sup> "Address to the Text and Teaching Symposium," Georgetown University, October 12, 1985, Washington, D.C.

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<sup>43</sup> "Address to the Text and Teaching Symposium," Georgetown University, October 12, 1985, Washington, D.C.

state's legitimate interest of providing the greatest range of educational opportunities for female students. After the Fifth Circuit Court of Appeals reversed the holding, the Supreme Court granted certiorari.

The Court's newest member, Justice O'Connor, joined by Justices Brennan, White, Marshall, and Stevens, delivered the opinion of the Court. The Court ruled that the Mississippi University of Women's policy could not be considered educational affirmative action for women because it perpetuated the stereotype that nursing was a woman's profession. Citing what she declared to be firmly established constitutional principles, O'Connor declared that although the statutory policy discriminated against males rather than females, it was not exempt from the same level of scrutiny. The Court reaffirmed its precedent that parties wishing to enforce classifications based on gender must show that the classification serves an important government interest that the discriminatory means employed are substantially related to achieving those objectives. O'Connor stated that although this test provided an easy method of determining the validity of a gender-based classification, the test itself must not enforce traditional views about the roles and abilities of men and women by accepting illegitimate government objectives or interests. O'Connor wrote, "Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."<sup>44</sup> According to the majority, the purposes of the close relationship test was to determine whether the classification was valid by assuring that it was not based on assumptions about the proper roles for men and women. Not only did O'Connor find these assumptions to be impermissible government objectives, but the majority also dis-

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<sup>44</sup> *Mississippi University for Women v. Hogan* (1982)

puted the legitimacy of certain facts. According to O'Connor, legitimate government interests cannot perpetuate a gender stereotype even if the stereotype is based on fact.

The Mississippi University for Women's argument failed to meet this standard because the state's primary justification for the single-sex admissions policy of the School of Nursing was that it constituted educational affirmative action by compensating for past discrimination against women. Justice O'Connor admitted that in limited circumstances, a gender-based classification could be constitutional but only if the classification "intentionally and directly assists members of the sex that is disproportionately burdened."<sup>45</sup> The key to this qualification is that the gender that receives the benefit must have suffered a disadvantage related to a gender classification, and the Court found that Mississippi could not prove that women were deprived of the opportunity to receive a nursing education. The majority concluded, "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job... and makes the assumption that nursing is a field for women a self-fulfilling prophecy."<sup>46</sup> Mississippi failed to show that the gender classification created by the single-sex admissions policy was substantially related to the proposed compensatory objective. This benign gender affirmative action, however, was a suspect objective because it was based on gender assumptions. In addition, the Court found that MUW's policy of allowing men to audit their classes undermined the claim that the women nursing students in the School of Nursing

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<sup>45</sup> *Mississippi University for Women v. Hogan* (1982)

<sup>46</sup> *Mississippi University for Women v. Hogan* (1982)



were adversely affected by the presence of men in their classrooms. Men who audited classes were able to participate, and men's presence did not affect the performance of the female students, according to the deposition of Dean Annette K. Barrar. Unconvinced by Mississippi's arguments, the majority concluded that the policy of excluding males from MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. By removing the choice to attend an all-female nursing school, the majority believed that it had liberated women from the plaguing stereotype that nursing is a women's profession.

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented from the Court's opinion. In his brief dissent, Justice Blackmun drew attention to the fact that the state of Mississippi offered other baccalaureate nursing programs to males. Blackmun stated that Hogan's maleness did not prevent him from receiving the additional education that he sought because the state did not deprive him of all alternate choices. Blackmun feared that the Court's decision placed all state-supported educational institutions that separated their student bodies by sex in constitutional jeopardy. He stated,

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity. The ringing words of the Fourteenth Amendment – what Justice POWELL aptly describes as its “liberating spirit,” – do not demand that price.<sup>47</sup>

To Justice Blackmun, equality and conformity were not synonymous. A university

could maintain classifications based on gender while also adhering to the Equal Protection Clause because equality requires only that a state provide equivalent opportunities to both genders.

In the final dissent, Justice Powell, joined by Justice Rehnquist, declared that the Court's opinion had ruled a fundamental element of American educational diversity to be unconstitutional. Powell contended that on the grounds of this ruling, every single-sex educational institution could be found to be in violation of the Court's understanding of the Equal Protection Clause. Powell first examined Hogan's constitutional complaint and found it wanting. Hogan's injury was characterized as one of “inconvenience” because he had to travel to attend one of the state-supported nursing schools that were available to him. Powell wrote, “This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town.”<sup>48</sup> To address Hogan's inconvenience, the majority applied heightened equal protection scrutiny to a classification that, according to Powell, provided an additional choice for women rather than exercised an outmoded sexual stereotype.

Powell found that MUW's gender classification provided a preference to women rather than imposed an antiquated stereotype because women attending all-female colleges choose to do so. They are not forced to attend a women's nursing school because only women can become nurses. Rather, they presumably choose the single-sex university program due to the additional educational benefits that it offers. Powell stated, “In my view, the Court errs seriously by assuming – without argument or discussion – that the equal protection standard generally applicable to sex

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<sup>47</sup> *Mississippi University for Women v. Hogan* (1982)

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<sup>48</sup> *Mississippi University for Women v. Hogan* (1982)

discrimination is appropriate here.”<sup>49</sup> The standard used by the Court to free women from “archaic and overbroad generalizations” had never been applied to a case in which a state attempted to expand women’s choices. By prohibiting states from providing women with the opportunity to choose the university they preferred, Powell declared that the Court “frustrates the liberating spirit of the Equal Protection Clause.”<sup>50</sup> Powell accused the majority of making women the victims of perception and stereotype rather than recognizing that they were given additional educational opportunities.

Justice Powell also found a weak link in the Court’s connecting nursing as a women’s profession and MUW’s single-sex admissions policy. Although the majority claimed that the School of Nursing fostered the perception that nursing was a women’s occupation, Powell noted that the School of Nursing was founded in 1871, 90 years before the single-sex campus was created. In addition, the School of Nursing was instituted a decade after a separate, coeducational school of nursing was created by the University of Mississippi. Because the School of Nursing was merely one part of the Mississippi University for Women’s campus and curriculum, Powell could not see the correlation between the School of Nursing and a stereotyped view of nursing a women’s profession. Powell concluded his dissent by stating,

A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi. In essence he insists that he has a right to attend a college in his home community. The Equal Protection

Clause was never intended to be applied to this kind of case.<sup>51</sup>

Powell determined that Mississippi’s enforcing a single-sex admissions policy was constitutionally sound because single-sex educational institutions have a rich tradition in the United States and because Mississippi’s educational programs were completely consensual. A student could choose the type of education which best suited her needs, and MUW was merely another educational opportunity afforded to women. Because the single-sex admissions policy was substantially related to Mississippi’s objective of providing broad educational opportunities, Powell reasoned that it did not violate the Equal Protection Clause.

Powell’s dissent in *Mississippi* seemed to reinforce his understanding of equality as explained in his opinion for the Court in *Regents of the University of California v. Bakke*.<sup>52</sup> Powell contended that racial quotas such as the one used by the University of California Medical School violated the Equal Protection Clause because equality guarantees that no one is deprived of an opportunity due to his race. Although he admitted that a properly tailored affirmative action program could survive the strict scrutiny test while also promoting genuine diversity, Powell rejected California’s quota system because “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”<sup>53</sup> By automatically admitting a certain number of minority students, California’s policy discriminated against non-minority applicants, and according to Powell, equality guarantees that an individual will not be deprived of an

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<sup>49</sup> *Mississippi University for Women v. Hogan* (1982)

<sup>50</sup> *Mississippi University for Women v. Hogan* (1982)

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<sup>51</sup> *Mississippi University for Women v. Hogan* (1982)

<sup>52</sup> *Regents of the University of California v. Bakke* (1978)

<sup>53</sup> *Regents of the University of California v. Bakke* (1978)

opportunity due to his race. Powell's opinions in *Bakke* and *Mississippi* may seem to be at odds, but because Hogan had the opportunity to attend a number of other state nursing schools in Mississippi, Powell believed the MUW's School of Nursing to be an additional educational opportunity for women rather than a program designed to discriminate against men.

### **CHAPTER THREE**

#### **Strict Scrutiny: The Battle Against Stereotypes and Generalizations 1996-Present**

Over the next decade, the Court heard several cases concerning statutory sexual harassment according to Title VII and Title IX of the Civil Rights Act, but the next significant gender equality case came before the Court in 1996. The fourteen years between *Mississippi University for Women v. Hogan* and the *United States v. Virginia* saw a dramatic transformation in the composition of the Court. The only remaining justices from the 1982 court were Justices Rehnquist, Stevens, and O'Connor. Justices Scalia, Kennedy, Souter, Thomas, Ginsberg, and Breyer replaced the retired justices and created the Court of 1996, a body that decided that Virginia violated the Equal Protection Clause by admitting only men to the Virginia Military Institute.

During George H.W. Bush's administration, the Department of Justice argued that the all-male Virginia Military Institute (VMI) violated the Fourteenth Amendment. The college was subject to the state legislature's control and had been founded as an all-male institution in 1839. VMI's distinction came not only from its single-sex admission policy but also from its mission of producing citizen-soldiers through an adversative educational methodology. A district

court ruled that VMI brought educational diversity to Virginia's predominately co-educational system and that admitting women would force the school to alter its distinctive methods. The Court of Appeals, however, reversed and remanded this decision, requiring that VMI admit women or create a similar program for females. In response, Virginia formed the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, but this institution's mission focused on leadership and training rather than an adversative method. Both the district and appellate courts upheld this plan as a legitimate solution to equal protection requirements.

Writing for the majority, Justice Ginsberg found that neither the goal of producing citizen-soldiers nor VMI's adversative methodology were inherently unsuited to women. Rather, women might want to apply to VMI because of the school's record of producing leaders as well as its extensive alumni network. According to the precedent set in *Hogan*,<sup>54</sup> the government's gender-based distinction must be based on an exceedingly persuasive justification and that justification could not be based on a gender stereotype. Although the Court acknowledged that enduring physical differences separate the genders, the majority ruled that neither the state nor the federal government could constitutionally deny women full citizenship stature solely because of their gender. Ginsburg asserted that these inherent differences between men and women were a "cause for celebration" rather than "artificial constraints on an individual's opportunity."<sup>55</sup> Ginsberg wrote,

Sex classifications may be used to compensate women "for particular economic disabilities [they have]

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<sup>54</sup> *Mississippi University for Women v. Hogan* (1982)

<sup>55</sup> *United States v. Virginia* (1996)

suffered, to “promote equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>56</sup>

Although the Court found Virginia’s objective of providing educational benefits through single-sex education to be legitimate, the majority ruled that Virginia could not pursue this objective at the price of isolating women and hindering them from achieving their full potential to participate in society by offering the opportunity to develop individual talents under VMI’s rigorous physical and mental programs to men only.

The Court did not doubt that VMI would have to modify its leadership training program if it admitted women, but the Court determined that VMI’s denying women admission to the institute was based solely on the fact that women were assumed to have different learning and developmental needs. This notion denies women the full protection of the law because gender classifications cannot be based on assumptions or facts about the abilities of the majority of women. When VMI was established in 1839, the Court noted, higher education was considered dangerous for women due to society’s view of women’s proper roles. Quoting from *The History of Women’s Education*, Ginsberg wrote, “If women were admitted, it was feared, they ‘would encroach on the rights of men....standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust.’”<sup>57</sup> Regardless of the unique and exceptional opportunities afford-

ed to Virginia’s sons, the Court reasoned that Virginia’s not offering the same opportunity to its daughters violated the Equal Protection Clause. The Court declared that precedent dating back to *Reed v. Reed*<sup>58</sup> firmly established that qualified individuals could not be excluded based on the traditional understanding of the roles and abilities of men and women. In addition, the fact that women participate in federal military academies and national military forces proved that VMI’s concern for the survival of the institution was unfounded. The Court reasoned that VMI’s mission of producing citizen-soldiers could certainly accommodate women because women and men are equal in modern American society.

The Court also addressed the Mary Baldwin Virginia Women’s Institute for Leadership program offered as a remedy by Virginia and found this program to be an inadequate solution because it did not repair the constitutional violation. Virginia violated the Constitution by excluding women from this extraordinary educational opportunity, so the Court concluded that a proper remedy “aims to ‘eliminate [so far as possible] the discriminatory effects of the past’ and to ‘bar like discrimination in the future.’”<sup>59</sup> The Court found that the Virginia Women’s Institute for Leadership was a “pale shadow”<sup>60</sup> to the VMI because VWIL attempted to spare women from the harsh aspects of military training in exchange for a focus on leadership. The Court, however, reasoned that the VWIL would never be equal because it lacked the “curriculum choices and faculty stature, funding, prestige, alumni support and influence.”<sup>61</sup> Because women successfully served in federal military academies and in the nation’s military forces, the Court saw no

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<sup>56</sup> *United States v. Virginia* (1996)

<sup>57</sup> *United States v. Virginia* (1996)

<sup>58</sup> *Reed v. Reed* (1971)

<sup>59</sup> *United States v. Virginia* (1996)

<sup>60</sup> *United States v. Virginia* (1996)

<sup>61</sup> *United States v. Virginia* (1996)

constitutional backing to prohibit every woman from receiving citizen-soldier training at VMI. Justice Ginsberg stated, “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI’s method of education suits *most men*.”<sup>62</sup> Although Virginia characterized the psychological and sociological differences between the developmental needs of the genders as real facts rather than stereotypes, the Court asserted that these facts were not legitimate because they did not apply to every individual woman. Some women could endure the adversative physical and mental training techniques employed by VMI, and VMI’s all-male admissions policy denied these women equal participation in a distinct educational opportunity.

The majority compared VWIL to the remedy to racial segregation proposed by Texas fifty years earlier. The University of Texas Law School established a separate school for its black law students, but the institution lacked an independent faculty, library and accreditation. The appellate courts were satisfied that black students were offered a substantially equivalent opportunity to study the law, but the Supreme Court found that the resources at the University of Texas Law School and the alternative for black students were drastically different. “More important than the tangible features, the Court emphasized, are ‘those qualities which are incapable of objective measurement but which make for greatness in a school.’”<sup>63</sup> Just as Texas’s alternative school lacked the reputation, faculty, experience, influence, and heritage of the University of Texas Law School,

Virginia Women’s Institute for Leadership did not have the same resources and educational methods as Virginia Military Institute. Because Virginia did not offer a cure for all of the opportunities and advantages denied to women who wanted a VMI education, VWIL did not offer an authentic solution. This reference to race seems to demonstrated the majority’s desire to judge gender classifications by the strict scrutiny test because these justices did not see an inherent difference between men and women that would legitimately affect their educational opportunities. The Court concluded by stating that women who qualified for VMI could not be offered anything less than a VMI education because society’s understanding of the meaning of “We the People” has come to embody the idea that men and women are fundamentally equal and deserve the same civic liberties and opportunities. In order to continue progressing toward a “more perfect Union,” the Court determined that genuine equal protection jurisprudence must cast aside gender stereotypes and embrace the idea that Virginia’s separate facility was inherently unequal.

Chief Justice Rehnquist filed the only concurrence in which he stated that although he agreed with the majority’s conclusion, he opposed the manner in which they reached that decision. Despite the fact that he once rejected the Court’s application intermediate scrutiny in favor of the rational relation test, Rehnquist believed intermediate scrutiny to be settled precedent because the Court had employed it since *Craig v. Boren* in 1976. Rehnquist, however, contested the majority’s invention of the ambiguous qualification that a government must display an “exceedingly persuasive justification” for its gender classifications. Rehnquist stated that this addition created unnecessary confusion to what would otherwise be an appropriate test. He

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<sup>62</sup> *United States v. Virginia* (1996)

<sup>63</sup> *United States v. Virginia* (1996)

did not enthusiastically champion intermediate scrutiny, but this new caveat crafted by the majority clouded the settled precedent that he differentially applied.

The Chief Justice also noted that VMI's attitude toward women in 1839 could not be judged by the modern understanding of the Equal Protection Clause because the Fourteenth Amendment was adopted nearly thirty years later and heightened scrutiny for gender discrimination was about a century away. Rehnquist declared that Virginia's actions post *Hogan*<sup>64</sup> were the only relevant considerations because Virginia had the obligation to determine whether the alleged educational diversity offered by VMI was actually desirable. Rehnquist's contention with VMI's single-sex program centered on its response to *Hogan* because the Court's decision informed Virginia that its program at VMI could be unconstitutional. Rehnquist noted that VMI could have responded by admitting women, but the institute thought that admitting women would seriously harm the educational methods it employed.

Rehnquist also found Virginia's solution to be inadequate because Virginia did not make a genuine effort to provide comparable resources to the women of VWIL. Rehnquist stated that single-sex education is not unconstitutional on its face, but Virginia had to make educational diversity available to both men and women. Rehnquist wrote,

Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in doing so, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest

in providing the same opportunity for women.<sup>65</sup>

Not only did Virginia have to provide a women's institution, but this institution also had to be of the same caliber as VMI. According to Rehnquist, VMI's excluding women did not violate the Constitution, but the maintenance of an all-male institution without an equal or even comparable women's institute did violate the Equal Protection Clause because equality demands that men and women be offered the same quality of educational opportunities. This distinction reconciles Rehnquist's dissent in *Hogan*. Because *Hogan* could attend a number of comparable nursing schools in Mississippi, Rehnquist found MUW's School of Nursing to be a constitutional form of educational diversity. VWIL, on the other hand, was an underfunded attachment to a private college and a sad likeness to the legacy and prestige of VMI.

In his heated dissent, Justice Scalia charged the majority with ignoring precedent, the factual findings of the lower courts, and the history of the Virginia Military Institute. Although Scalia admitted that the past attitude toward women's education was closed-minded, the democratic system provides the people with an opportunity to change the law as their views change. Scalia emphasized that the Founding Fathers left the American people free to alter their laws. The Court's inserting its social preferences, however, undermined this democratic system. Scalia claimed, "The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."<sup>66</sup> Scalia declared that the Constitution, with-

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<sup>64</sup> *Mississippi University for Women v. Hogan* (1982)

<sup>65</sup> *United States v. Virginia* (1996)

<sup>66</sup> *United States v. Virginia* (1996)

out the majority's modifications and judicial tests, does not participate in the educational debate because every generation has its own preferences and prejudices that are not considered controversial at the time.

Scalia rebuked the majority's equal protection jurisprudence, which permitted the Court to apply some variation of rational basis scrutiny, intermediate scrutiny, or strict scrutiny to any cases it chooses. Scalia accused the justices in the majority of randomly applying these less-than scientific tests and stated that the Court applied intermediate scrutiny "when it seems like a good idea to load the dice."<sup>67</sup> Regardless of the test it used, Scalia stated,

But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.<sup>68</sup>

Scalia accused the majority of asserting their own views about gender equality into the text of the Constitution rather than allowing the democratic process to reflect society's changing understanding of equality. West Point, the Naval Academy, and the Air Force Academy admitted only males for most of their history but began admitting women after their states' representatives, not the Court, decreed a change. Scalia claimed that the majority smuggled politics into the law by declaring that a region's educational traditions are unconstitutional. Scalia believed that these traditions could be changed through the democratic decisions of the

people. The majority, however, did not interpret the Constitution but created a new one with its custom-built tests that forced Virginia to change its tradition.

Scalia asserted that the Court crafted the "exceedingly persuasive justification" test in order to establish that intermediate scrutiny is not survived if some women who were interested in VMI and met the physical demands were excluded because the Court ruled that excluding qualified women could not be an exceedingly persuasive government interest. According to the Court, if one woman is willing and able to participate in VMI's program, denying her access violates the Constitution, but Scalia declared that intermediate scrutiny has never required a least-restrictive-means analysis. Rather, precedent dictated that a gender classification survives intermediate scrutiny if the classification in the aggregate advances the government's objective. Scalia found no support for the notion that a gender-based distinction is unconstitutional unless the characteristics it describes are true in every instance. Scalia accused the majority of using purposefully misleading language about the use of strict scrutiny in the consideration of gender discrimination cases so that they could undermine and destabilize established law. He stated,

Our task is to clarify the law – not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.<sup>69</sup>

Scalia chastised the justices in the majority for creating tests that suit their political

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<sup>67</sup> *United States v. Virginia* (1996)

<sup>68</sup> *United States v. Virginia* (1996)

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<sup>69</sup> *United States v. Virginia* (1996)

agendas and that cause states as well as the national government to need to take extra precaution to guarantee that they are in compliance with the Court's current understanding of equal protection.

Scalia also observed that the history of men's and women's universities provides evidence that Virginia had an important interest in offering an effective college education for its citizens. This history, coupled with Virginia's study that revealed that although males and females do have educational overlaps, they also have deep-seated differing developmental needs, demonstrated the constitutionality of VMI's admissions policy. Scalia agreed that coeducational environments could be appropriate, but single-sex colleges also provide benefits to the sexes by focusing on the differing developmental needs rather than the overlaps. Although it had used a distinct educational method that was more effective for teaching men, VMI's only option was to admit women at the cost of this adversative methodology. The majority did not believe Virginia's interest in maintaining a school based on an adversative method to be genuine because it was a pretext for discriminating against women. Scalia, however, stated that Virginia's three-year study "utterly refutes the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason."<sup>70</sup> Scalia rejected the Court's conclusion that VMI's excluding women was based on the VMI's 1839 view that only men were fit for military service and leadership. Scalia declared that the majority had assembled a straw man argument about VMI's failures rather than addressing the fact that Virginia recognized a legitimate difference in the educational needs of men and women.

When he examined the composition of Virginia's colleges, Scalia found that the

state funded fourteen coeducational universities and one all-male school run on the adversative model. Scalia stated that the majority argued that unless Virginia pursued a wide variety of diversity, any educational diversity it did pursue must have been fraudulent. He also attacked the majority's analysis of VMI's mission because the Court described the mission of all schools, not VMI specifically. Scalia concluded that what was distinctive about VMI was its application of its mission in a military, all-male, adversative fashion. This mission could not accommodate women because VMI would have to alter its fundamental mission and its methods. He stated that the Court's analysis created the stipulation that a state's objectives must always be broad enough to accommodate women regardless of how few women actually have an interest in pursuing the objective and regardless of how much a program would have to change to include women as participants. Scalia declared that the Court should not have discussed how much change was too much for VMI because VMI's single-sex program was substantially related to the government's important educational objective, making VMI's policy constitutional.

Scalia asserted that the reason why the applicant filed suit was not to attend an all-male school as the majority suggested because the school would cease to be all male if she were admitted. Rather, she wanted the distinctive, adversative education offered by VMI. The United States' solicitor general battled for these women despite the fact that if women were admitted, VMI would alter or abolish its adversative system because they found it be an ineffective way to educate women. Rather than addressing this issue, the Court issued a decision that announced that public single-sex education is unconstitutional.

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<sup>70</sup> *United States v. Virginia* (1996)



Indeed, the Court indicates that if any program restricted to one sex is “unique,” it must be open to members of the opposite sex “who have the will and capacity” to participate in it. I suggest that the single-sex program that will not be capable of being characterized as “unique” is not only unique but nonexistent.<sup>71</sup>

Scalia asserted that no public single-sex program was safe from the reach of this decision. A woman willing and able to participate in men’s football or wrestling would be constitutionally entitled to do so. Scalia rebuked the majority for making intermediate scrutiny indistinguishable from strict scrutiny and for believing that their worldviews are enshrined in the Constitution. He wrote,

But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a “more perfect Union,” (a criterion only slightly more restrictive than a “more perfect world”), can impose its own favored social and economic dispositions nationwide.<sup>72</sup>

Because the justices disapproved of Virginia’s educational method, the Court compelled Virginia to adopt its social views – a process, Scalia believed, that narrowed the sphere of self-government. He concluded his dissent by quoting VMI’s booklet entitled “The Code of a Gentleman.”

The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He

is the descendent of the knight, the crusader; he is the defender of the defense-less and the champion of justice...or he is not a Gentleman.

Scalia could not imagine that anyone, including women, would be better without the existence of an institution committed to educating such men.

The decision in *United States v. Virginia* clarified the Court’s understanding of acceptable gender-based distinctions. Ginsberg reasoned that the law could create gender differences, but the differences could not create different opportunities. An unconstitutional classification, therefore, is one which denigrates or restricts an opportunity by implying that one gender is less capable of participating fully in citizenship or directing their life’s course. Consequently, the government cannot base policy decisions on gender assumptions. Gender assumptions may be legitimate government interests, but these interests cannot be used to restrict any opportunity for even one person. Although the majority’s understanding of gender equality seems clear, Justice Scalia’s dissent did not reveal what he understands equality to mean. Rather, Scalia rejected the majority’s arguments without explaining what the Equal Protection Clause requires of educational institutions.

In the 1998 case, *Oncale v. Sundowner Offshore Services*, Scalia wrote the unanimous opinion in which the Court declared that Title VII of the Civil Rights Act of 1964 protects individuals from same-sex sexual discrimination in the workplace. Joseph Oncale worked for Sundowner Offshore Services on an oil platform in the Gulf of Mexico and alleged that on several occasions, he was forcibly subjected to sex-related, humiliating actions by male coworkers in the presence of the rest of the eight-man crew. He also claimed that a male coworker had physically assaulted him and

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<sup>71</sup> *United States v. Virginia* (1996)

<sup>72</sup> *United States v. Virginia* (1996)

threatened him with rape. Oncale's complaints to supervisory personnel did not produce remedial action, so he quit his job due to the fact that he believed that he would have been raped or forced to endure sexual harassment if he had continued to work on the oil platform. Oncale requested that the pink slip show that he left voluntarily due to sexual harassment and verbal abuse. When Oncale filed suit against his employer, a Louisiana district court and the Court of Appeals for the Fifth Circuit found that, as a male, Oncale had no cause of action under Title VII for harassment by male co-workers.

The Supreme Court, however, declared that Title VII's prohibition of discrimination because of sex protects men and women from discrimination from either sex. Title VII states, "It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Referencing the Court's precedent established in *Meritor Savings Bank, FSB v. Vinson*,<sup>73</sup> Justice Scalia stated that the statute is meant to cover "the entire spectrum of disparate treatment of men and women in employment."<sup>74</sup> The Court found that any working condition that creates an abusive working environment violates Title VII. Just as an employer may not discriminate against employees of his own race, an employer may not discriminate against employees of the same sex. Although Scalia's reasoning appears to have embraced some justices' desire to judge both gender and racial discrimination according to strict scrutiny, Scalia seems to suggest only that it is not absurd to think that an individual would discriminate against his own race or gender.

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<sup>73</sup> *Meritor Savings Bank, FSB v. Vinson* (1986)

<sup>74</sup> *Meritor Savings Bank, FSB v. Vinson* (1986)

The Court suggested that its precedent clearly established that the gender of the alleged discriminator is not significant in determining whether an individual has experienced the type of discrimination barred by Title VII. Scalia also criticized the state and federal courts for adopting "a bewildering variety of stances."<sup>75</sup> Some courts held that same-sex harassment cases were never valid under Title VII. Other decisions stated that claims were actionable only if the plaintiff could prove that the defendant was homosexual, making sexual desire his motivation for harassment. The Court, however, adopted a third stance "that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."<sup>76</sup> The Court held that Title VII considers action rather than motive when determining the validity of a plaintiff's case.

Although preventing same-sex harassment was not the original intent of Title VII, the Court declared that sexual harassment of any kind falls within the scope of Title VII. Scalia stated,

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>77</sup>

The Court declared that Title VII extends to any sexual harassment that meets the statutory requirement of a reasonably com-

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<sup>75</sup> *Oncale v. Sundowner Offshore Services* (1998)

<sup>76</sup> *Oncale v. Sundowner Offshore Services* (1998)

<sup>77</sup> *Oncale v. Sundowner Offshore Services* (1998)

parable evil. Although this decision seemed to broaden the application of Title VII, the Court continued to enforce the precedent that the plaintiff must prove that the conduct was discrimination because of sex rather than merely offensive sexual connotations. Scalia rejected the suggestion that this decision would transform Title VII into a general civility code for the American workplace because that risk would be just as probable for opposite-sex harassment rulings, and this transformation of the law is prevented by a close application of the requirements of the statute.

Scalia stated that Title VII does not prevent all verbal or physical workplace harassment. Rather, Title VII prohibits only sex-based discrimination. Sexual content or connotation alone, even between men and women, is not enough to classify an act as discrimination. According to the text of Title VII, discrimination occurs when “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>78</sup> The Court determined that courts and juries are capable of recognizing that legitimate discrimination can occur between opposite-sex and same-sex individuals. Although past opposite-sex gender discrimination cases had been simple to decide because the conduct was typically explicit or implicit proposals of sexual activity, Scalia claimed, “The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”<sup>79</sup> Regardless of whether the harasser is the same or opposite sex of the plaintiff, the plaintiff must prove that the harasser’s

conduct was not merely sexually suggestive but actually constituted sex-based discrimination.

According to Scalia, another protection against Title VII’s becoming a general civility code is the fact that the law does not require men and women to interact identically in the workplace. “The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”<sup>80</sup> According to the Court, this qualification must be recognized not only because men and women interact differently but also because horseplay and sexual flirtation are not discrimination. Scalia asserted that reasonable people are able to determine the level of severity of harassment if they consider the social context in which an action occurred. For example, Scalia stated that a coach smacking a player on the buttocks is not considered harassment, but if that same coach smacked his male or female secretary at the office, a reasonable person could conclude that his action was abusive.

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or rough-housing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position

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<sup>78</sup> *Oncala v. Sundowner Offshore Services* (1998)

<sup>79</sup> *Oncala v. Sundowner Offshore Services* (1998)

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<sup>80</sup> *Oncala v. Sundowner Offshore Services* (1998)

would find severely hostile or abusive.<sup>81</sup>

Because Title VII demands that any reasonable sexual discrimination claim be examined, the Court reversed and remanded *Oncale*'s case. The Court held that same-sex discrimination charges are just as legitimate as opposite-sex discrimination cases under Title VII because the important factor for establishing sexual discrimination is not the parties' genders but the circumstances surrounding the allegation.

The Court's decisions in *United States v. Virginia* and *Oncale v. Sundowner Offshore Services* seem inconsistent – in the former case, gender stereotypes are explicitly condemned, but in the latter, the Court's decision recognizes and accepts the "fact" that men and women typically interact in a different manner in the workplace setting. In one case, justices such as Ginsburg, O'Connor, Souter, and Stevens balked at the notion that the Virginia Military Institute barred women from admission due to the outmoded stereotype that women cannot thrive under an adversative education method. In the majority's opinion, Justice Ginsberg wrote, "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."<sup>82</sup> In *Virginia*, the majority concluded that any gender classification that denigrates or restricts an opportunity by implying that one gender is less capable of participating fully in citizenship or directing their life's course is an unconstitutional classification because a legitimate government interest cannot use gender classifications to restrict an opportunity for even one person.

In *Oncale*, on the other hand, the Court seemed to transcend gender. Writing for the unanimous Court, Scalia stated, "[W]orkplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."<sup>83</sup> Scalia, however, cautioned that this ruling did not transform Title VII into a general civility code because Title VII does not require men and women to be asexual or androgynous while at the workplace. Although the Court held that sexual desire did not have to be the motivation for sexual harassment, Scalia noted that horseplay and sexual flirtation are not grounds for a gender-based discrimination claim. Rather, Scalia concluded that reasonable courts and juries could distinguish between genuine sexual harassment and innocent sexual interaction by considering "the constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."<sup>84</sup> At first glance, the Court's understanding of gender equality in *Oncale* seems to be the embodiment of its rejection of gender stereotypes asserted by the *Virginia* ruling because the Court rejected the stereotype that only homosexuals would harass a member of their own gender and embraced the modern understanding that sexual harassment jurisprudence should focus on the harasser's words and actions rather than his motivations. A closer examination of Scalia's opinion, however, reveals that the Court may not have abandoned all vestiges of gender stereotypes and generalizations. Perhaps Scalia's opinion did not excite indignation because the other justices did not perceive its veiled meaning, or perhaps this sexual harassment dilemma exposes a contradiction in some justices' understanding of gender equality.

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<sup>81</sup> *Oncale v. Sundowner Offshore Services* (1998)

<sup>82</sup> *United States v. Virginia* (1996)

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<sup>83</sup> *Oncale v. Sundowner Offshore Services* (1998)

<sup>84</sup> *Oncale v. Sundowner Offshore Services* (1998)

While explaining that Title VII does not ban all flirtatious interactions or playful teasing, Scalia presented the example of a coach smacking a player's buttocks and a boss smacking the buttocks of his male or female secretary. A coach smacking his player's buttocks, Scalia contended, is not considered sexual harassment due to the context of the action. Slapping a secretary's buttocks, however, can reasonably be considered abusive behavior. Both as a coach and as a boss, a man has positions of authority over his players and secretary, yet Scalia claims that one smack is a clear violation of Title VII's anti-harassment policy. The obvious distinction between these two scenarios is the meaning behind the smack. One is meant to degrade or humiliate, and the other is socially accepted "locker room" behavior attached to the office of a coach. The problem with this difference, however, is the fact that the distinction between the actions seems to conflict with the Court's declaration that Title VII does not require harassment to be motivated by sexual desire. Undoubtedly, a boss could sexually harass his secretary in order to assert his authority or to intimidate his subordinate, and such abuse could qualify as sexual harassment under Title VII. No one suspects, however, that the coach's smack is intended to be an assertion of domination over his players because he is acting as a coach and motivating his team. Despite the Court's desire to reject the harasser's intent or motivation, in order for a jury or court to understand the "constellation of surrounding circumstances,"<sup>85</sup> it seems necessary to examine the alleged harasser's motivation.

The dilemma underlying this scenario seems to be a reemergence of the gender stereotyping or generalizing that the Court attempted to eradicate from gender equality jurisprudence. The coach did not harass his

player because reasonable people in today's society understand that, at times, coaches behave in this playful manner. This reasoning, however, seems to evoke an image of the exact type of sex-based generalizations that Justices Ginsburg, Souter, Stevens, and O'Connor denounced in *Virginia*. When the coach smacks his player's buttocks during a game, reasonable people understand that the action is not abusive but is merely part of a coach being a coach. One cannot help but wonder if this theory of examining surrounding circumstances would survive Title VII muster if a male coach smacked a female player's buttocks or if a female coach smacked a male player's buttocks. If female players were offended by such behavior, could justices dismiss their concerns due to the fact that their discomfort is based on a generalized view of how males act rather than an understanding of how coaches behave?

Although the Court's unanimous decision in *Oncale* appears to be a victory for a gender-neutral application of the law, this decision reveals a core issue that the Court has yet to address. Is it possible to escape gender generalizations and stereotypes, or will society's understanding of the proper and typical behavior of men and women always be infused into the law? Behind some justices' pining for gender-neutral jurisprudence lurks the shadow of a gender stereotype. When research and studies that suggest the existence of psychological differences between men and women are used to promote a harassment-free workplace, these justices seem willing to ignore the fact they have rejected similar research suggesting that most women do not learn well under an adversative educational method because such studies embody the antiquated gender stereotypes of a past age. Perhaps the best example of this apparent inconsistency lies in sexual harassment case

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<sup>85</sup> *Oncale v. Sundowner Offshore Services* (1998)

law. In the landmark 1986 case *Meritor Savings Bank v. Vinson*,<sup>86</sup> the unanimous Court held that “hostile environment” sexual harassment is unlawful under Title VII because “[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not likewise be prohibited.”<sup>87</sup> If the sexual harassment were severe or pervasive enough to alter working conditions or create an abusive working environment, the Court held the harassment to be actionable under Title VII.

Certainly, the Court’s decision seems free of plaguing gender stereotypes, but the briefs for the respondent, Mechelle Vinson, uncover arguments that embrace some form of inherent psychological difference between men and women. Vinson’s attorneys emphasized the qualifying fact that sexual harassment is unwelcomed sexual advances. Drawing a parallel between racial harassment, Vinson’s counsel, which included outspoken feminist Catherine MacKinnon, declared that victims of harassment are forced to suffer injury in order to file a sexual harassment charge. Much of the respondent’s brief argued in favor of removing the barrier of a loss of a tangible job benefit in favor of accepting “an intangible benefit such as psychological well-being at the workplace.”<sup>88</sup> Although the bank contended that sexual activity in the workplace might be socially acceptable or desirable, MacKinnon declared that women’s position of submission and inferiority in the workplace may cause sexual intercourse to appear voluntary or desired despite the fact that the initial advances were unwelcome. “Sex that kept occurring could be a victim’s ‘voluntary’ submission to unlawful discrimination and still be a fight repeatedly lost, or it could be a free choice...Respondent submits that if

the law of sexual harassment is useless to her because of her lack of choices, it is of little use.”<sup>89</sup> MacKinnon contended that women such as Vinson had no choice but to submit to sexual harassment because they could not afford to risk losing their jobs or promotion opportunities.

In the final section of the respondent’s brief, MacKinnon attacked the jurists who argued for including evidence of Vinson’s provocative dress and reports of sexual fantasies.

The underlying issue here is the implicit ‘archaic and stereotypic notion’ projected onto Ms. Vinson, that some women lie about sex for money. It is apparently feared that women subordinates will entrap unsuspecting supervisors into sexual liaisons which women want and keep secret in order to sue the company.... The deeper fear seems to be that if a woman can sue for forced sex at work, there will be no voluntary sex at work because she could always lie about it later.<sup>90</sup>

MacKinnon dismissed the notion that the workplace would become asexual and declared that the sexual harassment laws must exist because sexual harassment exists. She also claimed that including Vinson’s clothing choice and private conversations would transform the victims of sexual harassment into perpetrators by fostering the stereotype that women who dress provocatively, if there is such a thing as provocative dress, are lewd and are volunteering or consenting to be harassed by their male coworkers and superiors. In conclusion, MacKinnon declared what she called a social fact: “Women are first excluded from employment opportunities free of sexual

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<sup>86</sup> *Meritor Savings Bank v. Vinson* (1986)

<sup>87</sup> *Meritor Savings Bank v. Vinson* (1986)

<sup>88</sup> Brief of Respondent Mechelle Vinson

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<sup>89</sup> Brief of Respondent Mechelle Vinson

<sup>90</sup> Brief of Respondent Mechelle Vinson

extortion and then stigmatized by having the behavior that the context produced in them (that is, their survival skill), singled out as the reason why they are unfit for the guarantees of equality.”<sup>91</sup> MacKinnon asserted that women may submit to harassment due to their limited economic conditions but this fact did not make the harassment unwelcome.

In the amici curiae in support of Vinson filed by the Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association, the counsel repeated MacKinnon’s view that sexual harassment hinges on a stereotypical view of women as sexual objects and inferiors. The brief declared, “Sexual harassment is *not* an expression of social or courting behavior. Rather sexual harassment is an assertion of power by the harasser over the victim where the weapon is unwanted sexual attentions and the harasser’s leverage over the victim is his ability to affect her work.”<sup>92</sup> The counsel enforced this “power dominance theory” with statistics showing that most women find unwanted sexual attention to be “demeaning, embarrassing, and intimidating”<sup>93</sup> because sexual harassment reduces women to nonhuman, sexual objects. The brief argued for a harassment policy that embraces what appears be an acceptable generalization – most women are offended, intimidated, and demeaned by unwanted sexual attention. After clarifying that normal

or acceptable social patterns for sexual advances are not automatically harassment, the counsel declared that if employers provide male employees with a work environment free from discrimination and intimidation, employers must also provide an “equally inoffensive environment to women employees” because “[a] sexually intimidating work environment, or an environment that is hostile to women due to pervasive sexual harassment, amounts to an unlawful condition of employment imposed on women, but not on men, in the workplace.”<sup>94</sup>

In addition to data showing the physical and psychological harm endured by harassment victims, the brief cited statistics stating that “most men also find it offensive and embarrassing to see their own working mothers, sisters, daughters or friends subjected to derogatory verbal abuse.”<sup>95</sup> Instead of than assuming that when men see their mothers or sisters, they see human beings rather than sexual objects, the counsel argues that men see these individuals as women in need of protection. The brief also explored why sexual harassment must be classified as discrimination because of sex. “Sexual harassment is obviously conduct engaged in ‘because of’ the victim’s sex since, were it not for the woman’s gender, she would not be subjected to the unwanted sexual attention.”<sup>96</sup> This understanding of

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<sup>91</sup> Brief of Respondent Mechelle Vinson

<sup>92</sup> Brief of Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association as Amici Curiae in Support of Respondent

<sup>93</sup> Brief of Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association as Amici Curiae in Support of Respondent

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<sup>94</sup> Brief of Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association as Amici Curiae in Support of Respondent

<sup>95</sup> Brief of Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association as Amici Curiae in Support of Respondent

<sup>96</sup> Brief of Women’s Bar Association of Massachusetts, Minnesota, Women Lawyer’s Inc., Women Lawyers Association of Michigan, and Colorado Women’s Bar Association as Amici Curiae in Support of Respondent

sexual harassment, however, excludes harassment by a bisexual and was modified by the Court's decision about same-sex harassment in *Oncale*.

The brief filed by Working Women's Institute (WWI) continued exploring the damage done to women by sexual harassment. WWI found that women are more likely to be harassed due to their lower status in the workplace, and the brief included being pressured for dates in its list of actions that qualify as sexual harassment. WWI asserted that harassment is males' way of showing that "women do not belong in what had previously been an allmale 'club.'"<sup>97</sup> The brief maintained its theme of portraying men as sexual bullies and claimed that black men harass black women due to the stereotype of black women as sexually promiscuous fostered by white men. WWI also suggested that socialization is responsible for women's vulnerability. "In American society, men are usually the initiators of purely social interactions and women the recipients. That men, rather than women, generally initiate sexual relationships ensures that women bear the brunt of job-related advances."<sup>98</sup> The socialization of women to be sexually passive, the WWI argued, leaves women defenseless against harassment. Women are helpless and believe they have no options for stopping harassment. This fear creates a barrier to equal employment opportunities for a woman because her self-esteem and job performance are damaged when she is viewed as a sexual object rather than a fellow employee. WWI argued that a woman should not have to tell a harasser to stop because she is unable to prevent or halt the advances. In *Oncale*, however, the Court seems to argue that no human being should have to tell a

harasser to stop, not because the victim may not have the power to stop the advances but because a basic level of common humanity condemns the harassment of a fellow human being.

The Women's Legal Defense Fund's (WLDF) amicus curiae brief echoed the tone of WWI's brief with the addition of a large section devoted to explaining why Vinson's dress and conversation were inadmissible in court. WLDF criticized those who wanted this evidence to be included because "[a]ny purported justification of this view assumes that evidence of dress, fantasies, and conversations can reveal whether a woman is more or less likely to welcome sexual advances from her supervisor...This is nothing other than resurrection of the discredited myth that only women who ask for trouble get it."<sup>99</sup> The Women's Legal Defense Fund vehemently declared that the government could not make this archaic assumption connecting a woman's dress and conversation to her character because the meaning of personal appearances is complex and "deeply personal."<sup>100</sup> In order to prevent "inquisitions into the victim's morality,"<sup>101</sup> WLDF asserted that all evidence about personal appearance and conversation was dangerous and impermissible in court. "The virtual certainty of stereotypically based prejudice in response to evidence of dress mandates its exclusion."<sup>102</sup> Despite the ardent arguments that Vinson's clothing choices and conversation topics should be barred from evidence, Justice Rehnquist's opinion for the Court found that such evidence was necessary to assess the situation as a whole. Court of Appeals

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<sup>97</sup> Brief of Working Women's Institute as Amici Curiae

<sup>98</sup> Brief of Working Women's Institute as Amici Curiae

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<sup>99</sup> Brief Amicus Curiae of the Women's Legal Defense Fund

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<sup>101</sup> Brief Amicus Curiae of the Women's Legal Defense Fund

<sup>102</sup> Brief Amicus Curiae of the Women's Legal Defense Fund



Judges Bork and Scalia had previously espoused this position in their dissent to the Appellee's Suggestion for Rehearing En Banc.<sup>103</sup> Although some members of the feminist community accused the judges of holding this conservative position due to their stereotypical view of women as dishonest, the judges maintained the including such evidence was necessary to determine whether the sexual advances were welcome.

Some lower courts, as well as women's advocacy groups, denounced any alleged use of gender stereotypes that made psychological generalizations about women while also supporting positions in favor of sexual harassment policies that support what they considered to be the social "fact" that men in positions of authority are likely to be aggressive toward women. In the 1991 Ninth Circuit Court of Appeals case, *Ellison v. Brady*, the majority established the "reasonable woman test" for determining whether conduct and speech qualified as sexual harassment. The purpose of the reasonable woman was to ensure that hypersensitive employees did not file false harassment claims. The majority concluded that if a reasonable woman would consider an action "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment,"<sup>104</sup> the court would uphold this finding. The court seemed to adopt this test in order to avoid the perception that it held a stereotypical view of women. Instead, the majority declared, "Conduct that many men consider unobjectionable may offend many women" because "men and women are vulnerable in different ways and offended by different behavior."<sup>105</sup> Rather than adopting

a gender-neutral test, the appeals court held that many women share concerns about harassment, abuse, and assault that men do not share and seem to be incapable of understanding. "Men, who are rarely the victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."<sup>106</sup> In order to place women in the workplace on equal footing with men, the court found it necessary to adopt this gendered test because women better understand the threats faced by women.

The "underlying threat of violence" seems to attempt to explain why social customs require men to protect women in general rather than just their mothers, daughters, and sisters. As society started to consider violence against any human being to be illegitimate, social customs began to require men to protect all women because women are human beings who are particularly vulnerable to force being used against them. The court proclaimed that as the views of the reasonable woman changed with society's progress, Title VII's standard of acceptable workplace behavior would evolve with her and presumably society's view. This test, the court concluded, shifted the focus to the victim's perspective so that the court would not "sustain ingrained notions of reasonable behavior fashioned by the offenders."<sup>107</sup> The Ninth Circuit's attempt to avoid stereotypes about women, however, seems to have resulted in a mass of stereotypes about male behavior and thinking. Not only did the court suggest that men are unable to recognize sexual harassment, but the court also implied that the previous, inadequate understanding of sexual harassment standards was fashioned by men, the usual offenders. Rather than

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<sup>103</sup> *Vinson v. Taylor* (1985) United States Court of Appeals for the District of Columbia Circuit

<sup>104</sup> *Ellison v. Brady* (1991)

<sup>105</sup> *Ellison v. Brady* (1991)

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<sup>106</sup> *Ellison v. Brady* (1991)

<sup>107</sup> *Ellison v. Brady* (1991)

considering these generalizations to be offensive stereotypes, the Ninth Circuit seemed to believe that it was merely recognizing a social fact about men and allowing the law to reflect these facts.

In 1993, the Supreme Court's unanimous decision in *Harris v. Forklift Systems* overturned *Ellison's* "reasonable women test." Writing for the Court, Justice O'Connor determined that "an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."<sup>108</sup> In addition to removing the requirement for proof of psychological injury, the Court outlined the characteristics of reasonableness. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>109</sup> Although the Court rejected the reasonable woman in favor of the reasonable person, in his concurrence, Scalia found the reasonableness test to be vague because the terms "abusive" and "hostile" were not clearly defined for the reasonable person's discernment. He stated that the critical issue of Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>110</sup> This observation, however, does not define what "disadvantageous conditions of employment" are and whether these conditions differ for the sexes. Scalia's concern exposes another unclear area of equal protection jurisprudence. The Court has yet to clarify explicitly whether sexual harassment and sex-based discrimination are separable or whether sexual harassment is inherently a form of gender discrimination. In *Oncale*, Scalia suggested that plaintiffs

must prove that alleged harassment is discrimination because of sex rather than merely conduct that includes offensive sexual connotations. He reasoned that harassing conduct does not need to be motivated by sexual desire to be sex-based discrimination, but despite this distinction, the Court does not answer whether conduct motivated by sexual desire is always sex-based discrimination.

Just three years after the Court's unanimous decision in *Oncale*, in 2001, a 5-4 majority found the government's differing requirements for acquiring United States citizenship depending on the citizen parent's gender to be consistent with the Equal Protection Clause. The petitioner, Tuan Anh Nguyen, was born out of wedlock in Vietnam to a Vietnamese mother and an American father. Nguyen was raised in the United States by his father from the age of six and became a legal resident of the United States. At the age of 22, Nguyen pleaded guilty to sexually assaulting a child, and Immigration and Naturalization Service (INS) initiated deportation proceedings because of his offenses. After a United States Immigration judge found him to be deportable, Nguyen's father, Joseph Boulais, obtained a court order of parentage based on DNA, which he argued would establish Nguyen to be a citizen and thus not deportable. The United States Board of Immigration Appeals, however, rejected Nguyen's citizenship claim because it failed to comply with the standards established in United States Code 1409. The law reads:

§ 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

<sup>108</sup> *Harris v. Forklift Systems* (1993)

<sup>109</sup> *Harris v. Forklift Systems* (1993)

<sup>110</sup> *Harris v. Forklift Systems* (1993)

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

According to §1409(c), a child born out of wedlock abroad receives the mother's citizenship status if the mother has previously lived in the United States or one of its possessions for at least one continuous year. USC 1409(a) outlines the different ways that a child can receive citizenship through his father. For a child to receive citizenship through his father, the father must be a United States citizen and must agree in writing to support the child financially until the child is eighteen according to § 1409(a)(3). Also, while the child is under eighteen, §1409(a)(4) states that the child must be legitimated under the law of his residence (A); the father may acknowledge paternity in writing under oath (B); or paternity must be established by adjudication of a competent court (C).

According to this statute, if a father files a petition to legitimate his child, swears to his paternity under oath, or is found to be a father by a court judgment, the law will recognize his child as a legitimate United States citizen. To meet these stipulations, Boulais would have needed to take one of these steps to legitimate his son before Nguyen's eighteenth birthday. Although Boulais had obtained a court order of parentage based on DNA evidence, the Board of Immigration Appeals rejected his claim because he had not complied with §1409(a) by establishing his paternity before Nguyen's eighteenth birthday. Nguyen argued that §1409 violated his right to equal protection of the law by providing different citizenship conditions for children born abroad out of wedlock depending on whether the citizen parent is the mother or father. On appeal by Nguyen and Boulais, the Court of Appeals for the Fifth Circuit rejected the claim that §1409 violated the Equal Protection Clause by providing different citizenship rules based on the gender of the citizen parent.

In *Tuan Anh Nguyen and Joseph Boulais v. Immigration and Naturalization Service*, Justice Kennedy wrote the opinion for the majority formed by Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas. The Court held that according to the precedent established in *United States v. Virginia*, a gender-based distinction withstands equal protection scrutiny if it serves an important government objective and the discriminatory means are substantially related to achieving the objective. Kennedy stated that Congress's decision to distinguish between mother and father was based on the significant difference between their respective relationships to the potential citizen at the time of birth because the government's first interest is ensuring that a biological parent-child relationship exists. Undoubtedly, a mother's relationship is

verifiable from the birth and documentation. The father, however, does not need to be present at the birth, and his presence is not proof of fatherhood. Because of these facts, Kennedy declared that mothers and fathers are not similarly situated with regard to proving parenthood, and the Constitution permits the government to recognize differences when the sexes are not similarly situated. Kennedy stated, “This issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful.”<sup>111</sup> Because the law provides several options for proving that the paternal bond exists, the use of gender specific terms in this case merely recognize the biological differences between men and women and the psychological effect of these differences at birth and during pregnancy.

Kennedy determined that the government also has an interest in ensuring that the citizen parent-child relationship consist of real, everyday ties that supply a connection to the citizen-parent as well as to the United States. Kennedy reasoned that equal protection principles do not require Congress to ignore the reality that male citizens traveling abroad may unknowingly or unintentionally father children, and the government has “too profound”<sup>112</sup> an interest in ensuring that a father and child have established the bond that is naturally formed between a mother and child at birth. DNA evidence may provide scientific proof of fatherhood, but DNA does not guarantee that the father has cultivated a bond with his child. Kennedy held that Congress has the power to refuse to

grant citizenship to children who lack this essential bond with their citizen parent.

Kennedy also rejected the assertion that the law is based on a gender stereotype. He stated, “There is nothing irrational nor improper in recognizing that at the moment of birth – a critical event in the statutory scheme and tradition of citizenship law – the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed to the unwed father.”<sup>113</sup> Kennedy found that Congress could legitimately recognize the fact that mothers and fathers have different relationships with their child at birth due to the physical differences between men and women. Despite the Court’s upholding heightened scrutiny in *United States v. Virginia*, Kennedy recalled that Justice Ginsberg’s opinion for the Court stated that physical differences between men and women are enduring.

Finally, Kennedy stated that the means Congress chose are substantially related to the government’s interest in facilitating the parent-child relationship. The law places minimal obligation on the father, and the law is not the sole means by which the child can receive citizenship. A father may establish his child’s citizenship on the day he is born or any day until the child turns eighteen, or the child may seek citizenship on his own. Although Congress could have required both parents to establish that they had formed a meaningful relationship with their child, the administrative scheme Congress chose provides different means to ensure that the essential parent-child bond has been established. A statute meets equal protection qualifications as long as it is substantially related to achieving an important government interest. Kennedy declared, “None of our gender-based classification equal protection cases have required

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<sup>111</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

<sup>112</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001) [67-68]

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<sup>113</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

that the statute under consideration must be capable of achieving its ultimate objective in every instance.”<sup>114</sup> Although Kennedy admitted that the statute in question might not effectively establish the bond between the mother and the child in every case, the law seeks to ensure that fathers have the opportunity to form this essential parent-child bond.

Kennedy declared that petitioner’s arguments confused the government’s means and end. The statute is not invalid merely because Congress chooses an interest that is less demanding than making both mother and father prove their bond with a child. Kennedy stated, “The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problems at hand in a manner specific to each gender.”<sup>115</sup> Rather than enforcing a gender stereotype, Kennedy declared that the Court recognized a basic biological difference between men and women and that the dissent’s stereotype accusation obscured genuine gender prejudice by presenting facts about the biological differences between the sexes as illegitimate, pervasive gender stereotypes.

Justice O’Connor joined by Justices Souter, Ginsburg, and Breyer dissented from the Court’s opinion because, in her view, the majority mutilated the application of heightened scrutiny precedent. O’Connor stated that all sex-based statutes must be considered in light of the history of sex discrimination, which means that even accurate gender generalities can deny opportunities to certain individuals who do not fit these generalities, a problem raised by the Court in its decision in *Virginia*.

O’Connor chastised the majority for returning to a version of the rational basis test and clarified the differences between rational basis review and heightened scrutiny. She stated,

Heightened scrutiny does not countenance justifications that “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational.<sup>116</sup>

O’Connor suggested that the Court had rejected rational basis jurisprudence because all sex-based generalizations are impermissible even if they are supported by fact. The Court’s duty, however, is to determine whether the government’s reason for adopting a gender-based distinction is exceedingly persuasive. In order to make this determination, O’Connor reasoned that the Court must examine the actual purpose for the statute’s gender-based distinction. According to O’Connor, heightened scrutiny demands that that government’s interest be important while rational basis requires only that the interest to be legitimate, and this clarification reveals the difference between heightened scrutiny and rational basis review – the relationship between the means and the end. According to heightened scrutiny, discriminatory means must be substantially related to an important government interest. Rational basis review, on the other hand, requires that the means be rationally related to a legitimate government interest.

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<sup>114</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

<sup>115</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

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<sup>116</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

O'Connor was describing the three tests used in the Court's equal protection jurisprudence. Rational basis or relation tests whether the government's action is a reasonably related to a legitimate government end. If the Court can logically come to the government's conclusion and the difference in question does not violate fundamental rights, rational basis review is satisfied. The Court generally applies this test to equal protection challenges concerning age. For example, pilots must retire at the age of sixty-five because the government can reasonably conclude that the sensory skills required to fly an airplane deteriorate with age, and the government has an important interest to ensure that pilots are able to fly safely. In order to meet intermediate or heightened scrutiny, on the other hand, a distinction must be substantially related to furthering an important government interest. Intermediate scrutiny stipulates that the means used must clearly and directly achieve the government's end. When applied to the issue of gender equality, intermediate scrutiny asserts that laws cannot use gendered language if that language condones a gender stereotype. For example, if a law distinguished between men and women because women naturally love their children, and men do not, the law would be condoning a gendered stereotype and would be outside the Constitution's protection.

Strict scrutiny, the most stringent equal protection test, requires the government's interest to be compelling, and the means used to achieve that end must be both narrowly-tailored and the least restrictive means for achieving the end. This judicial test operates under the theory of *sine qua non*, which means that a law may only recognize the least difference possible, a difference without which the end cannot be achieved. Although this jurisprudence is typically reserved for racial distinctions, if applied to gender equality, strict scrutiny

would prevent any law from recognizing a difference between men and women that is based on anything other than irrefutable biological differences. Strict scrutiny would also prohibit generalities based on biological difference – only accommodations of unalterable, intractable biological differences would be permitted. Because of these distinctions, O'Connor asserted that rational basis review ignores other means that could achieve the government's ends in a more equal manner. For example, rational basis review would permit the gender-based distinction between the drinking ages for males and female in order to promote highway safety. Intermediate scrutiny, on the other hand, would require that males and females have the same drinking age because the government's using a gender-based classification to achieve highway safety might be reasonable, but this means does not meet intermediate scrutiny's substantial relation standard. O'Connor also suggested that heightened scrutiny requires a closer relationship between the means used and the government's ends so that "the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification."<sup>117</sup> After defining these enduring differences between rational basis review and heightened scrutiny, O'Connor declared that the majority departed from the Court's traditional application of heightened scrutiny in favor of some version of rational basis review.

O'Connor suggested that the majority arrived at their conclusions after inadequately inquiring into the actual purpose of Congress' statute. According to the majority, the government's first purpose is to guarantee that biological citizen-parents have a relationship with the child, but O'Connor observed that INS does not rely on this supposed interest in its support of the

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<sup>117</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

law. After criticizing the majority for dismissing sex-neutral alternatives as irrelevant, O'Connor stated, "[T]he majority has not shown that a mother's birth relation is uniquely verifiable by the INS, much less that any greater verifiability warrants a sex-based, rather than sex-neutral, statute."<sup>118</sup> Rather than a meaningless formality, O'Connor declared that avoiding gender-based classifications is a hallmark of equal protection because the Constitution demands that individuals be protected from the injuries to personal dignity that often accompany gender distinctions. Quoting from her dissent in *Metro Broadcasting, Inc. v. FCC*,<sup>119</sup> O'Connor stated, "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not simply components of a racial [or] sexual...class."<sup>120</sup> The personal dignity of an individual lies both in the liberty to define oneself as a "self" and the equality of being treated as an individual rather than being labeled with the assumed characteristics of a particular group.

O'Connor expressed this understanding of personal liberty in the 1992 case, *Planned Parenthood v. Casey*,<sup>121</sup> and again in 2003 in *Grutter v. Bollinger*.<sup>122</sup> In *Planned Parenthood*, O'Connor declared, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>123</sup> According to this theory, every individual has the right to define herself as a mother, and no one but she may decide when, if ever, she chooses to adopt that role. The application of this idea to *Nguyen* leads

to the conclusion that the physical process of pregnancy and birth does not produce a mother-child bond. Rather, a woman's deciding that she will be a mother creates the bond. Due to this choice on the part of the individual, the biological differences between man and woman are not factors in determining whether a parent-child bond forms. If a father chooses to be present at his child's birth, then he has the same opportunity as a mother to choose parenthood. Nature imposes no constitutionally relevant, instinctive responsibility on either mother or father. Instead, each parent has the right to choose to accept the responsibility of becoming a mother or father.

In 2003, O'Connor further explained this view of human dignity. Although *Grutter v. Bollinger* examined the constitutionality of the University of Michigan Law School's admissions program that gave special consideration to certain racial minorities, O'Connor's opinion for the Court reiterated the same idea of individualized equality that she espoused in *Nguyen*. O'Connor declared that all members of the American society have the right to be considered as an individual of a certain race or ethnicity when seeking an education. Michigan's "plus" system met the standards of strict scrutiny because the law school considered race without isolating a candidate from comparison with other students. Because Michigan did not use a quota system, racial considerations did not sacrifice a candidate's individual uniqueness. O'Connor stated,

When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her

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<sup>118</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

<sup>119</sup> *Metro Broadcasting Inc. v. FCC* (1990)

<sup>120</sup> *Metro Broadcasting Inc. v. FCC* (1990)

<sup>121</sup> *Planned Parenthood v. Casey* (1992)

<sup>122</sup> *Grutter v. Bollinger* (2003)

<sup>123</sup> *Planned Parenthood v. Casey* (1992)

application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.<sup>124</sup>

To be constitutional, admissions programs must see candidates as individuals because according to O'Connor, the Constitution demands that individuals have the ability to define themselves. Equality demands that law school candidates are viewed as more than merely an African American student or a Hispanic student. Instead, candidates are students who possess various talents and abilities and are also African American or Hispanic. By considering applicants on an individualized basis, O'Connor reasoned that Michigan did not attribute unwarranted or unwanted characteristics to any members of a race.

This understanding of the individual aspect of human dignity as clarified in her *Grutter* and *Planned Parenthood* decisions explains O'Connor's vehement stance against the gender distinction within the naturalization law. O'Connor quoted Justices Kennedy's and Stevens' opinions that supported her call for heightened scrutiny as she attacked the Court for misrepresenting the government's purpose for enacting this legislation. She stated, "The majority's asserted end, at best, is a simultaneously watered-down and beefed-up version of this interested asserted by the INS."<sup>125</sup> O'Connor asserted that the majority underemphasized INS's goal of establishing an actual parent-child relationship rather than merely providing an opportunity to establish such a bond. The majority, however, exaggerated the desire that parents form "real, everyday ties" with their child. O'Connor suggested that this focus on the opportunity for a relationship suited the majority's attempt to

improve the means-end fit at the cost of the reality of the parent-child relationship because the opportunity for a relationship does not guarantee that one will develop. The majority's focus on opportunity undermined the substantial characteristic that is requisite of proper means-end relationships.

O'Connor also rejected the majority's suggestion that a mother and father are not similarly situated at their child's birth. She reasoned that although a mother is always present at her child's birth, a mother and father have equal opportunity to establish the essential parent-child bond. She stated, "The mother can transmit her citizenship at birth, but the father cannot do so in the absence of at least one other affirmative act. The different statutory treatment is solely on account of the sex of the similarly situated individuals."<sup>126</sup> As established by precedent, the law guarantees similarly situated individuals equal treatment, and O'Connor reasoned that the idea that mothers automatically have the opportunity to form a relationship with their children because they are present at birth could only find support in an over-broad, sex-based generalization. O'Connor declared that if presence at birth is a qualification for establishing a parent-child bond, only a gender stereotype would prevent fathers who are present at their children's births from forming a similar relationship to the birth mother's because mothers and fathers are similarly situated in that both have an opportunity, upon the birth of the child, to form a parent-child bond.

For O'Connor, *Virginia's* recognition of physical differences was not applicable because the naturalization statute recognized a gender stereotype rather than an actual physical difference. She denied that the physical process of pregnancy and birth

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<sup>124</sup> *Grutter v. Bollinger* (2003)

<sup>125</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

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<sup>126</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)



bestow a natural parent-child bond on a mother because each individual woman is free to choose when she will create a parent-child bond. The majority's reasoning also failed to meet heightened scrutiny's tailoring standards because the mere fact that a discriminatory policy intends to foster the opportunity for something beneficial does not ensure that the desired result will occur. O'Connor accused the majority of adopting its stance in order to further an administrative convenience, the likes of which had been repeatedly condemned by the Court. She reminded the majority that not even statistical or empirical support permit the government to base a policy on a gender stereotype because such a procedure arbitrarily denies an opportunity to one sex or relies on outdated, simplistic assumptions about the proper roles and abilities of men and women.

O'Connor declared that the majority's decision had the effect of perpetuating the gender stereotype that mothers must always be responsible for illegitimate pregnancies. She declared, "Section 1409(a) is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."<sup>127</sup> By creating additional steps for the father to prove his paternity, the law condones an undue burden on mothers and allows fathers to escape from illegitimate parenthood. Rather than addressing the stereotype upon which the law is based, O'Connor accused the majority of condoning the notion that mothers must care for illegitimate children while fathers may ignore them. O'Connor asserted, "Indeed, the majority's discussion may itself simply reflect the stereotype of male irresponsibility that is no more a basis for the validity of the classification than are stereotypes about the

'traditional' behavior patterns of women."<sup>128</sup> According to O'Connor, the Constitution's promise of equal protection guards against this exact type distinction based on generalizations about the sexes. She concluded her dissent by informing readers that the majority's application of the rational basis test was a precedential anomaly and inconsistent with gender equality jurisprudence. She declared that the multitude of equal protection precedence would ensure that the majority's error would remain an irregularity.

The Court's decision in *Nguyen* seems to be an attempt to resolve an unsettled question. The Court teeters between intermediate or heightened scrutiny and strict scrutiny and has failed to define these tests clearly and apply them consistently. Although they accuse one another of incorrectly interpreting and applying these tests, the justices seem unsure of whether gender equality should be judged using the same jurisprudence reserved for race or whether it should maintain the separate category of intermediate scrutiny. With the recent change in the Court's composition, the future of gender equality jurisprudence seems uncertain. The addition of Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan may lead to the Court's concluding its debate about the proper test. The progression of the Court's decisions, however, seems to suggest that gender equality jurisprudence depends not only on the Court's interpretation of the Equal Protection Clause but also on society's changing understanding of the equality of the sexes.

The Court established its first test for determining the constitutionality of gender differences in the 1908 case *Muller v. Oregon*. Rational relation review stipulates

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<sup>127</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

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<sup>128</sup> *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* (2001)

that the government's use of a gender distinction must be rationally related to a legitimate government interest. This test allows the law to recognize biological, psychological, and social differences between men and women if these differences are reasonably related to a legitimate government interest. In *Muller*, for example, the Court determined that limiting women's working hours served the government's legitimate interest of protecting society's wives and mothers. The Court concluded that it was reasonable for the law to recognize that long working hours have different and detrimental effects on women's bodies, which permitted the law's distinction between men and women. The Court recognized the social fact that as the center of the family, women were especially valuable to American society.

The law continued to mirror society's understanding of gender roles into the 1960s. In 1961, the Court accepted the government's argument that a law that exempts women from jury duty was constitutional because women's primary duty was managing her home and raising children. The Court did not declare that women were incapable of serving on juries, but rather, the Court found that the broad exemption with narrow exceptions was reasonably related to the government's interest of preventing women from being excessively burdened. Notably, in 1961, Justice O'Connor dissented from this opinion and declared that the Court's decision was based on an assumption that women cannot fulfill both their home responsibilities and the civic duties of a juror. Ten years later when the Court decided *Reed v. Reed*, the majority adopted O'Connor philosophy espoused in her dissent in *Hoyt v. Florida*. In this dissent, O'Connor declared that the government could not make certain assumptions about the abilities of the sexes. In *Reed*, the Court ruled that the government could not

reasonably assume that women are less able to administer estates. Rather, the Court declared that such assumptions based on administrative convenience were the exact type of arbitrary class distinction from which the Equal Protection Clause protects individuals. The Court's jurisprudence stated that when men and women are similarly situated, the law must treat them equally.

The Court's 1976 decision in *Craig v. Boren* rejected the government's use of loose-fitting generalities about the sexes. Instead of rational relation review, the Court adopted intermediate scrutiny, which stipulates that a gender distinction must be substantially related to furthering a compelling government interest. Intermediate scrutiny begins with the assumption that men and women are equal but different. This test allows the law to recognize biological differences and psychological differences as long as these distinctions do not imply that one gender is less capable than the other. The majority in *Craig* rejected the government's use of statistics to draw a conclusion about the drinking habits of all young men because this conclusion embodied an unconstitutional gender stereotype. Although the government's fact-based conclusion may have been reasonable, the Court found that the different drinking ages for men and women were not substantially related to the government's interest of ensuring highway safety. Justices such as Brennan and Marshall even suggested that gender and race should be decided using the same judicial test.

The Court's 1980 decision in *Wengler v. Druggist Mutual Insurance Co.* upheld intermediate scrutiny and echoed the precedent that the government's policies cannot make generalities about proper gender roles. The lone dissenter, Justice Rehnquist, contended that rational basis review was the correct test for gender

equality questions. One year later when Rehnquist wrote the opinion for the Court in *Michael M. v. Superior Court of Sonoma County*, he agreed that rational relation review needed a “sharper focus.” The Court held that men and women were not similarly situated in sexual intercourse because of the different, gender-specific risks. This decision recognized that the physical differences between the sexes produce different emotional, psychological, and sociological consequences, and the government’s policy may account for these distinctions. Rather than defending an overbroad generalization, the Court stated that the law, which held only men criminally liable for rape, was constitutional because it recognized biological facts about the sexes.

The Court’s internal debates about whether gender distinctions require rational relation or intermediate scrutiny jurisprudence continued in its rulings in both *Rostker v. Goldberg* and *Mississippi University for Women v. Hogan*. In the former, Rehnquist maintained that it is reasonable for the government to recognize gender differences when conducting draft registration because the United States military has concluded that men and women are not similarly situated for combat. *Hogan*, on the other hand, rejected the all-female admission’s policy at the School of Nursing at Mississippi University for Women because the university’s nursing program enforced the stereotype that nursing is a women’s profession. O’Connor, writing for the Court in *Hogan*, stated that upholding traditional gender roles is an impermissible government objective even if the gender generalizations are fact-based.

In 1996, the Court used precedent established in *Hogan* as its guide in its decision in *United States v. Virginia*. Justice Ginsberg stated that the government’s justification for a gender distinction must be exceedingly persuasive and must not be

based on gender stereotypes. Ginsberg reasoned that prohibiting women from attending the Virginia Military Institute denied women full citizenship status because women did not have the opportunity to participate in VMI’s unique educational methodology. The majority modified its understanding of heightened scrutiny by finding that if one woman meets VMI’s admissions standards, she must be allowed to apply because the government cannot assume that physical or psychological generalities about the sexes apply to every individual. The Court’s decision recognized the fact that men and women are fundamentally equal in modern society because the sexes have the same civic liberties. The Court found that the law could make distinctions between the genders, but the distinctions could not create different opportunities for any individual of either gender. An unconstitutional classification, therefore, is one that denigrates or restricts an opportunity by implying that members of one gender are less capable of participating fully in citizenship or directing their life’s course.

Although the Court’s gender equality jurisprudence seemed to be settled after its 7-1 decision in *Virginia*, the 2001 decision in *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service* reopened the issue of the government’s recognizing psychological byproducts of the physical differences between the sexes. The majority held that it was reasonable – and constitutional – for Congress to assume that the physical process of pregnancy and birth creates a natural parent-child bond between mother and child that does not exist naturally between father and child. Justice O’Connor, however, contended the Constitution’s promise of equal protection protects against this exact type of distinction based on generalizations about the sexes. The Court’s 5-4 decision indicates the possibility

that the justices' individual interpretations of gender equality coupled with society's evolving understanding of the roles of men and women contribute to the uncertainty of whether the Court will use intermediate or strict scrutiny to decide future equal protection cases.

## CHAPTER FOUR

### Testing Gender Equality: Women in Direct Combat Units

In April 2010, the Department of the Navy announced that it had lifted the ban on women serving in submarines. Some dissenters claimed that permitting women to serve on submarines would harm the all-male camaraderie and create an uncomfortable, sexual tension in confined submarine quarters. Opponents of the Navy's removing the restriction also cited naval studies as evidence for female-specific health risks and complications that could result from submarine service.<sup>129</sup> In spite of objections, the Navy plans to have women actively serving in submarine crews by January 2012.<sup>130</sup> The issue of equality in the armed forces, however, is not over. In January 2011, a Pentagon spokesman announced that the Department of Defense (DoD) would be reviewing the recommendations of a congressional committee studying the role of women in combat. The Department of Defense has inched to the stopping point of women's equality in the military. This final issue is the lone remaining obstacle hindering full gender integration into every area of

military life including direct ground combat units and Special Operations units. In addition to the practical arguments for and against removing the restrictions for women in the military, this issue also raises a legal dilemma. If women were integrated into every position in the military, the Supreme Court's decision in the 1981 case *Rostker v. Goldberg* could be called into question because it would invalidate the Court's reasoning that women do not have to register for the draft since they do not fill combat positions.

Overtuning a past decision, however, will be the least of the Court's worries if it contemplates this thorny issue. If a case reaches the Supreme Court, the justices will have to consider the physical differences between men and women and determine whether the potential psychological differences between the sexes are constitutionally relevant. Although the Court has not declared that the Constitution applies to the military personnel in the same manner that it applies to civilians, as congressionally passed law, the Uniform Code of Military Justice must adhere to constitutional principles. Service members may answer to a distinct code of law, but these laws must be applied equally. At the moment, the issue is moot because no case exists. The issue of women in direct ground combat, however, is both relevant and a perfect issue to test the Court's understanding of gender equality. In the Military Leadership Diversity Commission's (MLDC) final report issued on March 7, 2011, the Committee recommended that the DoD and all branches of the military "take deliberate steps in a phased approach to open additional career fields and units involved in 'direct ground combat' to qualified women."<sup>131</sup> One side of the debate

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<sup>129</sup> "The Medical Implications of Women on Submarines" <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA400035>

<sup>130</sup> "Women to Start Serving on Submarines, but Not Everyone's On Board" <http://www.foxnews.com/politics/2010/04/29/pub-navy-combats-critics-fight-let-women-submarines/>

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<sup>131</sup> Final Report from the Military Leadership and Diversity Committee "From Representation to Inclusion: Diversity Leadership for the 21<sup>st</sup> - Century Military" p. 127

asserts that lifting the ban on women in combat will deter women from enlisting because women will be more likely to face danger. Others argue that the opportunity for complete equality may prompt women to re-enlist because they will be able to take combat-related assignments, the fastest track to promotion. Underneath these issues of recruitment and retention lurks the more fundamental contention – are men and women physically and psychologically similar in their ability to endure combat conditions?

Despite heated objections to allowing women to serve in combat units, the congressionally established MLDC has recommended lifting all gender-based placement bans. In the abstract of the Women in Combat Issue Paper, the Commission simply declared, “[T]he research evidence has not shown that women lack the physical ability to perform in combat roles or that gender integration has a negative effect on unit cohesion or other readiness factors.”<sup>132</sup> The current DoD assignment policy for women in combat, as approved in 1994 by Secretary of Defense Les Aspin, states: “Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignments to units below the brigade level whose primary mission is to engage in direct combat on the ground.”<sup>133</sup> The MLDC’s report noted that the Army’s policy for assigning women is not identical to the DoD’s and asserts that the distinctions between the two policies is the source of confusion about appropriate

assignments for women because the Army’s policy is more restrictive concerning which units are prohibited to women. The MLDC emphasized that Army policy prohibits women from being assigned to units with combat as a “routine” mission while the DoD only prohibits women from joining units whose “primary” mission is combat.

The Commission concluded that neither research nor practical experience supports the notion that the presence of women in direct ground combat units would adversely affect unit cohesion and mission effectiveness. Although it recognized the validity of the concern that women will be unable to handle the physical rigors of carrying equipment or the stress of combat, MLDC declared that size rather than gender should be the critical issue and that the gender specific fitness standards promote the idea that women are less capable than men. Although the same studies show that many white female officers are less likely to reach higher ranks because they choose to leave the military between promotions, the Commission still reasoned that limiting women’s opportunities to serve in combat has a negative effect on their military careers.

The Commission’s study also showed that the issue of women in military is focused on the Army because few positions are closed to women in the Navy and Air Force and few women are in the Marine Corps. Much of the support for lifting the ban on women in direct ground combat units includes an aspect of the feeling that women are “less Army”<sup>134</sup> because they are unable to participate in combat, yet many of these same supporters often note that women are already in unrecognized, essential combat

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<sup>132</sup> Military Leadership Diversity Commission  
“Women in Combat: Legislative and Policy,  
Perceptions, and the Current Operational  
Environment”

<sup>133</sup> Military Leadership Diversity Commission  
“Women in Combat: Legislative and Policy,  
Perceptions, and the Current Operational  
Environment”

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<sup>134</sup> Military Leadership Diversity Commission  
“Women in Combat: Legislative and Policy,  
Perceptions, and the Current Operational  
Environment”

positions. A *New York Times* article noted that “women have done nearly as much in battle as their male counterparts: patrolled streets with machine guns, served as gunners on vehicles, disposed of explosives, and driven trucks down bomb-ridden roads.”<sup>135</sup> The article also indicated that women have a unique role because of their interaction with Iraqi and Afghan women. For cultural reasons, male soldiers cannot question or search local women, so the Marine Corps created a revolving unit called “The Lionesses” which performs these tasks.

The article also noted that the complete gender integration of direct ground combat units would not be a seamless transition. Not only do women need separate bunks and bathroom facilities, but the military would also be forced to face the fact that soldiers have sex and a carefully timed pregnancy would allow female soldiers to avoid deployment. In addition, the threat of rape, harassment, and sexual assault could be constant problems for female soldiers. The journalist concluded that although most women in the military do not want to join “the grueling, testosterone-laden light infantry,”<sup>136</sup> as long as job-specific physical exams are created to test a soldier’s ability to withstand combat physically, women should be permitted to join all-male units.

Regardless of women’s desires or society’s wishes to incorporate women into combat units, many still fear that a female presence would have an adverse and even irreparable effect on an all-male unit’s morale. In 2007, the RAND National Defense Research Institute published a report entitled *Assessing the Assignment Policy for Army Women* for the Office of the Secretary of Defense. RAND asserted that the Army’s assignment policy is out-of-date.

“The assignment policy was drafted at a time when battles were assumed to be linear, characterized both by a front line, where direct combat contact with the enemy occurred, and relatively safer areas in the rear. In Iraq, U.S. forces confront an asymmetric threat.”<sup>137</sup> Although the RAND report found no evidence that women are initiating direct combat missions, women interact with units whose primary mission is combat, and RAND is not convinced that the framers of the Army’s policy intended women to have any interaction with direct ground combat units.

RAND determined that the Army is complying with the DoD’s assignment policy, but whether the Army is violating its own assignment policy hinges on the meaning “collocate.” If collocate strictly refers to the location of a unit, the letter of the Army’s policy prohibits women from being collocated to infantry or combat units, and the Army is in violation of its own policy. If, however, collocate includes both proximity and interdependence, RAND found inconclusive evidence about whether the Army has violated its policy. In an appendix entitled “Opportunities Available to Army Women,” the study lists all Army occupations including those prohibited to women. Of the 445 positions available in the Army, women do not qualify for 38.<sup>138</sup>

Another RAND study, “Effects of Gender Integration on Cohesion,” defined cohesion as task cohesion or “the shared commitment among members to achieving a goal that requires the collective efforts of the group”<sup>139</sup> and concluded that gender differences alone do not seem to erode unit cohesion. Although most respondents to RAND’s

<sup>135</sup> “G.I. Jane Breaks the Combat Barrier” in *The New York Times* August 16, 2009

<sup>136</sup> “G.I. Jane Breaks the Combat Barrier” in *The New York Times* August 16, 2009

<sup>137</sup> RAND National Defense Research Institute *Assessing the Assignment Policy for Army Women*, 2007 6

<sup>138</sup> RAND National Defense Research Institute *Assessing the Assignment Policy for Army Women*, 2007

<sup>139</sup> “Effects of Gender Integration of Cohesion” p. 54

surveys stated that they trusted their co-workers of both genders, many males blamed their leadership for fostering or reinforcing an environment of separation or even hostility toward females. The study also examined the alleged threat posed by a female presence to male bonding or the “Band of Brothers” effect. “Some men did complain that they could no longer walk around half-naked on ship, swear and drink with the guys, go as a unit to a strip club with their leaders, or engage in hazing practices.”<sup>140</sup> RAND concluded that most men found that the raised level of discipline due to gender integration had a positive effect because those activities do not belong in a professional military environment and because drunkenness and rowdiness do not promote workplace performance. The men in RAND’s study also denied that they would be more likely to protect a female soldier. Although some respondents indicated that military couples might protect one another, most believed that with proper training, both men and women are prepared to handle crisis situations identically.

Although RAND’s studies provide information about the meaning of combat in modern warfare, the Center for Military Readiness (CMR) has suggested that the picture painted by this data is incomplete. Undoubtedly, anyone serving in a war zone is exposed to hostile enemy fire and is in danger. Unlike previous wars, however, the conflicts in Iraq and Afghanistan do not have literal front or rear combat zones. All troops face the threat of enemy fire, improvised explosive devices, and other combat-related dangers. The Center for Military Readiness asserts that the difference between this understanding of combat and direct ground combat is that the latter refers to engaging the enemy with “deli-

berate offensive action.”<sup>141</sup> Although the Congress’s emphasis on equality may be based on good intentions, CMR suggests that the DoD officials behind diversity policies do not understand the drastic difference between civilian and military life.

The reality of war is a key ingredient missing from the RAND reports. Although the studies recognize the physical differences between men and women, RAND suggested that a gender-neutral job placement test could solve equal opportunity problems. If a soldier meets the physical requirements for a specific job, he or she should be assigned to that position. CMR, however, points out the potential for modified standards if women fail. In the past, the Army and military institutes such as West Point have been forced to lower physical standards to accommodate women. The failure to do so often results in criticism claiming that high, uncompromising standards are an obstacle to women’s career success. “As a result, standards are adjusted so that performance can be measured in terms of ‘equal effort’ rather than ‘equal performance.’”<sup>142</sup> The glaring problem with this tendency, however, is that in direct ground combat, a sacrifice in training standards may lead to an unnecessary loss of life.

Although some officers responded to RAND’s questionnaires by stating that the presence of females moderated male horseplay and vulgarity, these demure responses do not capture the essence of the day-to-day lives of infantry and Special Operations soldiers. The reports published by RAND gloss over the issues of unit morale, sexual tension, and brotherhood by citing data which suggests that gender distinctions are

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<sup>140</sup> “Effects of Gender Integration of Cohesion” p. 64-65

<sup>141</sup> Center for Military Readiness “New Commission Wants ‘Diversity’ Taken to Extremes”

<sup>142</sup> Center for Military Readiness Policy Analysis “Rubber Stamp RAND Report Promotes Women in Land Combat” September 2007 p. 7

dead to modern soldiers. Using evidence gathered from interviews with officers and enlisted soldiers, RAND repeatedly presented the theory that the Band of Brothers effect is an outdated mode of operation. Rather, the presence of female colleagues is a hindrance only when commanding officers emphasize gender differences.

Some advocates of gender integration claim that Israel serves as a military model of equality. In reality, however, women have not served in Israeli combat units since 1950. Like all citizens, Israeli women are conscripted into the Israeli Defense Force at the age of 18. Women may be exempted for religious, psychological, physical, or familial reasons and are only required to serve for two years compared to the three years required of men. Although women fought alongside men in Israel's War of Liberation in 1948, women were banned from combat after the war's conclusion. Historian Edward N. Luttwak of the Center for Strategic and International Studies asserted that men's protecting women fueled the change in policy.<sup>143</sup> During the 1979 hearings before the Military Personnel Subcommittee in the House of Representatives, retired Brigadier General Andrew J. Gatsis testified that Israeli Defense Minister Moshe Dayan told him that during the War of Liberation men "could not stand the psychological stress of watching women being killed and captured," and that women in combat units "knocked down their combat effectiveness."<sup>144</sup> Undoubtedly, the roles of men and women in 1950 and even 1980 are drastically different than women's social roles today, but Israel still has not lifted its ban on women in combat. Women can serve in the Mossad, Israel's elite counter-terrorist unit, but

infantry and other combat-related positions remain prohibited to women.

Although the policy regarding women in the military remains a congressional and military issue, if the Supreme Court were to hear a case raising this question, the justices would be asked to decide whether barring women from direct ground combat units violates the Equal Protection Clause of the Fourteenth Amendment as applied through the Due Process Clause according to the Court's precedent established in *Bolling v. Sharpe*.<sup>145</sup> In order to make this decision, the justices would rely on one of three jurisprudential tests – rational relation, intermediate or heightened scrutiny, or strict scrutiny. Although the first gender equality cases before the Court were decided using rational relation, the Court traditionally applies some form of intermediate scrutiny to current cases. The justices frequently attack one another for reverting to the old method of rational relation review or for modifying intermediate scrutiny so that it is almost indistinguishable from strict scrutiny. In order to contemplate what the Court's decision would be, it is vital to understand the boundaries and requirements of each test.

When applied to the issue of gender equality, each test outlines which difference between the sexes that can be legitimately recognized by law. The least restrictive test, rational relation review, assumes that men and women are equal but different biologically, psychologically, and socially. This test would allow the military to prohibit women from serving in combat positions due to physical and psychological differences, and it would allow unit assignments to be based on social roles such as the fact that most nurses are women. Intermediate or heightened scrutiny, on the other hand, assumes that men and women are equal but different biologically and psychologically.

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<sup>143</sup> The Heritage Foundation, "Women in Combat: Why Rush to Judgment?" June 14, 1991, p. 10

<sup>144</sup> The Heritage Foundation, "Women in Combat: Why Rush to Judgment?" June 14, 1991, p. 10

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<sup>145</sup> *Bolling v. Sharpe* (1954)



Although intermediate scrutiny recognizes biological and psychological differences, the differences cannot denigrate either gender by assigning them to positions based simply on gender or assuming that either gender is less capable than the other. When applied to the issue of women in combat, intermediate scrutiny would allow unit exclusions based on physical and psychological differences between men and women but not based on any generalizations about what social roles are more suitable to either gender. Strict scrutiny, the most stringent equal protection test, is based on the idea that there are only biological or physical differences between men and women. This test does not permit either psychological or social distinctions between the sexes, and strict scrutiny also prohibits generalizations based on biological differences. Only immutable biological differences between men and women would survive strict scrutiny jurisprudence, so women would only be prohibited from serving in a unit if they were physically incapable of performing job-related tasks.

The Court began approaching the issue of gender equality by applying rational relation review. To meet this equal protection test, the government's interest must be legitimate and the means used must be reasonably related to accomplishing this end. Although this test is now generally reserved for equal protection challenges based on age, before the Court's decision in *Craig v. Boren* in 1976, the Court upheld reasonable gender-based distinctions. Rational relation jurisprudence holds that men and women are equal but different biologically or physically, psychologically, and socially. For example, in 1961, the Court's unanimous opinion in *Hoyt v. Florida* found a Florida law automatically exempting women from jury duty to be constitutional because the government had a legitimate interest in ensuring that women were not unduly burdened and unable to accomplish

their familial duties. The law recognized that the differing social roles of men and women were reasonably related to the legitimate end of preserving the family structure. The Court upheld Florida's recognizing that women's primary role was in the home and that forced jury duty may have an undesirable effect on women's ability to accomplish their familial duties.

Justice Rehnquist continued to defend rational relation review even after the Court abandoned this test in *Craig*. Rehnquist represented the view that if the sexes are not similarly situated, a gender-based distinction is constitutional. The majority of the Court, however, adopted the standard of intermediate or heightened scrutiny, which assumes that the sexes are equal with exception to biological and psychological differences that do not denigrate either sex. According to intermediate scrutiny, a constitutional gender classification cannot assume that either gender is less physically or psychologically capable than the other. In order to meet intermediate scrutiny, the government's means must further an important government interest that is substantially related to the government's end. Intermediate scrutiny stipulates that the means used must clearly and directly achieve the government's end. The Court's intermediate scrutiny has also defined certain ends that are illegitimate government objectives. In the 1980 case *Wengler v. Druggist Mutual Insurance Co.*, the Court noted that the burden of proof lies with those defending gender distinctions and that administrative convenience is not a legitimate end. In 1981, the Court added that the law may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the

affected class.”<sup>146</sup> Again in the 1996 case *United States v. Virginia*, the Court declared that precedent dating back to *Reed v. Reed*<sup>147</sup> firmly established that qualified individuals could not be excluded from admission to the Virginia Military Institute based on the traditional understanding of the roles and abilities of men and women.

Strict scrutiny requires the government’s interest to be compelling, and the means used to achieve that end must be both narrowly-tailored and the least restrictive possible. This judicial test operates under the theory of *sine qua non*, which means that a law may only recognize the least difference possible, a difference without which the end cannot be achieved. Although this jurisprudence is typically reserved for racial distinctions, if applied to gender equality, strict scrutiny would prevent any law from recognizing a difference between men and women that is based on anything other than irrefutable biological differences. Strict scrutiny would also prohibit generalities based on biological difference – only accommodations of unalterable, intractable biological differences would be permitted. Although the Court’s gender equality jurisprudence has not yet encompassed the strict scrutiny test, some justices seem to believe that equality demands this additional layer of constitutional protection. In 1981, Justices Brennan, White, and Marshall adopted the view that the government’s burden of proof includes not only demonstrating an important government objective and a substantial relationship between the gender distinction and the objective but also proof that a gender-neutral statute would be a less-effective way to accomplish the government’s goal. Marshall and Brennan believed that the law must begin from the basis that each individual

controls his or her life and must be able to participate equally in public life, so a law must not use gender-based classifications to deny opportunities to any individual.

Justices Ginsberg and O’Connor also adopted a similar understanding of gender equality. In the Court’s ruling in *United States v. Virginia*, Ginsberg reasoned that a law can recognize gender differences, but differences cannot create different opportunities. According to this understanding of equality, an unconstitutional classification is one which denigrates or restricts an opportunity by implying that one gender is less capable of participating fully in citizenship or directing their life’s course. Consequently, the government cannot base policy decisions on these gender assumptions because legitimate government interests cannot restrict an opportunity for even one person. Although some justices hold expansive views of rights of citizens to be free from gender-based distinctions, the majority under Justice Kennedy in *Tuan Anh Nguyen and Joseph Boulais v. Immigration and Naturalization Service* declared that mothers and fathers are not similarly situated with regard to proving parenthood, and the Constitution permits the federal government to recognize differences when the sexes are not similarly situated. This 2001 case recognized that physical differences between the sexes, namely the process of pregnancy and birth, could cause psychological distinctions. The majority held that the differing naturalization requirements for citizen mothers and citizen fathers is substantially related to the government’s important interest of ensuring that a parent-child bond exists between the child and the citizen parent. Justice O’Connor rejected the majority’s view that the process of pregnancy and birth causes women to form a parent-child bond naturally, arguing instead that all sex-based generalizations are impermissible even if they are supported by psychological fact.

<sup>146</sup> *Michael M. v. Superior Court of Sonoma County* (1981)

<sup>147</sup> *Reed v. Reed* (1971)

Distinguishing between generalizations and stereotypes is crucial to understanding how the Court views gender equality. Justices such as O'Connor and Ginsberg contend that generalizations, or assumptions about the physiology or psychology of the majority of men and women, are always impermissible. The Court as a whole, however, has condemned gender stereotypes but not generalizations. The Court seems to understand a stereotype as a generalization that denies one gender a fundamental right or assumes a denigrating feature caused by gender. Stereotypes, whether physical or psychological, imply that because of an individual's gender, he or she is less able to participate as a citizen in society. For example, the Court recognized an acceptable generalization about the sexes in *Tuan Ahn Nguyen and Joseph Boulais v. Immigration and Naturalization Service*. The Court upheld the constitutionality of a law that creates different citizenship requirements for mothers and fathers due to the fact that the physical process of pregnancy and birth causes women form a parent child bond naturally. The Court found this psychological difference cause by a physical difference to be substantially related to the government's important interest of ensuring that illegitimate children born abroad have a bond with their citizen-parent. The Court found an impermissible stereotype, on the other hand, in the 1976 case *Craig v. Boren*. The Court rejected Oklahoma's law that created a gender-based distinction for the sale of 3.2% beer because the law was based on "archaic and overbroad"<sup>148</sup> generalizations about the drinking habits of men and women rather than biological or psychological fact.

The issue of women in combat is especially difficult because psychological

differences teeter between generalizations and stereotypes. No one is completely sure how women will respond to direct ground combat or how the presence of women would affect unit morale. If the Court were asked to decide whether it is constitutional to exclude women from combat units, the justices would have to weigh the government's interest in maintaining and operating a combat force with the fewest casualties possible against a female soldier's right to have the same combat opportunities as her male colleagues. Although many arguments against permitting women to join direct ground combat units mirror those against allowing women to serve in submarines, the distinguishing issue between these two types of assignments seems to be the psychological implications of combat. Undoubtedly, both sailors and infantrymen face the issue of privacy and sexual tension, but combat conditions are a unique set of circumstances. The harsh conditions and violent nature of combat operations permit the Court to consider psychological differences between men and women in order to determine if both sexes are similarly situated for combat.

The undeniable physical differences between men and women pose a problem for combat related assignment, but this distinction could be overcome with a job placement test that would require both genders to perform the same physical tasks. A physical test may allow Congress or the Army to keep women from being placed into direct ground combat units by crafting physical standards that are extremely difficult for women to meet. Combat roles which women currently fill would remain open and would be officially recognized as combat, but women would not be placed into the currently restricted infantry or special operations positions. This type of testing would temporarily solve the Army's gender integration dilemma on paper, but it would

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<sup>148</sup> *Craig v. Boren* (1976)

not answer the fundamental question of whether men and women are equal in relation to combat. As soon as a woman meets the physical standard, the Army would be forced to form an opinion on whether women should serve in direct ground combat units.

With the current composition of the Court, it is difficult to know how it would decide this issue. In the past, the Court has upheld a tradition of deference to Congress's judgment concerning military issues, but in the recent decisions concerning the military's "Don't Ask, Don't Tell" policy, lower courts appear to be trending away from this custom. In the Order Denying Defendants' Motion for Summary Judgment in *Log Cabin Republicans v. United States*, a California district court recognized that certain deference is due to the military. The Court declared, "That deference, however, is not unlimited, and must be balanced against the court's 'time-honored and constitutionally mandated roles of reviewing and resolving claims.'"<sup>149</sup> The Supreme Court also seems to be inching closer to applying something resembling strict rather than intermediate scrutiny. If the Court applied strict scrutiny as it decided whether women could be banned from direct ground combat units, the process of restricting specific positions to women would have to be narrowly tailored and the least restrictive means to further the government's compelling interest of unit safety and military effectiveness. Because strict scrutiny recognizes only indisputable biological differences, prohibiting women from serving in certain positions based on psychological assumptions is destined to fail strict scrutiny criterion. The Army would have to use a physical test to attempt to ensure that the fewest positions would remain restricted to the fewest number

women based solely on the biological differences between men and women.

If the Court applied intermediate or heightened scrutiny to this issue, the justices could consider both biological and psychological differences between men and women as related to direct ground combat. This test would allow women to be excluded from combat units based on psychological differences as well as biological differences between the sexes. The Court could recognize the psychological stress of combat on both men and women, or it could recognize the potential that men would attempt to protect women during combat. The newest members of the Court seem more likely to side with a broad understanding of equal protection similar to the views of Justices O'Connor, Ginsberg, and Breyer, which would label all gender-based psychological assumptions as stereotypes because they do not apply to every member of a particular gender and because such generalizations limit opportunities for otherwise qualified individuals. Justices such as Thomas, Scalia, Roberts, and Alito, on the other hand, seem likely to find psychological generalizations about the effect of women on infantry unit morale to be substantially related to the government's important interest of troop safety and effectiveness. Justice Kennedy, the Court's moderate, could decide on either side of the issue. If his opinion for the Court in the 2001's *Nguyen* is any indication of his leaning, however, he may recognize that due to the psychological and physical differences between men and women, women are not similarly situated for all combat positions and may be prohibited from some positions in order to guarantee the most unit safety and cohesion. Although some members of the Court seem to be inclined to apply strict scrutiny to gender as well as race, if the issue of excluding women from particular military units reached the Court, the Court would probably apply some ver-

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<sup>149</sup> *Log Cabin Republicans v. United States* Order Denying Defendants' Motion for Summary Judgment filed July 6, 2010 p 22, lines 22-25

sion of intermediate scrutiny. Unless the minority can convince Kennedy that the psychological differences between men and women as related to combat are based on an antiquated stereotype about the sexes, it seems likely that the Court would uphold the military's current unit assignment system.

## **CONCLUSION**

### **A Fatal Distraction: The Case Against Women in Direct Ground Combat Units**

The discussion of whether the Army should permit women to serve in every unit and position raises several important questions. The first question is whether the Army's and the Department of Defense's policies for women in the military would be a concern within the Court's jurisdiction. No cases have specifically addressed the issue of equal protection in military policy, but equal protection has been assumed to be an aspect of military life since desegregation in the 1940s. Because the Constitution reserves war powers to Congress and the president, some may argue that this military issue should be completely deferred to Congress. Undoubtedly, the Court should not deliver military protocol from the bench or assume Congress's constitutionally granted war powers. Rather, the Court gives deference to Congress by assuming that Congress's conclusions about military issues are correct. Those arguing against Congress's judgment must provide exceedingly persuasive proof that Congress came to an incorrect conclusion. The Court should defer to Congress in order to determine how men and women are different in relation to military life in general and combat specifically. In civilian life, men and women are practically equal in every way with the exception of immutable biological differences such as pregnancy.

The character of military life, however, may require that the Army recognize a wider variety of gender-based distinctions including physical differences and psychological differences that result from physical distinctions. Due to the nature and function of the military, the equal protection of the law will not mirror civilian equal protection, and the Court should defer to Congress's judgment to determine where the specific differences between military men and women exist.

Before the Court could determine whether the current policies for women in combat are constitutional, it is important to understand the current definitions of combat. When government officials, military personnel, or the media refer to combat, they are actually describing direct ground combat. Although this difference seems trivial, the distinction is essential to understanding which units are restricted to women. When most people hear "combat," they think of the traditional understanding of combat as the exchange of fire with enemy forces. They picture World War II style fighting with frontline troops charging toward the enemy and a rear zone that is free from hostile fire. This conception of war, however, does not encompass the reality faced by troops in places like Iraq or Afghanistan. Modern warfare cannot be contained in front and rear lines. Rather, all soldiers are in danger of receiving fire because war has become asymmetrical – there are no clearly defined lines or sides. The DoD defines direct ground combat as:

Engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy

to defeat them by fire, maneuver, or shock effect.<sup>150</sup>

The Army, on the other hand, adds a requirement for a “substantial risk of capture”<sup>151</sup> and “repelling the enemy’s assault by fire, close combat, or counterattack”<sup>152</sup> to its definition. The problem may lie in a miscommunication due to the fact that popular culture uses “combat” to refer to what is actually direct ground combat, yet the Army’s definition seems to suggest that more positions should be prohibited to women due to the inclusion of defensive action – repelling assault – in the definition of direct ground combat.

Although some members of the Court seem likely to approach the issue of women in combat from the view that men and women are fundamentally equal and only different biologically, strict scrutiny jurisprudence discounts the psychological conditions of war. Strict scrutiny may be implemented into civilian life without major disruption, but insisting that men and women are only different biologically even when in war is idealistic and dangerous. A physical test could tell the Army whether a woman is physically strong enough to complete combat-related tasks, but such a test could not determine if her presence would change the cohesion and morale of a combat unit. Some justices condemn psychological generalizations about the sexes, but combat-related psychological differences do not imply that either gender is

less capable of accomplishing combat-related tasks. The reason for allowing the Army to recognize psychological distinctions between men and women is not to deny women combat placements because women are incapable of fulfilling combat duties. The Army should not prohibit women from joining combat units because women are unable to exchange fire with the enemy or because American culture shudders at the thought of women being captured, tortured, or raped. Rather, the military should be permitted to prohibit women from joining combat units because the presence of women in combat units may be detrimental to the brotherhood of these units, and this bond among men is essential to combat effectiveness and success.

In the recently published book *War*, author Sebastian Junger examines the thoughts and feelings of the men stationed at a remote outpost in the Korengal Valley in eastern Afghanistan. This home of direct ground combat infantry – untouched by Army regulations and political correctness – remains closed to women. The most obvious issues for women in an infantry unit are related to the physical differences between the sexes. Soldiers routinely carry 80 to 120 pounds of gear. While under oath in 1991, Colonel Patrick Toffer, Director of West Point’s Office of Institutional Research, admitted that West Point had identified 120 physical differences between men and women.<sup>153</sup> As reported by the meeting minutes from August 10, 2009, a Defense Department Advisory Committee on Women in the Services (DACOWITS) member stated, “Bottom line you’re still going to have a 40 percent difference in physical strength. That person-on-person combat is still happening and it’s going to continue to happen.”<sup>154</sup>

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<sup>150</sup> Military Leadership Diversity Commission  
“Women in Combat: Legislative and Policy, Perceptions, and the Current Operational Environment”

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“Women in Combat: Legislative and Policy, Perceptions, and the Current Operational Environment”

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<sup>153</sup> The Heritage Foundation, “Women in Combat: Why Rush to Judgment?” June 14, 1991

<sup>154</sup> DACOWITS Meeting Minutes August 10, 2009

In addition to bodily strain, the seclusion of the outpost added other gender-specific physical challenges. The men urinated into PVC pipes stuck into the ground, and they did not need privacy because there were no women in the unit. When on covert missions, they would roll over to urinate so that the enemy did not detect them. A lack of social politeness accompanied the lack of women. The men usually were able to shower one per week using water pumped from a local creek. On occasion, however, the soldiers went weeks without bathing. These conditions are highly unsanitary for menstruating women. Granted, it is possible for a woman to stop menstruating due to the extreme physical demand on her body, but, in general, a woman must bathe more often than a man as well as have access to feminine products. If she did not have access to some sort of sanitation, she could face personal health risks in addition to problems caused by odor.

Junger dedicates much of *War's* text to examining and attempting to understand the psychological implications of direct ground combat. He notes that frontline troops have an extensive variety of psychological reactions. "The core psychological experiences of war are so primal and unadulterated, however, that they eclipse subtler feelings, like sorrow or remorse, that can gut you quietly for years."<sup>155</sup> The psychological thrill of war – of a soldier's finding out whether he will continue living – obscures the more acceptable or even more natural human emotions. During a firefight, for example, the Second Platoon had a wounded enemy combatant pinned down with gunfire, and all of the soldiers cheered when the fatal round hit. These soldiers had seen so much combat that they could cheer at death. The men began to yearn for combat after days without a firefight. The psycho-

logical exchange for victory caused the soldiers to wonder if they would be able to survive in civilian life – if they would be able to find satisfaction in something besides combat.

At Outpost Restrepo, a place named for a fallen friend, soldiers snapped at the sight of dangling shoelaces or the smell of urine revealing dehydration. When the soldiers were on patrol, the smell of urine not only could expose their location to the enemy, but dehydration also caused the men to move sluggishly at a time when seconds separated life and death. These actions are so minute that no one in the civilian world would perceive potential dangers. Seemingly unimportant, individual actions, however, had a noticeable bearing on the safety of the whole group because minor inconsistencies or distractions prevent a soldier from fulfilling his duty, which puts the other members of his unit in direct danger. Soldiers are trained to be proficient and effective despite the chaos surrounding them because individual failures place their entire unit in harm's way. The constant dependence on each other for survival causes soldiers to form an intimate attachment to one another. A soldier may not like a particular man in his unit, but these men are his brothers fighting a common enemy.

Not only does fighting the enemy create camaraderie among the men in a unit, but horseplay and fights also unite soldiers. The more experienced soldiers at Outpost Restrepo encouraged the new privates, or "cherries," to fight each other in what often resulted in a dog pile of soldiers. The tension of waiting for a firefight created a need for violence. A man would sneak up behind another to choke him out, or the soldiers would have rock fights. Inspired by the movie *Blood in, Blood Out*, the men of the Second Platoon adopted a system of beatings. Both enlisted men and officers received beatings on their birthday, when

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<sup>155</sup> *War*, Sebastian Junger p. 145

they left for leave, and when they returned from leave. The beatings were not a method of discipline but of affection and respect – brotherhood.

The men's bond was based on both physical and emotional openness. They had to do be able to do anything together – absolutely anything. These soldiers had to know that the other men in their unit could take and give beatings, that they could handle being hit with rocks, or that they could dance together in the bunker. These physical challenges not only relieved tension in the lulls between firefights, but they also proved that each man was worthy – worthy to be fought with and to be fought for. The soldiers walked around practically naked because even clothing was an unwelcome barrier. Nothing could be permitted to build a wall between a soldier and his unit because each soldier must know that every man would sacrifice his individual interest for the unit's good. The men constantly taunted one another and lobbed jokes about each other's mothers and sisters. Only wives and girlfriends were off-limits. No one wanted to think about what was going on at home or to consider whether the women he had left behind would recognize the man combat had made. Each man wondered whether his wife or girlfriend would be faithful physically and emotionally, while also knowing that he would never be able to tell her exactly what had happened while he was at war. Each man understood these feelings of insecurity and doubt because the brotherhood bond had an aspect that was more intimate than even marriage. The soldiers could talk only to each other about war, combat, and death.

This Band of Brothers effect has been the source of significant debate about unit compositions and cohesion. Researchers and psychologists question whether the Band of Brothers mentality is essential to unit cohesion and whether the presence of women in an infantry unit such as the

Second Platoon would irreparably undermine this male unity. There is good reason to believe that male unity would or at least might be undermined by women's presence, which is enough to justify excluding women from such units. Junger suspected that the men of the Second Platoon secretly wished that the enemy would overrun Outpost Restrepo before their deployment ended. "It was everyone's worst nightmare but also the thing they hoped for most, some ultimate demonstration of the bond and fighting ability of the men."<sup>156</sup> The fierceness and extraordinary fighting capability of small units is often attributed to the brotherhood of the men. The best infantry units are the ones with the most brotherhood. They re-enlisted for this bond; they died for this bond; and if given the opportunity, most of the Second Platoon would go back to Restrepo in an instant to be with their brothers. When a man is part of a group in which his survival depends on the other men, studies have shown that men are able to withstand more physical pain than men who are part of a loosely associated group.<sup>157</sup> Although the Band of Brothers effect has not been scientifically proven, the men of the Second Platoon demonstrate that the theory is far from absurd. "Combat fog obscures your fate – obscures when and where you might die – and from that unknown is born a desperate bond between the men. That bond is the core experience of combat and the only thing you can absolutely count on."<sup>158</sup> No one can survive independent of the group, so each soldier sacrifices his desires and fears because he knows that everyone else must do the same if he is to stay alive.

Another aspect of the bond among the men seems to be due to the fact that there are no women. Outpost Restrepo had an undeniable sexual energy. The men could

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<sup>156</sup> *War*, Sebastian Junger p. 215

<sup>157</sup> *War*, Sebastian Junger p. 240-241

<sup>158</sup> *War*, Sebastian Junger p. 239



not have sex, but their language was laced with innuendo. The men were so consumed with thoughts of sex that gender no longer mattered. They simulated man-rapes, made suggestive come-ons, and danced around the bunker together, but he only outlet for this sexual energy was combat. This is the environment that the Military Leadership Diversity Committee claims should be open to women as a viable service option. Many of the problems of introducing women into these all-male infantry units are obvious and can perhaps be overcome with time and training, but issues such as the psychological implications of combat have yet to be discussed adequately. The introduction of women into units such as the Second Platoon could have the effect of undermining the brotherhood bond upon which these men rely for survival. Granted, a woman may think of herself as “one of the guys,” but it seems unlikely that men would ever accept her as a brother. No generalization about the sexes encompasses the psychology or physiology of every individual man and woman. The question, however, seems to be whether this desire for equality through gender integration into direct ground combat units is worth the potential loss of life that could occur if men and women are not similarly situated for combat.

The Band of Brothers effect is often cited as a description of military exclusivity or as an example of the “old boys’ club” mentality. Unit cohesion and morale, however, provide an atmosphere in which soldiers can survive in spite of the chaos of war. Direct ground combat units must maintain the most cohesion possible because every soldier’s life is intricately tied to the lives of the rest of the men in his unit. Each man must be able to perform his task at all times because even the most insignificant distraction can result in death. Infantrymen such as the soldiers of the Second Platoon at

Outpost Restrepo must learn to live a life filled with death, and these men should not be exposed to anything that has the potential to create a fatal distraction.

Recognizing the Band of Brothers effect does not condone the stereotype that men cannot work with women or that men would sexually harass or assault female colleagues. It does, however, acknowledge that the presence of women in direct ground combat units would place an additional burden upon soldiers who already face excessive hardships due to their unit’s mission and purpose. Preserving male unity would certainly be an illegitimate government interest in a civilian workplace, but unit cohesion is indispensable to combat operations. In fact, success in combat operations is one of the most compelling interests that the United States government can have. It is possible that men could incorporate women into a close-knit combat unit with little difficulty, but even the potential that women’s presence could cause a loss of life is significant enough to be an exceedingly persuasive justification for a gender-based distinction. The success of infantry, special operations, and other combat units hinges on the fact that these soldiers are able to abandon civility in order to accomplish terrifying and deadly missions. Direct ground combat units are unique among other military units because their main purpose is to kill the enemy. Given today’s asymmetrical warfare, all units may exchange fire with enemy combatants, but only direct ground combat units have the specific, primary objective of killing hostile forces. This mission is taxing emotionally and psychologically as well as physically because killing other human beings has an effect on the souls of the soldiers. Units whose purpose is to kill the enemy require a specific kind of community and bond that allows the soldiers to function as normally as possible and maintain sanity despite the

trauma and strain of their occupation. These soldiers rely on each other for survival so completely that any minor change in the unit's dynamic could have lethal consequences because these men do not operate as individuals in a group but as one unified force.

If the Court were to approach the issue of women in combat, it must recognize the reality faced by direct ground combat troops. Direct ground combat units cannot risk even the potential that men would be distracted from their mission by sexual attraction or by a desire to protect women in their unit. The issue is not whether women can form a Band of Brothers bond with men, but rather the fact that men may not be able to form this bond with women due to women's potential for distracting the unit from its war fighting capacity. Such an acknowledgment, however, would not demand returning to the days of rational relations jurisprudence. The Court should not allow the military to take psychological differences one step further and recognize gender-specific social roles because this distinction is unnecessary for the military to accomplish its tasks and is based on the assumption that women are more suited to non-conflict occupations such as nurses. Women can be barred from direct ground combat units because of the exceedingly persuasive justification that male soldiers require a specific environment in order to accomplish combat objectives, and this environment would be disturbed by women's presence. Although some women may be able to perform the necessary physical tasks required of an infantry or special operations soldier, the potential that her presence may reduce the effectiveness of the unit permits the Army to exclude her so that soldiers' lives are not lost in pursuit of absolute gender equality.

The Court should continue to apply intermediate scrutiny, which maintains that

men and women are different biologically and psychologically but are not less capable. Intermediate scrutiny requires an important government interest and a distinction that is substantially related to this objective. This test would allow the Court to recognize the Army's legitimate concern that the psychological differences between men and women may have an adverse effect on unit morale and effectiveness. In order to determine where the exact differences occur, the Court should defer to Congress because as a political branch of the government, it has more access to relevant military information and has the power to act on this knowledge. The Army need not prove that women will always adversely affect unit cohesion because the potential that women's presence could reduce the effectiveness of combat units meets intermediate scrutiny's substantial relation requirement. Equality does not require sameness, but direct ground combat units do. The Court's finding the military's policy of restricting direct ground combat positions to be constitutional in order to preserve unit cohesion and morale to the greatest extent would not be declaring that women are incapable of accomplishing combat-related tasks. Rather, the Court would be recognizing that men and women are not similarly situated in relation to combat, and the Constitution does not require the Army sacrifice soldiers to the altar of ideological equality.