

BEYOND STEREOTYPING IN EQUAL PROTECTION DOCTRINE: REFRAMING THE EXCLUSION OF WOMEN FROM COMBAT

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In *United States v. Virginia*¹ (*Virginia*), the United States Supreme Court held that Virginia could not exclude qualified women from the Virginia Military Institute (VMI) based upon generalizations about the abilities of women, even if such generalizations are true for most women.² Writing for the majority, Justice Ruth Bader Ginsburg explained that states may not use claims of gender difference to demean women or “to create or perpetuate the legal, social, and economic inferiority of women.”³ The Court dismissed Virginia’s argument that women would destroy the institution, impair unit cohesion, and disrupt male bonding as the type of doomsday prediction used throughout history to exclude women.⁴

Many scholars consider *Virginia* to be a classic example of the anti-stereotyping principle that both animates and limits the Court’s gender equality jurisprudence.⁵ Because *Virginia* protects the right of the exceptional woman to be treated as an individual rather than as a member of a group, *Virginia* has been read to vindicate formal equality.⁶ This reading is consistent with the supposed dichotomy between anti-subordination and anti-classification principles in the Supreme Court’s equal protection doc-

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1. 518 U.S. 515 (1996).

2. *Id.* at 550.

3. *Id.* at 534.

4. *Id.* at 540-46.

5. See, e.g., Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004); Mary Anne Case, “The Very Stereotype the Law Condemns”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

6. See, e.g., Ruthann Robson, *Assimilation, Marriage, and Lesbian Literature*, 75 TEMP. L. REV. 709 (2002) (arguing that *Virginia* exemplified concern for the assimilation of women into dominant and idealized male groups); Erin Daly, *The Limits of the Constitutional Imagination: Equal Protection in the Era of Assimilation*, 4 WIDENER L. SYMP. J. 121, 125 (1999) (“Yet, the VMI litigation is troublesome because it demonstrates the poverty of the feminist vision. . . . If mainstream modern feminism goes no further than that, it is in a sorry state. The state says women cannot be more like men, the Court says women can.”). See also Kristina Brittenham, Note, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone is Not Enough*, 45 B.C. L. REV. 869, 902 (2004).

trine.⁷ According to most scholars, the Supreme Court has repudiated its interpretation of equal protection in *Brown v. Board of Education*⁸ as prohibiting state action that subordinates groups.⁹ In its place, most scholars think the Court has substituted an anti-classification principle that interprets the guarantee of equal protection to prohibit state action that classifies individuals based upon their membership in a protected group.¹⁰

In this Article, I argue that *Virginia* expresses both anti-classification and anti-subordination values. While *Virginia* invokes the anti-stereotyping principle to condemn gender classifications that exclude all women, regardless of their individual merit, the decision also expresses a commitment to anti-subordination principles. Rejecting the presumed symmetry of formal equality, the Court held that states may not rely upon claims of gender differences “to create or perpetuate the legal, social, and economic inferiority of women.”¹¹ Ignoring the district court’s factual findings that the admission of women would materially change VMI, the Court dismissed such arguments, claiming that they were the same assertions as used throughout history to exclude women from other all-male institutions—a move that situates VMI’s exclusion of women within a system of subordination.¹² Further, the Court rejected formal equality’s goal of assimilation based upon male norms and required VMI to make accommodations in its program to admit women.¹³

Dissolving the dichotomy between the anti-subordination and anti-classification approaches is an important step in constructing litigation strategies to shift the Court’s understanding of how gender discrimination operates to subordinate women. As Reva Siegel and Jack Balkin have argued, courts have used anti-classification discourse to limit the expression of anti-subordination values, but courts have also used the anti-classification framework to express concerns about state practices that enforce the second-class status of less powerful groups.¹⁴ While the Court has not abandoned anti-classification analysis, it has broadened the discursive space

7. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1533 (2004).

8. 349 U.S. 294 (1955).

9. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 558 (1998).

10. See Siegel, *supra* note 7, at 1472-73; see also Mark Tushnet, *The Return of the Repressed: Groups, Social Welfare Rights, and the Equal Protection Clause*, ISSUES IN LEGAL SCHOLARSHIP (2002), available at <http://bepress.com/ils/iss2/art7> (arguing that constitutional doctrine has rejected a group-oriented approach to equal protection law); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 218 (1989) (“Laws or practices that express or reflect sex ‘stereotypes,’ understood as inaccurate overgeneralized attitudes often termed ‘archaic’ or ‘outmoded,’ are at the core of [liberal definitions of discrimination.]”); Yoshino, *supra* note 9, at 558 (stating that the Supreme Court appears to have rejected the anti-subordination principle’s class-based view).

11. *Virginia*, 518 U.S. at 534.

12. *Id.* at 533.

13. *Id.* at 551 n.19.

14. Siegel, *supra* note 7, at 1474.

within equal protection doctrine to understand gender discrimination as a system of subordination.¹⁵

Litigation strategies that illuminate the particular practices within social institutions that subordinate women are well-suited to enrich the courts' understanding of discrimination. A legal challenge to the continued exclusion of women from direct ground combat is one example of this strategy. While the combat exclusion can easily be challenged as improper gender stereotyping, it is better framed as an institutional practice that constructs warriors as male and masculine while demeaning women. Challenging the combat exclusion, I argue, shifts judicial attention from stereotyping to concrete practices of subordination.

My argument proceeds in three parts. Part I analyzes the Court's gender equality jurisprudence in *Virginia* and other recent decisions to examine the extent to which the Court has considered anti-subordination concerns and values within its anti-classification framework.

Part II addresses the question of how to enrich the Court's understanding of gender discrimination beyond stereotyping. In this section, I draw upon sociological theories of gender that focus on the social practices within institutions that construct and reinforce gender inequality. Several legal scholars have relied upon this literature to enrich the courts' understanding of the mechanism and harm of sexual harassment in the workplace.¹⁶ This scholarship offers a particularized account of sexual harassment as a means of devaluing and subordinating women in the workplace, dissolving the dichotomy between anti-classification and anti-subordination concerns.

In Part III, I illustrate how this approach could be used to frame a legal challenge to the exclusion of women from direct ground combat and shift the attention of courts from gender stereotyping to the institutional subordination of women in the military. The Department of Defense (DOD) continues to exclude women from direct ground combat,¹⁷ denying women access to 15% of total available positions in the armed forces, regardless of whether or not they are qualified.¹⁸ To justify its categorical exclusion, the

15. See, e.g., Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 773 (2002) (arguing that the language in *Virginia* that gender classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. . . . represents a substantially new idea within the constitutional jurisprudence of sex discrimination"); Denise C. Morgan, *Anti-Subordination Analysis After United States v Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 383 ("Since the Supreme Court decided *Frontiero v. Richardson* in 1973, constitutional scrutiny of [sex-based] classifications has turned on two considerations: 'fit'—whether the challenged practice actually serves the objective the legislature intended it to serve; and 'anti-subordination'—whether the legislative objective is to disadvantage, and sometimes, whether the challenged practice has subordinating effects.") (footnote omitted); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

16. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

17. U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION 2-3 (1998) [hereinafter GENDER ISSUES].

18. *Id.* at 4 ("[A]bout 221,000 . . . of the approximately 1.4 million positions in DOD, were closed to servicewomen [in 1998].").

military relies on gender stereotypes: women lack the physical and emotional strength to fight and kill; their presence will impair male bonding and unit cohesion; their integration will reduce “military effectiveness.”¹⁹

Although the direct ground combat exclusion can be easily framed as a case of impermissible stereotyping, a legal challenge should focus on the institutional practices within the military that construct warriors as male and masculine, and simultaneously denigrate women and femininity.²⁰ The ground combat exclusion is not merely a product of mistaken gender stereotypes; it rests upon the military’s desire to define and preserve the identity of the warrior as male and masculine.²¹ As General Robert H. Barrow, a former commandant of the Marine Corps, explained: “War is a man’s work. . . . When you get right down to it, you have to protect the manliness of war.”²²

A legal challenge to the direct ground combat exclusion does not merely vindicate formal equality or anti-classification principles. By looking closely at the practices inside the military as an institution, the exclusion of women from direct ground combat can be seen as a means of subordination rather than a classificatory error. Like the military’s now-discredited policy of racial segregation, the exclusion rationalizes the inequality and subordination of women—not only in the military, but within American society as well. This type of analysis of institutional practices that denigrate and subordinate women can be used to enrich judicial understanding of gender discrimination as not merely an error in classification, but also as part of a system of subordination that reflects hostility toward treating women as equals.

I. GENDER DISCRIMINATION AS SUBORDINATION WITHIN THE ANTI-CLASSIFICATIONS FRAMEWORK

Unlike classifications based upon race or national origin, gender classifications have not been afforded strict scrutiny by the Supreme Court.²³ In *Frontiero v. Richardson*,²⁴ the Court recognized that “our Nation has had a long and unfortunate history of sex discrimination” similar to that experienced by African-Americans.²⁵ The Court has assumed, however, that there

19. See, e.g., Kingsley Browne, *Women in War, An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 60-68 (2001); PRESIDENTIAL COMM’N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 24-27 (1992) [hereinafter PRESIDENTIAL COMM’N].

20. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 113 (2002).

21. See Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL’Y 261, 266 (2002); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 499-502 (1991).

22. Michael Wright, *The Marine Corps Faces the Future*, N.Y. TIMES, June 20, 1982, § 6 (Magazine), at 16 (quoting General Robert H. Barrow).

23. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-36 (1994).

24. 411 U.S. 677 (1973) (plurality opinion).

25. *Id.* at 684-85.

are differences between men and women that may justify differential treatment.²⁶ The Court repeatedly has observed that legislators historically have relied upon outdated assumptions that sex is an accurate proxy for more germane bases of classification.²⁷ Accordingly, courts scrutinize the asserted objective to determine whether it reflects “archaic and stereotypic notions” about men and women.²⁸ To justify a sex-based classification, states must offer an “exceedingly persuasive” justification that meets the requirements of intermediate scrutiny; that is, the classification must be substantially related to an important state purpose.²⁹

Most of the Court’s jurisprudence has focused on the use of overly broad gender stereotypes and traditional gender norms to deny women access to equal opportunities.³⁰ Courts have rejected two types of stereotypes: descriptive stereotypes, which purport to describe the presumed abilities and interests of women, and normative stereotypes, which specify the appropriate roles of men and women in our society.³¹ Even assuming that stereotypes may contain a shred of truth, the Court has repeatedly held that states may not use gender as a proxy to exclude or deny women opportunities for which they are qualified.³²

By concentrating on stereotypes, the Court’s equality jurisprudence has tended to focus on gender as a category of classification rather than as a system of subordination. The Court’s recent jurisprudence has defined equal protection as the right of the individual to be treated as an individual, rather than as a member of a group.³³ The constitutional wrong becomes the classification of individuals as members of groups. The remedy lies in treating men and women without regard to their sex or gender. If women demonstrate they are like men in relevant respects, then the remedy becomes admission to the existing institutions on the same terms as men.³⁴ While the Court has used its remedial powers to compel the states to take affirmative steps to dissolve racially segregated schools, historically it has not imposed

26. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946))) (citation omitted) (brackets in original).

27. See, e.g., *Virginia*, 518 U.S. at 531-32; *J.E.B.*, 511 U.S. at 138-40; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982).

28. *Hogan*, 458 U.S. at 725.

29. See, e.g., *Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724.

30. *Mary Anne Case*, for example, argues that the Court’s gender equality jurisprudence is based upon the principle that states may not use gender as a proxy for other, more relevant characteristics. See *Case*, *supra* note 5, at 1449-51.

31. See *id.* at 1457.

32. See, e.g., *J.E.B.*, 511 U.S. at 141-42.

33. See *id.* at 142.

34. See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 869 (arguing that “equality theory” or “liberal feminism” is grounded in the notion that men and women are “functionally indistinguishable” and that, consequently, women have been “frequently obliged to squeeze themselves into ill-fitting roles in andocentric institutions, rather than using their growing numbers and sometimes distinct perspectives to transform those institutions”).

the same remedial obligations upon states that have engaged in gender segregation.³⁵

Most scholars have interpreted the Court's gender equality jurisprudence to embrace formal equality, not substantive equality.³⁶ As Catherine MacKinnon explains, equal protection doctrine has been premised upon the Aristotelian principle that things that are alike should be treated alike.³⁷ To the extent that men and women are similarly situated, the state must treat them alike; if there are differences, however, states may treat men and women differently.³⁸ Under this construction of equality, women are entitled to equal treatment only to the extent that they can prove they meet the male norm.³⁹

While the Court's gender equality jurisprudence has largely reflected the principle of formal equality, it has not ignored anti-subordination principles. As Ruth Colker has observed, "[t]wo sometimes conflicting principles, anti-differentiation and anti-subordination, underlie equal protection jurisprudence."⁴⁰ In *Frontiero, J.E.B. v. Alabama ex rel. T.B.*, and *Virginia*, the Supreme Court analogized sex discrimination to race discrimination, identifying the system of state laws that relegated women to an inferior legal and social status.⁴¹ In each of these cases, the Court has focused not only on the improper use of gender stereotypes by state actors, but also upon the harm to the status or dignity of women as a group.

In *Mississippi University for Women v. Hogan*,⁴² the Court held that the University (MUW) could not deny males admission to its all-female nursing program.⁴³ Employing anti-classification principles, the Court rejected MUW's proffered justification that its program compensated women for past discrimination, holding that an all-female nursing school perpetuated traditional gender stereotypes.⁴⁴ But the Court also held that the Equal Protection Clause prohibited gender classifications that stigmatized women as inferior or perpetuated historical discrimination, a move that embraces anti-

35. See Vojdik, *supra* note 20, at 75 (arguing that the court should require previously all-male institutions to eliminate facially neutral practices that perpetuate the exclusion of women).

36. For a discussion of formal equality in gender equal protection jurisprudence, see Case, *supra* note 5, at 1442-47 (defending the focus on formal equality violations in equal protection review of sex-based classifications). See also Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 53-60 (1990); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 328 (1985) (discussing formal equality arguments in the context of pregnancy).

37. See MACKINNON, *supra* note 10, at 220-21.

38. *Id.*

39. *Id.* at 222.

40. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986).

41. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) ("While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'"); see also *United States v. Virginia*, 518 U.S. 515, 542 (1996).

42. 458 U.S. 718 (1982).

43. *Id.* at 724.

44. *Id.*

subordination values.⁴⁵ While this language might be considered rhetorical, *Hogan* analyzed MUW's female-only policy primarily in terms of its harm to women rather than to Joseph Hogan, the male plaintiff, or to other men seeking a nursing education.⁴⁶ While the Court acknowledged that MUW's policy forced Hogan to travel a great distance to attend another nursing program, its discussion of the harm to Hogan was relegated to a single footnote.⁴⁷ The bulk of the opinion addressed the harm to females from state gender classifications that perpetuate the notion that women are different and inferior. In addition to focusing on the status harm to women as a group, *Hogan* discussed the harm to women from the occupational segregation that resulted from MUW's policy. In a footnote, the majority observed that the preservation of nursing as a female profession also serves to depress the wages of female nurses.⁴⁸ Within an anti-classification framework that expressed gender stereotyping, *Hogan* also expressed and vindicated anti-subordination values.⁴⁹

In *J.E.B.*, the Court similarly held that discriminatory state laws that stigmatize on the basis of gender or perpetuate historical patterns of discrimination also violate the Equal Protection Clause.⁵⁰ The Court invalidated the government's use of preemptory challenges to exclude prospective jurors based solely on their sex.⁵¹ Striking individual jurors simply because of their sex, the Court held, is based on "the very stereotype the law condemns."⁵² Viewed through the lens of anti-classification principles, *J.E.B.* can be read as a classic example of the Court's anti-stereotyping analysis, focusing on the harm to the individual from state action that treats him or her as a member of a particular group, rather than as an individual.⁵³ Many scholars have characterized *J.E.B.* as an exercise in formal equality or sameness theory, focusing on the Court's condemnation of stereotypical assumptions about women.⁵⁴

45. *Id.* at 725 ("[I]f 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.").

46. *Id.* at 718.

47. *See id.* at 724 n.8.

48. *Id.* at 725 n.15.

49. *See* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1517-18 (2d ed. 1988) (arguing that the Court in *Hogan* "denounced the single-sex policy both because it *discriminated* against men and because it reinforced the *subjugation* of women"); *see also* Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 424-27 (1990).

50. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-46 (1994).

51. *Id.* at 143-46.

52. *Id.* at 138 (quoting *Powers v. Ohio*, 449 U.S. 400, 410 (1991)).

53. *Id.* at 139 n.11 ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

54. *See, e.g.*, Abrams, *supra* note 34, at 875-78. Professor Abrams concludes that Justice Blackmun's majority opinion in *J.E.B.* "connected the use of preemptory challenges to remove women from a jury with the long-standing legal rules excluding women from juries altogether." *Id.* at 876 (citing *J.E.B.*, 511 U.S. at 149 (O'Connor, J. concurring)). Although noting that Blackmun likened the use of gender-based preemptories to "practically [putting] a brand upon [women]," she concludes that Blackmun

The Court in *J.E.B.*, however, did not focus solely on the harm to individual men or women, but also focused on the social meaning of the use of gender-based peremptory challenges. The Court situated the practice within the history of the nation's exclusion of women from federal jury service, one of the most fundamental privileges and duties of citizenship.⁵⁵ Given that history, the Court noted that the use of peremptory challenges based solely on gender sends the message to the community that women are inferior.⁵⁶ The Court stated:

All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority."⁵⁷

While Justice Blackmun's opinion plainly draws on the Court's anti-stereotyping analysis, he recognized that gender-based peremptory challenges "denigrate[] the dignity of the excluded juror."⁵⁸ Further, the Court recognized that female jurors are uniquely harmed.⁵⁹ For those women who are excluded, the Court held that a gender-based peremptory challenge "re-invokes a history of exclusion from political participation."⁶⁰ The Court concluded, "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."⁶¹

By focusing on the stigma resulting from the use of such gender-based challenges, the Court conceptualized the nature of the harm as group harm. As the Court explained:

The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that *state actors look beyond the surface*

"was able to resolve the case using an 'equality' or 'sameness' theory of feminism." *Id.* (quoting *J.E.B.*, 511 U.S. at 142, 146).

55. *J.E.B.*, 511 U.S. at 137-42.

56. *Id.* at 142.

57. *Id.* at 141-42 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (footnote omitted)).

58. *Id.* at 142.

59. *Id.*

60. *Id.*

61. *Id.*

*before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.*⁶²

While *J.E.B.* appears at first blush to read as a quintessential anti-stereotyping decision, the decision situates the practice of gender-based peremptory challenges within an anti-subordination framework. Within this framework, the Court focused on the harm to women's dignity and status, invoking their historical exclusion from the justice system by state and federal actors.

United States v. Virginia similarly can be read to express anti-subordination concerns within an anti-classification framework.⁶³ To fully appreciate the Court's analysis, it is important to understand the factual claims regarding men and women proffered by VMI. To defend its discriminatory policy, VMI first argued that its male-only policy was substantially related to Virginia's alleged interest in promoting single-sex education within a diverse range of educational offerings.⁶⁴ It also argued that the admission of women would destroy VMI's unique military-style methodology.⁶⁵

At the trial before the district court, VMI offered testimony by expert witnesses regarding alleged gender differences between men and women to support its claim that women are not suited to its stressful military-style program.⁶⁶ In addition, VMI's experts testified that the admission of women to West Point and other U.S. military academies resulted in a host of changes to the institutions, from requiring dual physical fitness standards and modifying boot sizes to hiring a gynecologist and adding blinds and shades to the barracks.⁶⁷

On the basis of this testimony, the district court issued over 500 detailed "findings of fact" that largely recited conclusions by VMI's expert witnesses regarding alleged gender differences and the harm that would befall VMI if women were admitted.⁶⁸ For example, the district court found that there are no less than 120 physical differences between men and women,⁶⁹ leading the court to conclude that most women would be unable to "participate in the 'VMI experience.'"⁷⁰ Men and women have deep-seated differences in learning and developmental needs.⁷¹ Women, the court found, could not handle the stress of the VMI system.⁷² According to the district

62. *Id.* at 139 n.11 (emphasis added).

63. *See United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 518 U.S. 515 (1996).

64. *Id.* at 1412-13.

65. *Id.* at 1413-14.

66. *Id.* app. at 1432-35.

67. *Id.* app. at 1437-41.

68. *Id.* app. at 1415-43.

69. *Id.* app. at 1432.

70. *Id.* at 1414.

71. *Id.* app. at 1434-35.

72. *See id.* (discussing the developmental differences between men and women that may prevent

court, men would not treat female cadets the same as male cadets, as “[e]qual treatment would necessarily give way to fair treatment.”⁷³ Women would interfere with the male bonding, morale, and the *esprit de corps* necessary to sustain the VMI system.⁷⁴ The admission of women would decrease the “intensity” of the VMI experience and reduce the morale among the male cadets.⁷⁵

The United States did not appeal the factual findings of the similarities and differences between men and women.⁷⁶ In affirming the district court’s decision, the Fourth Circuit Court of Appeals observed that, “[m]en and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated.”⁷⁷

The Supreme Court reviewed VMI’s discriminatory policy under “skeptical scrutiny” and rejected Virginia’s proffered justifications.⁷⁸ The Court held that there was no evidence that Virginia had a policy of promoting single-sex education—indeed, the state had eliminated all single-sex schools with the exception of VMI.⁷⁹ While the Court supposedly was bound by the factual findings of the district court, it held that, even assuming that such generalizations were true, Virginia could not exclude qualified women from VMI, a state military-style college, based upon generalizations about women as a group.⁸⁰

Virginia may be read as an anti-stereotyping case that protects the “exceptional” woman who is no different than a man. However, the opinion also focused on anti-subordination values in its analysis of the equal protection doctrine. Rather than narrowly defining the right to equal protection as the right to be treated as an individual, the majority opinion recognized that the guarantee of equal protection insures women the full status of citizenship.⁸¹ Justice Ginsburg wrote, “[N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”⁸²

The Court limited the state’s ability to rely upon claims of gender difference to justify differential treatment of men and women. The Court acknowledged that gender differences exist but held that such differences should be celebrated rather than being used by states to demean women or

women from thriving in the VMI environment).

73. *Id.* app. at 1440.

74. *Id.* app. at 1438.

75. *Id.*

76. *United States v. Virginia*, 518 U.S. 515, 541 (1996).

77. *United States v. Virginia*, 976 F.2d 890, 897 (4th Cir. 1992), *rev’d*, 518 U.S. 515 (1996).

78. *Virginia*, 518 U.S. at 534.

79. *Id.* at 534-40.

80. *Id.* at 545-46.

81. *Id.* at 532.

82. *Id.*

to deny them opportunity.⁸³ The majority held that states may use sex-based classifications “to compensate women ‘for particular economic disabilities [they have] suffered,’ . . . to ‘promot[e] equal employment opportunity,’ [and] . . . to advance the full development of the talent and capacities” of all persons.⁸⁴ However, sex-based classifications may *not* be used “to create or perpetuate the legal, social, and economic inferiority of women.”⁸⁵

Rather than narrowly focusing on VMI’s exclusionary policy, the Court broadened its analysis to situate VMI women within the unfortunate history of systematic exclusion of women throughout our nation’s history.⁸⁶ In its analysis, the Court concluded that VMI was no different than a host of medical schools, law schools, the military, and other all-male occupations that excluded women.⁸⁷ Faced with the admission of women, each institution raised the same argument offered by VMI: women would destroy the value or essence of the institution.⁸⁸ The Court stated that police departments had resisted females seeking careers as police officers based on similar claims that women’s presence would “‘undermine male solidarity;’ deprive male partners of adequate assistance; and lead to sexual misconduct.”⁸⁹ Citing empirical studies of the impact of female police officers, the Court observed that these fears were not confirmed by actual experience.⁹⁰ In addition, the Court cited evidence that women have successfully entered the federal service academies, where they have graduated at the top of their class, and that female troops have served courageously in our military, making vital contributions to our nation’s national defense.⁹¹ The Court concluded, “Virginia’s fears for the future of VMI may not be solidly grounded.”⁹²

The majority’s analysis in important respects resembles the scrutiny afforded racial classifications.⁹³ Scalia argued that the majority effectively dismissed the lower court’s factual findings, which the United States did not appeal and which were therefore not properly brought before the Court.⁹⁴

83. *Id.* at 533.

84. *Id.* (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987)).

85. *Id.* at 534; *see also* Hasday, *supra* note 15, at 808 (arguing that “Virginia seems to express a particular constitutional concern for women’s ‘full citizenship stature’ and ‘the legal, social, and economic inferiority of women.’”) (quoting *Virginia*, 518 U.S. at 532, 534).

86. *See id.* at 542-45.

87. *Id.*

88. *Id.*

89. *Id.* at 544 (citations omitted).

90. *Id.*

91. *Id.* at 544-45.

92. *Id.*

93. Justice Scalia argued that majority departs from the “standard elaboration of intermediate scrutiny.” *Id.* at 573 (Scalia, J., dissenting). While I suggest in this Article that the majority has departed from traditional notions of formal equality, I disagree with Justice Scalia’s larger argument that Virginia’s males-only policy would survive constitutional muster under a traditional formulation of intermediate scrutiny.

94. *Id.* at 585 (Scalia, J., dissenting). Scalia notes:

Ultimately, in fact, the Court does not deny the evidence supporting these findings. It instead makes evident that the parties to this litigation could have saved themselves a great deal

The findings that the admission of women would destroy unit cohesion and necessitate changes that would destroy the institution arguably are not descriptive or normative stereotypes, nor did the majority label them as such.⁹⁵ Instead, the majority referred to them as “generalizations” and dismissed them as “a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophec[ies],’ once routinely used to deny rights or opportunities.”⁹⁶ In this sense, the Court’s analysis seems more like the reasoning in race discrimination cases in which alleged racial differences are no longer heard to justify differential treatment of racial groups.⁹⁷ *Virginia* similarly reflects the same normative judgment with respect to claims of gender difference when used to exclude women.

Unlike formal equality, which attempts to treat men and women as individuals without regard to their gender, *Virginia* is not blind to gender. The Court acknowledged that the admission of women would require VMI to modify its program to accommodate the presence of women.⁹⁸ While VMI argued that such changes justified keeping its program all male, the Court explicitly rejected the argument.⁹⁹ Instead, the Court held that VMI must accommodate the need for privacy and the different physical capabilities of men and women, just as the military had to accommodate the increased integration of female troops.¹⁰⁰ Rather than requiring women to assimilate into institutions by conforming to male expectations or norms, the Court required VMI to change to include women.¹⁰¹ In its remedial decree, the Court limited the use of anti-classification analysis and formal equality, which recognizes that states may treat men and women differently if they are not similarly situated.¹⁰²

The Court’s remedial approach contrasts markedly with earlier gender cases involving under-inclusive benefits statutes. In cases such as *Heckler v. Mathews*,¹⁰³ the Court ordered that a defendant may remedy the violation by either extending the benefit to the excluded group or denying the benefit to the preferred group.¹⁰⁴ This remedy is consistent with the Aristotelian notion that those that are alike should be treated alike.¹⁰⁵ In *Virginia*, however,

of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices’ own view of the world

Id. (citation omitted).

95. *Id.* at 542-46.

96. *Id.* at 517 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (citation omitted) (bracket in original)).

97. *Cf. id.* at 532-34.

98. *Virginia*, 518 U.S. at 550-51 n.19.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* at 550-51.

103. 465 U.S. 728 (1984).

104. *Id.* at 738 (citing *Welsh v. United States*, 398 U.S. 333, 361 (1970)).

105. *See* SAMUEL FLEISCHACKER, *A SHORT HISTORY OF DISTRIBUTIVE JUSTICE* 19 (2004), available at http://www.hup.harvard.edu/pdf/FLESHO_excerpt.pdf (according to Aristotle, “it is unjust for unequals in merit to be treated equally or equals in merit to be treated unequally”).

the Court imposed the same remedy used in cases involving racially segregated schools.¹⁰⁶ Citing *Milliken v. Bradley*,¹⁰⁷ a landmark case setting forth the scope of a proper remedy for racial segregation in public education, the Court held that VMI must restore the plaintiffs to the position they would have occupied absent discrimination: “eliminate . . . the discriminatory effects of the past” and “bar like discrimination in the future.”¹⁰⁸ This notion of restorative justice, though not fully developed in *Virginia*, is at odds with formal equality’s demand for gender neutrality.¹⁰⁹ The Court’s remedial conclusion was consistent with its limitation on the use of alleged gender differences to discriminate: If gender differences cannot justify the denial of rights or opportunities to women, then VMI must admit women and make whatever changes are necessary to accommodate women.¹¹⁰

By expressly relying on *Milliken v. Bradley* in fashioning a remedy, the Supreme Court recognized the similarity between gender and race discrimination. While VMI objected to accommodation for women, the Court explicitly noted that VMI had voluntarily changed aspects of its program to accommodate African-American cadets in 1968.¹¹¹ These changes included the elimination of cherished traditions such as requiring students to sing “Dixie” and salute the Confederate flag (and the tomb of General Robert E. Lee) at ceremonies and sports events.¹¹² The Court also emphasized that VMI established a recruitment program to attract African-American students and a retention program “designed to offer academic and social-cultural support to ‘minority members of a dominantly white and tradition-oriented student body.’”¹¹³ Though the Court couched its analysis in terms of VMI’s ability to manage change, the Court plainly analogized VMI’s exclusion of women to its former exclusion of African-American students, inserting its analysis as a footnote to the sentence in which the Court held that Virginia’s goal “is not substantially advanced by women’s categorical exclusion, in total disregard of their individual merit, from the Commonwealth’s premier ‘citizen-soldier’ corps.”¹¹⁴ To the extent that *Brown v. Board of Education* recognized that racial segregation in education subordinated African-American students,¹¹⁵ *Virginia* can be read to suggest that

106. *Virginia*, 518 U.S. at 547.

107. 433 U.S. 267 (1977).

108. *Virginia*, 518 U.S. at 547 (quoting *Louisiana v. United States*, 300 U.S. 145, 154 (1965)).

109. See Vojdik, *supra* note 20, at 120-21.

110. See Candace Saari Kovacic-Fleischer, *United States v. Virginia’s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 863 (1997) (“Requiring VMI to alter and adjust its physical requirements and housing arrangements provides women equal results with men: the ability to enter VMI at the same level of comfort, or discomfort, that the men experience, neither more nor less.”).

111. *Virginia*, 518 U.S. at 546 n.16.

112. *Id.*

113. *Id.* (citing *United States v. Virginia*, 766 F. Supp. 1407, 1436-37 (W.D. Va. 1991), *aff’d*, 44 F.3d 1229 (4th Cir. 1995), *rev’d*, 518 U.S. 515 (1996)).

114. *Id.* at 546.

115. 347 U.S. 483 (1954).

VMI's males-only policy similarly subordinated women as a class, denying them access to power and privilege.

To be clear, I am not arguing that the majority opinion rejected anti-classification analysis in favor of an anti-subordination analysis. In fact, the Court could have taken a much stronger anti-subordination approach. For example, the Court could have framed VMI's males-only admission policy as similar to Virginia's anti-miscegenation law, which the Court struck down in *Loving v. Virginia*.¹¹⁶ VMI did not use sex as a proxy for some other quality—it sought instead to exclude females qua females.¹¹⁷ The Court also could have taken a harder look at VMI as an all-male institution. The United States did not dispute the benefits that VMI purported to bestow upon its male cadets, an unsurprising tactical choice given that it argued persuasively that Virginia could not deny qualified women access to a prestigious state college.¹¹⁸ There was substantial evidence that VMI's program denigrated women, however, just as the military itself employed practices that construct masculinity as the opposite of femininity.¹¹⁹ Still, the Court's analysis went beyond a purely anti-classification approach.¹²⁰ Formal equality principles would not have required (and arguably would have prohibited) the Court from framing VMI's males-only policy within the history of state-sponsored exclusion of women from the public sphere, adopting an asymmetrical approach to gender difference and requiring VMI to modify its program to admit women.¹²¹

In its most recent gender discrimination decision, the Supreme Court, in *Nevada Department of Human Resources v. Hibbs*,¹²² similarly moved beyond the anti-stereotyping principle to uphold the constitutionality of the Family Medical Leave Act (FMLA).¹²³ The Court held that the FMLA, which requires certain employers to offer family leave to all employees, was a valid exercise of Congress' power under Section 5 of the Equal Protection Clause to adopt prophylactic legislation to prevent discrimination.¹²⁴

Writing for the majority, Chief Justice Rehnquist acknowledged “[t]he long and extensive history of sex discrimination”¹²⁵ by state actors sanctioned by the Supreme Court under the rational basis test applied to gender discrimination prior to *Reed v. Reed*.¹²⁶ In his opinion, Rehnquist wrote that such laws were based upon normative stereotypes about the proper role of

116. See Case, *supra* note 5, at 1455-57. Case makes this point nicely, noting that VMI did not use gender as a proxy for any particular quality of students. Rather, the admissions policy was designed to exclude women qua women. See *id.*

117. *Id.*

118. *Virginia*, 518 U.S. at 530, 547-51.

119. See Vojdik, *supra* note 20, at 94-96.

120. *Id.* at 106-07.

121. *Virginia*, 518 U.S. at 531, 565 (Rehnquist, J., concurring).

122. 538 U.S. 721 (2003).

123. *Id.* at 740.

124. *Id.* at 735.

125. *Id.* at 730.

126. *Id.* at 729-30.

women, for example, the related beliefs that women are, and should be, “the center of home and family life”¹²⁷ and that legislation was appropriate to protect the “proper discharge of [a woman’s] maternal functions.”¹²⁸ According to the Court, the traditional gender stereotype that women are the primary caretakers of the family and the parallel stereotype that men have no domestic responsibilities, “foster[] employers’ stereotypical views about women’s commitment to work and their value as employees.”¹²⁹

While *Hibbs* focuses on the wrong of gender stereotyping, it also offers a nuanced view of gender discrimination in the workplace, recognizing that these reciprocal stereotypical beliefs result in “subtle discrimination that may be difficult to detect on a case-by-case basis.”¹³⁰ This type of discrimination, the Court recognized, has been a “difficult and intractable proble[m]” to change.¹³¹ The Court held that the persistence of such discrimination justified Congress’s decision to affirmatively require employers to provide unpaid family leave to covered employees.¹³²

Significantly, Rehnquist’s majority opinion rejected the dissent’s argument that Section 5 only authorized Congress to proscribe discrimination by employers in granting parental leave.¹³³ As the dissent argued, such a statute would be gender-neutral and, therefore, would not violate the anti-classification principle.¹³⁴ The majority rejected that argument, reasoning that merely prohibiting discrimination would permit states to deny parental leave to both men and women under the guise of treating men and women equally.¹³⁵ This approach would not be an adequate remedy, the majority reasoned, because it would operate to exclude “far more women than men from the workplace.”¹³⁶ By creating a benefit for all eligible employees, Congress intended “to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees” and prevent employers from hiring men to avoid leave obligations.¹³⁷ Thus, *Hibbs* recognized that nondiscrimination may not afford women equal protection; instead, affirmative steps may be required to remove the stigma from family leave and prevent employers from relying on gender stereotypes.¹³⁸

As these cases demonstrate, the Court’s gender jurisprudence is more flexible than the traditional view of the equal protection doctrine suggests. In *J.E.B.* and *Virginia*, the Court recognized that state-sponsored gender

127. *Id.* at 729 (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

128. *Id.* (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

129. *Id.* at 736.

130. *Id.*

131. *Id.* at 737 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

132. *Id.* at 730.

133. *Id.* at 737.

134. *See id.* at 750 (Stevens, J., dissenting).

135. *Id.* at 738 (majority opinion).

136. *Id.*

137. *Id.* at 737.

138. *Id.*

discrimination results in more than mere classificatory harms, often stigmatizing or demeaning women as a group while perpetuating their exclusion from full citizenship.¹³⁹ The Court in *J.E.B.* considered the social meaning of state-sponsored gender discrimination, concluding that state laws that send the message that women and men are different violate the guarantee of equal protection.¹⁴⁰ In *Hibbs*, the Court acknowledged that the deeply entrenched practice of gender stereotyping may require remedies that impose affirmative obligations upon state actors to ensure equal employment opportunities for women.¹⁴¹ In each of these cases, it seems that the Court did not focus narrowly upon a particular classification that discriminated against women, but instead broadened its analytical frame to locate the challenged practice within the history of state laws that enforced the systematic exclusion of women from the public sphere.

II. ADVANCING ANTI-SUBORDINATION: LOOKING AT INSTITUTIONAL PRACTICES THAT CONSTRUCT GENDER WITHIN INSTITUTIONS

Assuming that the Court has broadened the discursive space within equality jurisprudence to consider how gender discrimination subordinates women, the challenge is to employ legal theories and strategies that will continue to focus the Court's attention not on gender classifications, but on the concrete mechanisms and harms of gender subordination. In this section, I consider how more particularized accounts of gender discrimination in traditionally male institutions can accomplish this goal. Specifically, this section examines recent feminist legal scholarship that analyzes sexual harassment as an institutional practice that subordinates women in the workplace.

Critical legal scholars have sought to broaden judicial understanding of the processes of workplace exclusion beyond gender stereotyping to expand the reach of antidiscrimination law. Despite the enactment of Title VII,¹⁴² prohibiting sex discrimination in the workplace, the American workforce remains deeply segregated by gender.¹⁴³ While Title VII has succeeded in

139. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994); *United States v. Virginia*, 518 U.S. 515, 534 (1996) (“[Sex] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”).

140. *J.E.B.*, 511 U.S. at 142 (striking jurors because of their gender sends a message “to all those in the courtroom, and all those who may later learn of the discriminatory act . . . that certain individuals, for no reason other than gender, are presumed unqualified”).

141. *Hibbs*, 538 U.S. at 737.

142. 42 U.S.C. §§ 2000e-2000e17 (2000).

143. See Debra S. Gattton et al., *The Effects of Organizational Context on Occupational Gender-Stereotyping*, *SEX ROLES*, Apr. 1999, at 568. Gattton et al. argue:

Gender segregation in occupations has been a tradition in the U.S. work force for decades. In fact, the degree of gender segregation in the work force has not changed much since the early 1900's. In 1985, occupations which comprised at least 70% women employed greater than two-thirds of all working women. Moreover, while gender segregation in occupations exhibited somewhat of a downward trend during the period between 1960 and 1990, this trend has been remarkably slow, leaving segregation levels quite high.

Id. (citations omitted).

eliminating many of the formal policies used in the past to deny employment to women, it has been less successful in dismantling traditionally male institutions such as police departments, fire departments, and other institutions that construct the ideal employee as male and masculine.¹⁴⁴

Given the persistence of gender segregation, a number of legal scholars have drawn upon sociological and social theories of gender to illuminate the use of harassment as a social practice that constructs the ideal worker as male and masculine, thereby preserving the workplace for men.¹⁴⁵ There is a rich literature in the field of sociology that has examined the structural barriers to integrating traditionally male institutions, including the construction of gender in the workplace.¹⁴⁶ Sociologists and gender theorists have shifted their focus from gender-role stereotyping as a means of gender discrimination to analyzing the institutional and social practices within institutions that construct gender to exclude women and perpetuate gender segregation in the labor force.¹⁴⁷ This literature offers the type of particularized understanding of gender as a social process of distinction and exclusion that is necessary to persuade courts to move beyond discrimination as mere stereotyping.

Pierre Bourdieu, for example, argues that institutions create and maintain socially significant differences between men and women, differences that naturalize gender inequality within the institution and society.¹⁴⁸ Bourdieu argues that these differences are not merely created through ideological systems of meaning.¹⁴⁹ Rather, they are created and inscribed within particular social structures, including the workplace, the state, and other institutions such as the military and the family.¹⁵⁰ As R.W. Connell explains, “[I]nstitutions are substantively, not just metaphorically, gendered.”¹⁵¹ Social practices map the boundaries of gender within the institution, preserving and enforcing traditional gender roles.¹⁵² Such gendered

144. In 1999, women comprised 1.9% of firefighters, 4.1% of construction laborers, and 14.2% of police and detectives. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NONTRADITIONAL OCCUPATIONS FOR WOMEN IN 1999, available at <http://www.dol.gov/wb/factsheets/nontra99.htm> (last visited November 9, 2005).

145. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 772 (1997).

146. See, e.g., CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 136-64 (1988); JUDITH LORBER, *PARADOXES OF GENDER* 225-30 (1994); R.W. CONNELL, *MASCULINITIES* 72-75 (1995).

147. See, e.g., LORBER, *supra* note 146.

148. PIERRE BOURDIEU, *MASCULINE DOMINATION* 9 (Richard Nice trans., Stanford Univ. Press 2001) (1998).

149. *Id.* at 24-25.

150. *Id.*

151. CONNELL, *supra* note 146, at 73.

152. See Cynthia Fuchs Epstein, *Tinkerbells and Pinups: The Construction and Reconstruction of Gender Boundaries at Work*, in *CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY* 232, 238-41 (Michele Lamont & Marcel Fournier eds., 1992).

practices operate to maintain gender distinctions in the workplace, reinforcing the exclusion of women from traditionally masculine institutions.¹⁵³

Bourdieu refers to such constitutive practices as “rites of institution” that symbolically highlight sexual distinction.¹⁵⁴ The group harassment of men who are perceived to be effeminate or homosexual, for example, is a powerful rite that marks¹⁵⁵ “real” men from homosexuals and women.¹⁵⁶ Rites of institution, Bourdieu argues, test the masculinity of individual men.¹⁵⁷ Numerous sociologists have documented the prevalence of sexual harassment in traditionally male workplaces.¹⁵⁸ Practices such as sexual harassment and rape require men to prove their manhood by denying their stereotypically feminine qualities, such as compassion or gentleness.¹⁵⁹ Men who fail these tests or refuse to participate in these rituals are defined as “wimps,” “girlies,” and “fairies.”¹⁶⁰

Drawing on similar literature, scholars such as Katherine Franke, Vicki Schultz, and Kathryn Abrams have focused on the construction of gender within the workplace, shifting the understanding of discrimination from stereotyping to the process of gender construction within traditionally male institutions. Franke, for example, argues that sexual harassment is a “tool or instrument of gender regulation” to enforce hetero-patriarchal gender norms in the workplace.¹⁶¹ In her analysis, Franke focuses on harassment as a process of gendering in the workplace.¹⁶² Drawing upon postmodern theories of gender, Franke argues that sexual harassment in the workplace constructs female workers as feminine women and male workers as masculine men.¹⁶³ She explains that same-sex harassment similarly establishes masculinity in the workplace—those men who are perceived as effeminate are punished for failing to conform to social norms of masculinity.¹⁶⁴ By focusing on the use of harassment in constructing gender in the workplace, Franke’s work has provided a theory of the method and harm of harassment.

153. *Id.*

154. BOURDIEU, *supra* note 148, at 52.

155. *Id.*

156. *Id.*

157. *Id.*

158. See, e.g., James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 GENDER & SOC’Y 301-20 (1998); Sharon R. Bird, *Welcome to the Men’s Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 GENDER & SOC’Y 120-132 (1996).

159. *Id.*

160. *Id.*

161. Franke, *supra* note 145, at 772.

162. See *id.* at 693-94.

163. *Id.* at 771-72.

164. *Id.* at 693.

If a “technology” is a manner of accomplishing a task, or the specialized aspect of a particular field, then sexual harassment is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology. Sexual harassment is a technology of sexism. It is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects.

Id. (footnote omitted).

Similarly, Vicki Schultz has offered a particularized account of how harassment of women in the workplace functions to preserve male control and exclude women. In her article *Reconceptualizing Sexual Harassment*, Professor Schultz argues persuasively that sexual harassment serves a regulatory function by policing the boundaries between men and women, punishing those women who transgress gender norms.¹⁶⁵ Schultz analyzes the ways in which sexual harassment performs this function. In its myriad forms, sexual harassment undermines the perceived competence of women in the workplace, reinforcing the definition and identity of certain jobs as masculine.¹⁶⁶ Sexual harassment highlights and exaggerates gender difference in the workplace, reminding women that they are out of place in what traditionally has been a “man’s world.”¹⁶⁷ To the extent that sexual harassment functions to force women out of traditionally male jobs, it operates to reinforce the definition of the job as male, preserve traditionally male occupations “as bastions of masculine competence and authority,” and preserve sex segregation in the workplace.¹⁶⁸

By policing the boundaries of gender in the workplace, Professor Schultz argues that harassment preserves the masculinity of work that has been traditionally performed by men.¹⁶⁹ Throughout the article, she draws upon the actual experiences of women and men negotiating gender in traditionally male workplaces.¹⁷⁰ She quotes a female pipe fitter who explains:

You see it is just very hard for them to work with me because they’re really into proving their masculinity And when a woman comes on a job that can work, get something done as fast and efficiently, as well, as they can, it really affects them. Somehow if a woman can do it, it ain’t that masculine, not that tough.¹⁷¹

Several courts have cited the scholarship of Franke and Schultz in decisions finding a hostile work environment in traditionally male institutions.¹⁷² For example, the Second Circuit in *Dawson v. County of Westchester*¹⁷³ cited the work of Schultz to support its finding that letters from male corrections officers to a female coworker constituted a hostile work environment.¹⁷⁴ The Court held that the issue was whether the workplace

165. Schultz, *supra* note 145, at 1687.

166. *Id.*

167. *Id.* at 1760.

168. *Id.* at 1687.

169. *Id.* at 1691 (quoting JEAN REITH SCHROEDEL, *ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES* 20-21 (1985)).

170. *See id.* at 1694-95, 1706-10, 1722-29.

171. *Id.* at 1691.

172. *See, e.g., Dawson v. County of Westchester*, 373 F.3d 265, 274 (2d Cir. 2004); *see also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 n.3 (9th Cir. 2002) (“All-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms.”); *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001).

173. *Dawson*, 373 F.3d 265.

174. *Id.* at 274.

atmosphere, considered as a whole, “undermined plaintiffs’ ability to perform their jobs, compromising their status as equals to men in the workplace.”¹⁷⁵

In *Ocheltree v. Scollon Productions, Inc.*,¹⁷⁶ Judge Blane Michael relied on the analysis of both Schultz and Franke in his dissent from the panel majority opinion that ordered the entry of judgment as a matter of law for the employer after a jury awarded a female plaintiff damages for sexual harassment in her lawsuit against Scollon Productions, a predominantly male workplace.¹⁷⁷ Citing Schultz and Franke, Judge Michael held that the alleged acts, which included graphic discussions of oral sex and simulated intercourse with a mannequin, constituted sexual harassment “because they express and reinforce a regime of gender hierarchy in which men are portrayed as sexual subjects while women are portrayed as sexual objects.”¹⁷⁸ Judge Michael concluded that “[w]hen a workplace is suffused with representations of women as sexual objects, a woman in that workplace would doubtless wonder whether the primary questions about her in the minds of her coworkers involved such matters as whether she ‘swallows’ or whether she could ‘suck a golf ball through a garden hose.’”¹⁷⁹ The Fourth Circuit, sitting en banc, later reversed the dismissal, holding that the plaintiff stated a claim for actionable harassment.¹⁸⁰

As *Dawson* and *Ocheltree* illustrate, litigation strategies that draw upon sociological theories of gender can enrich the courts’ understanding of gender discrimination beyond stereotyping. In both cases, the courts focused on harassment as a mechanism of exclusion as well as a means of subordination. As these cases demonstrate, reconceptualizing gender as a social practice or process that operates within institutions can help persuade courts to broaden their analysis of gender discrimination beyond a classification error and to consider the concrete ways in which institutions themselves construct the ideal worker or workplace as male and masculine—excluding women in the process.¹⁸¹ Rather than explain the exclusion of women as a violation of anti-classification principles, legal theories that expose the concrete ways that workplaces are gendered allow courts to understand how institutions operate to exclude women, not merely with formal employment policies, but also by constructing worker roles as male and masculine.¹⁸²

175. *Id.*

176. 308 F.3d 351, *rev'd en banc*, 335 F.3d 325 (4th Cir. 2002).

177. *Id.* at 374-75 (Michael, J., dissenting).

178. *Id.* at 374.

179. *Id.* at 375.

180. *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (reinstating jury verdict for plaintiff but denying punitive damages).

181. *See* Vojdik, *supra* note 20, at 85.

182. *See id.* at 120.

III. A CASE STUDY: FRAMING THE MILITARY'S BAN ON WOMEN IN COMBAT AS SUBORDINATION

The Supreme Court has never considered the constitutionality of the combat exclusion. In *Rostker v. Goldberg*,¹⁸³ the Court held in 1981 that the exclusion of women from Selective Service registration did not violate the right to equal protection guaranteed under the Fifth Amendment's Due Process Clause.¹⁸⁴ Because the male plaintiffs did not challenge the combat exclusion, the Court did not review its constitutionality.¹⁸⁵ The Court concluded that the male-only registration was substantially related to the government's purpose in mobilizing troops for combat duty, finding that Congress decided to register only men because women were ineligible for combat.¹⁸⁶ Males and females, the Court held, were not similarly situated with respect to registration because women were ineligible for combat.¹⁸⁷

In its decision, the Court cited the 1980 Senate Report on the matter, concluding that women should not be subject to registration.¹⁸⁸ Specifically, the Court relied upon the Report's statement that "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."¹⁸⁹ Because the question of whether women should be registered for the draft was subject to wide-ranging public and Congressional debate, the Court concluded that the decision was not the "accidental by-product of a traditional way of thinking about females."¹⁹⁰

Since *Rostker* was decided, the factual and legal assumptions underlying the Court's reasoning no longer apply. Over the past twenty years, the percentage of women in the military has increased dramatically from 5% in 1979 to approximately 15% in 2005.¹⁹¹ While *Rostker* assumed that women would not be necessary in wartime, that is no longer the case.¹⁹² Following the first Gulf War, Defense Secretary Dick Cheney stated, "We could not have won [the war] without [women]."¹⁹³

While the categorical exclusion of women from direct ground combat appears to be a textbook case of stereotyping under *Virginia*,¹⁹⁴ many feminists have either failed to advocate or have opposed a constitutional challenge to the exclusion of women from direct combat.¹⁹⁵ Historically, femi-

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

184. *Id.* at 78-79.

185. *Id.* at 63.

186. *Id.* at 77.

187. *Id.* at 77-78.

188. *Id.* at 77 (citing S. REP. NO. 96-826, at 157 (1980)).

189. *Id.*

190. *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

191. Jodi Wilgoren, *A Nation at War: Women in the Military; A New War Brings New Role for Women*, N.Y. TIMES, Mar. 28, 2003, at B1.

192. *Rostker*, 453 U.S. at 83.

193. HOLM, *infra* note 202, at 470.

194. See, e.g., Blythe Leszkay, *Feminism on the Frontlines*, 14 HASTINGS WOMEN'S L.J. 133 (2003).

195. See, e.g., Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39, 62 (1999) (criticizing

nists have disagreed about whether women should participate in combat.¹⁹⁶ Some feminists are opposed to the military and war and believe that feminists should seek to dismantle the military, or at a minimum should not insist that women be trained to kill in war.¹⁹⁷ Other feminist scholars consider the legal issue of women in combat to be rooted in outdated notions of liberal feminism and formal equality, both of which limit gender equality to instances in which women can prove that they are no different than men.¹⁹⁸

Neither of these views is particularly persuasive. As a practical matter, female troops are presently engaged in what historically has been considered combat.¹⁹⁹ While the military's arguments can be characterized as improper stereotypes about the abilities and appropriate roles for women, they can also be seen as part and parcel of a system of gender subordination within the military as an institution. Reframed in this way, a legal challenge to the combat exclusion offers the opportunity to shift the Court's attention from stereotyping as a cognitive mistake to the institutional practices that construct the military as male and masculine, stigmatizing and demeaning women in the process.

The military's policy of excluding women from direct combat, as I argue below, rests not only on traditional gender stereotypes, but also upon hostility toward women and a desire to preserve the institution as exclusively male and masculine. In Part III.A, I offer a brief history of the resistance to women in combat. In Part III.B, I analyze the direct combat exclusion as impermissible gender stereotyping and briefly discuss the military's likely response that its personnel policies are entitled to judicial deference.

legal feminists' avoidance of the issue of women in the military).

196. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 866-67 (1990) ("Feminists disagree . . . about whether women should be subject to a military draft."); Hirshman, *infra* note 197, at 990 ("We ask whether feminists should press for the inclusion of women in mandatory military service and why . . ."); Littleton, *infra* note 197, at 1328 n.256 ("Feminists are as deeply divided in their responses to this issue [employment in the armed services] as they are with regard to separate pregnancy leave."); Williams, *infra* note 197, at 163 ("As for *Rostker v. Goldberg*, the conflicts among feminists were overtly expressed.").

197. See, e.g., Linda R. Hirshman, *The Book of "A,"* 70 TEX. L. REV. 971, 993-94 (1992) (describing the feminist opposition prior to *Rostker*, 453 U.S. 57, as the "alienationist position . . . that women should reject the draft as part of a fundamental critique of American foreign and domestic policy and 'reject the war reflex as an instance of male hysteria; in its essence, feminism opposed to violence.'")

(quoting A Feminist Opposition to the Draft (authors unidentified), collected in Catharine MacKinnon's unpublished materials for a course taught at the Stanford Law School, Fall 1980, and reported in Wendy W. Williams, *The Equality Crisis: Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151 (1992)). Christine Littleton summarized feminist opposition to women in combat as follows: "On the one hand, the current institution of combat is the apotheosis of phallogentrism, a nonstop program of hierarchy, barely controlled aggression, and alienation. . . . Perhaps we should be grateful to be excluded and spend our energy working to get the men excluded, too." Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1328 n.256 (1987). For a discussion of feminist antimilitarism, see ILENE ROSE FEINMAN, CITIZEN RITES: FEMINIST SOLDIERS AND FEMINIST ANTIMILITARISTS 19-27 (2000) (explaining that feminist antimilitarists oppose the "masculinist construction of militarism" in society and the violence and destruction that it causes).

198. See, e.g., *supra* note 6.

199. See, e.g., Dave Moniz, *Female Amputees Make Clear That All Troops are on Front Lines; Reality in Iraq has Overtaken Long-Running Debate at Home*, USA TODAY, Apr. 28, 2005, at A1.

In Part III.C, I reframe the combat exclusion to reveal the institutional practices that subordinate women as different and inferior to men.

A. *The History of Resistance to Women's Role in Combat*

The history of women in the military reveals the institutional resistance to integrating women into this powerful male preserve. For women, the doors have been reluctantly “pried open”²⁰⁰ largely as a result of the need for more troops during times of war and following the adoption of an all-volunteer force.²⁰¹ As the discussion below demonstrates, the military's exclusion of women has been based upon unfounded stereotypes and myths about women's supposed abilities, as well as traditional moral judgments that a woman's place is not at war.²⁰² Throughout, the military has redrawn the definition of combat to perpetuate the myth that women are not in combat.²⁰³

During World War I, approximately 34,000 women served in the war.²⁰⁴ As many as 21,400 of them served in the Army and Navy Nurse Corps.²⁰⁵ In World War II, the United States turned to women as a temporary source of military support and created the Women's Army Auxiliary Corps (WAAC) and Women Accepted for Volunteer Emergency Service (WAVES).²⁰⁶ Some 350,000 women served in nursing and administrative positions, as well as all other types of non-combat service.²⁰⁷ After the end of World War II, however, Congress passed the Women's Armed Services Integration Act of 1948 (Act), which severely limited women's role in the military.²⁰⁸ The Act capped the number of women in the military to 2% of all enlisted troops.²⁰⁹ It barred women from serving on aircraft or ships engaged in combat missions.²¹⁰ In addition, the Act also barred women from serving in a command position; women could not hold the rank of general or hold permanent rank above lieutenant colonel.²¹¹ Although the Act did not specifically ban female Army soldiers from combat, the Army issued its own policy of excluding women from direct combat.²¹²

200. MARGARET C. HARRELL ET AL., *THE STATUS OF GENDER INTEGRATION IN THE MILITARY* 2 (2002).

201. As experts point out, “In times of national emergency, traditional restrictions on gender roles tend to be eased.” Kim Field & John Nagl, *Combat Rules for Women: A Modest Proposal*, 31 *PARAMETERS* 74, 75 (2001).

202. JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 337-45 (rev. ed. 1992).

203. *See, e.g., id.* at 337-38.

204. *Id.* at 10.

205. *Id.*

206. *Id.* at 21-27.

207. *Id.* at 100-01.

208. *Id.* at 113, 119-27.

209. *Id.* at 120-22.

210. *Id.* at 120, 126-27.

211. *Id.* at 120, 122-23.

212. *Id.* at 126-27.

Nearly twenty years later, Congress repealed the 2% cap and some limits on promotion in 1967, paving the way for the increased participation of women during the Vietnam War.²¹³ The ban on women in ROTC was eliminated in 1972,²¹⁴ and in 1976, the federal service academies began to admit women.²¹⁵ Military commanders and the commandants of the academies, however, strongly opposed the admission of women.²¹⁶ The Superintendent of West Point, General William Westmoreland, argued that “maybe you could find one woman in 10,000 who could lead in combat, but she would be a freak and we’re not running the military academy for freaks.”²¹⁷

In 1979, Congress considered requiring women to participate in Selective Service registration.²¹⁸ In Senate hearings, military leaders testified against the registration of females and the repeal of the combat exclusion.²¹⁹ The Senate Committee on Armed Services issued a report in 1980 in which it rejected registering women for the draft. The Committee reasoned that historically, women had not regularly participated in combat and no society had conscripted women for combat roles.²²⁰ The Committee cited “important societal reasons” for preserving an all-male registration, including the “sweeping implications” for society should young mothers be drafted and leave their children with their young fathers.²²¹ The Committee concluded that women lack the physical and emotional strength to kill and fight in battle; their presence would result in sexual tension, pregnancy, and perceptions of unfairness; and women would impair the male bonding and unit cohesion necessary for military effectiveness.²²² Although the country was no longer at war, the Senate Committee warned that assigning women to combat positions “would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the committee finds militarily unwarranted and dangerous.”²²³

In 1981, the United States Supreme Court upheld the exclusion of women from Selective Service registration in *Rostker*, holding that because

213. *Id.* at 192-202 (discussing the enactment of Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 374 (codified in various parts of 10 U.S.C.)).

214. *Id.* at 167-70.

215. *Id.* at 305-12 (discussing the enactment of the Department of Defense Appropriation Authorization Act of 1975, Pub. L. No. 94-106, 89 Stat 531 (codified at 10 U.S.C. § 4342 (2000)) and the integration of women into the military academies).

216. *Id.* at 307-08.

217. David Lamb, *A Conversation on . . . General Principles; William Westmoreland Reflects on America's Recent Wars*, L.A. TIMES, Mar. 25, 1991, at E1.

218. HOLM, *supra* note 202, at 350; *see* SELECTIVE SERV. SYS., BACKGROUND: WOMEN AND THE DRAFT IN AMERICA (1998), .

219. LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY 22-23 (1997).

220. *Id.* at 149.

221. *Id.* at 159. The Report stated, “Moreover, the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation’s resources.” *Id.* at 157.

222. *Id.* at 157.

223. *Id.*

women were ineligible for combat, their exclusion was substantially related to the need to raise combat troops.²²⁴

Following the end of the Vietnam War, the Department of Defense had adopted a definition of combat that applied broadly to cover the participation of women in World War II, Korea, and Vietnam. The definition provided:

The term “combat” refers to “engaging an enemy or being engaged by an enemy in armed conflict.” *Under current practices, a person is considered to be “in combat” when he or she is in a geographic area designated as a combat/hostile fire zone by the Secretary of Defense. . . .* These definitions apply to men and women of all the services.²²⁵

Moreover, the definition explicitly acknowledged that “[w]omen have served in combat in many skills during World War II, Korea, and Vietnam.”²²⁶ The definition stated that “[w]omen have received hostile fire pay and combat awards in past conflicts”—both of which are authorized only if a service member has engaged in combat.²²⁷

In 1988, the Department of Defense scrapped its broad definition of combat and replaced it with the “Risk Rule” that redefined combat to bar women from serving in units with a high probability of engaging in combat.²²⁸ Under the 1988 Risk Rule, Congress narrowed the definition of combat to exclude women’s historical participation in warfare.²²⁹ The new rule defined combat as:

[E]ngaging 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 combat [normally] takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.²³⁰

The definition of combat under the Risk Rule substantially alters the traditional notion of combat duty. Under the definition, thousands of soldiers in World War II would find themselves not in combat, a result plainly opposite the common understanding of war. Moreover, the Risk Rule expressly excluded women from serving in combat units as well as “non-

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

225. *HOLM*, *supra* note 202, at 338 (emphasis added).

226. *Id.*

227. *Id.*

228. *Id.* at 433.

229. *Id.*

230. Rowan Scarborough, *Female Soldiers Eyed For Combat; Army Seeks End of 1994 Ban*, WASH. TIMES, Oct. 22, 2004, at A1 (quoting the new combat definition).

combat units or missions if the risks of exposure to direct combat, hostile fire, or capture are equal to or greater than the risk in the combat units they support.”²³¹ Each service made its own evaluation as to “whether a non-combat position should be open or closed to women.”²³²

The first Gulf War in 1991 marked a major turning point for women’s military participation. The United States deployed more than 40,000 female troops during Operation Desert Storm, approximately 10% of all deployed troops.²³³ Female troops served in key combat-support positions throughout the Gulf, performing in medical and administrative jobs, as well as non-traditional assignments, including airlifting supplies and personnel, maintaining weapons systems, and serving as intelligence specialists.²³⁴ Females served as fighter pilots, weapons inspectors, and supply company members.²³⁵

The Gulf War blurred the distinction between direct and indirect combat embodied in the Risk Rule. Operation Desert Storm had no “frontline.”²³⁶ It was fought on a non-linear battleground in which Iraqi troops engaged U.S. combat and support forces.²³⁷ As a result, dozens of female troops engaged in combat with Iraqi troops—twenty-three female Marines received the Combat Action Ribbon.²³⁸ Thirteen women were killed in the line of duty; two females were taken as prisoners of war.²³⁹ One of the female POWs, Major Rhonda Cornum, was on a search-and-rescue mission when the Army helicopter in which she was flying was shot down in southeastern Iraq.²⁴⁰ Major Cornum suffered two broken arms, had a bullet enter her right shoulder, and injured her knee seriously.²⁴¹ Cornum’s commanders agreed that her presence did not hurt the unit’s performance; specifically, Lieutenant Colonel Bryan wrote in his Officer Evaluation Report of Cornum’s performance:

Outstanding performance in combat. Rhonda Cornum is the finest aviation medical officer in the Army. She is a tough, no-nonsense officer who has demonstrated magnificent technical skill combined with outstanding leadership. Rhonda has the most profound impact on the combat effectiveness of my battalion. Rhonda

231. David F. Burrelli, *Women in the Armed Forces*, CRS ISSUE BRIEF, Dec. 12, 1996, <http://www.fas.org/man/crs/92-008.htm>.

232. GENDER ISSUES, *supra* note 17, at 2.

233. Leela Jacinto, *Girl Power, Women Join the Boys in Combat, But Not Without a Fight*, ABC NEWS.COM, Jan. 14, 2003, http://www.opportunity.wpafb.af.mil/MAR%2003%20ADVISOR/Mar%2003%20News%20Articles/ABCNEWS_com%20%20The%20Cost%20of%20Women%20in%20Combat.htm.

234. *See id.*

235. *See id.*

236. PRESIDENTIAL COMM’N, *supra* note 19, at 93 (dissenting to the retention of the DOD risk rule).

237. *Id.* at 94.

238. *Id.*

239. *Id.*

240. HOLM, *supra* note 202, at 458.

241. PRESIDENTIAL COMM’N, *supra* note 19, at iii.

Cornum makes things happen. People follow her anywhere. She goes where soldiers need her. A true ultimate warrior.²⁴²

The Presidential Commission on the Assignment of Women in the Armed Services reported in 1993 that the women who served in the Persian Gulf War “met the highest standards of military professionalism during a watershed period in our nation’s history.”²⁴³ Like male soldiers, female soldiers faced hostile fire; flew into enemy territory; suffered death, injury, and confinement as prisoners of war; lived in conditions of extreme hardship; and performed tasks requiring physical strength and stamina.²⁴⁴

After the end of the Gulf War, given the outstanding contribution of female troops to the war, a number of legislators sought to abolish the statutory restrictions on women in combat.²⁴⁵ The House Armed Services Committee conducted hearings in 1991 to consider repealing the statutory restrictions on women in combat.²⁴⁶ Each of the members of the Joint Chiefs of Staff testified against allowing women in combat.²⁴⁷ Army Chief General Carl E. Vuono and Marine Commandant General Alfred M. Gray, Jr., adamantly opposed allowing women in ground combat, claiming that it would reduce military effectiveness because “women [lack the] physical strength or stamina and that their presence would distract [the] male soldiers.”²⁴⁸ Officers of the various services testified as well, both for and against expanding women’s roles in combat.²⁴⁹ No senior female officer, nor any expert who had researched women’s performance in the armed services, was asked to testify.²⁵⁰

Over the opposition of military leaders, Congress, in 1991 and 1993, repealed the statutory prohibitions against the assignment of women to combat aircraft and naval ships.²⁵¹ The National Defense Authorization Act for Fiscal Year 1994 also required the Secretary of Defense (1) to ensure that qualification for occupational career fields is evaluated on the basis of a common, relevant performance standard and not on the basis of gender; (2) to refrain from the use of gender quotas, goals, or ceilings, except as specifically authorized by Congress; and (3) to refrain from changing occupational standards to increase or decrease the number of women in an occupa-

242. RHONDA CORNUM AS TOLD TO PETER COPELAND, SHE WENT TO WAR: THE RHONDA CORNUM STORY 199 (1992).

243. PRESIDENTIAL COMM’N, *supra* note 19, at iii.

244. *See id.* at 445-46.

245. *Id.* at 473-74.

246. *Id.* at 475.

247. *Id.* at 481.

248. *Id.* at 481-82.

249. *See id.* at 484-86.

250. *Id.* at 486.

251. National Defense Authorization Act for Fiscal Years 1992 & 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365-70 (1991); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993).

tional career field.²⁵² In November 1993, Congress repealed the statutory exclusion of women from naval combat ships.²⁵³

The DOD, in 1994, rescinded the Risk Rule, expanding the opportunities for women in combat.²⁵⁴ Because combat and non-combat support units in Desert Storm were both at risk, DOD concluded that the Risk Rule was no longer appropriate.²⁵⁵ The DOD issued a new direct ground combat assignment rule that required that all service members be assigned to all posts for which they qualify.²⁵⁶ The rule, however, “excludes women from assignment below the brigade level whose primary mission is direct ground combat.”²⁵⁷ “Brigades are ground combat units of [approximately] 3,000 to 5,000 soldiers whose primary mission is to close with and destroy enemy forces.”²⁵⁸ In addition, services also may close positions to women if:

(1) the[ir] units and positions are required to physically collocate and remain with direct ground combat units, (2) the service Secretary attests that the cost of providing appropriate living arrangements for women is prohibitive, (3) the units are engaged in special operations forces’ missions or long-range reconnaissance, or (4) job related physical requirements [that would mandate exclusion].²⁵⁹

The Secretary of the Army, Togo West, explained that the expansion of professional roles for women in the Army

not only mirrors changes in our society—but more importantly it reflects changes in the conduct of war, which has evolved from a contest of strength of individual combatants, to a contest in which a far wider variety of skills contribute to victory. The nature of the modern battlefield is such that we can expect soldiers throughout the breadth and depth of a theater of war to be potentially in combat.²⁶⁰

At the time DOD adopted the 1994 direct ground combat exclusion, it issued a written report stating that it did not consider changing the long-standing exclusion of women from direct ground combat because DOD officials believed the change lacked public and Congressional support.²⁶¹ Presumably, the report represented the official reasoning of DOD on this

252. National Defense Authorization Act for Fiscal Year 1994, §§ 542-43.

253. *Id.* § 541.

254. GENDER ISSUES, *supra* note 17, at 2.

255. *Id.*

256. *Id.* at 2-3.

257. *Id.* at 3.

258. *Id.* at 3 n.3.

259. *Id.* at 3.

260. Brief for Lieutenant Colonel Rhonda Cornum et al. as Amici Curiae Supporting Petitioner at 7, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941) (quoting Memorandum from Togo West, Sec. of the Army, on Increasing Opportunities for Women in the Army (July 27, 1994)).

261. GENDER ISSUES, *supra* note 17, at 4.

issue. At a press conference, DOD officials also stated “that the assignment of women to direct ground combat units ‘would not contribute to the readiness and effectiveness of those units’” because women lacked the physical strength and stamina necessary for the job.²⁶²

The repeal of the statutory bans on women in combat opened many positions to women. However, the continued exclusion of women from direct ground combat bars women from one out of five military positions.²⁶³ In the Army, one-third of officer assignments are closed to women, including infantry, armor, cannon field artillery, short-range air defense artillery, and special forces.²⁶⁴ These positions are considered to be of greatest significance to the defense mission, both in terms of their function and cultural significance.²⁶⁵ They are also the most valuable routes to promotion to high command positions.²⁶⁶ As a result, the division of labor in the military is highly gender-oriented.²⁶⁷ Female troops are concentrated in low ranks and pay grades.²⁶⁸ For example, two-thirds occupy traditionally female jobs in administration, health care, communications, and service/supply occupations.²⁶⁹

During the past two years, the United States has deployed tens of thousands of female troops to serve in the war against Iraq and Afghanistan.²⁷⁰ Women currently comprise one of every seven troops in Iraq, serving as fighter pilots, military police, weapons inspectors, and supply company members.²⁷¹ The United States’ war on Iraq is being fought as a guerilla war without a front line, blurring the distinction between direct and indirect combat.²⁷² Female pilots have flown combat missions under enemy fire in Black Hawk helicopters, Stealth bombers, and F18 fighter jets.²⁷³ As of January 2005, thirty-eight female troops have been killed, most of them in hostile action.²⁷⁴ In addition, two soldiers, Jessica Lynch and Shoshana

262. *Id.*

263. See MARGARET C. HARRELL & LAURA L. MILLER, *NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE* app.b at 111-30 (1997) (RAND Report).

264. *Id.* at 12, 20.

265. *Id.* at 13.

266. *Id.*

267. JOSHUA GOLDSTEIN, *WAR AND GENDER* 102-05 (2001).

268. *Id.* at 103.

269. *Id.*

270. Bryan Bender, *US Women Get Closer to Combat*, *BOSTON GLOBE*, Jan. 26, 2005, at A1.

271. Wilgoren, *supra* note 191.

272. *Id.* (“There is no front line in combat anymore, so we have to change our thinking The enemy wants to go after the supply chain, and that’s where you will find women, in those rear areas, in the combat support areas.”) (quoting Carol Mutter, chairwoman of the Defense Advisory Committee on Women in Service).

273. Jeanette Steele, *Revolution in Jet Fighter Scene*, *SAN DIEGO UNION-TRIB.*, May 30, 2003, at B1. Marine Captain Amy McGrath and Captain Jaden Kim, Hornet weapon systems officers in Marine Fighter Attack Squadron 121, flew combat missions in Iraq, including bombing runs, forward air control, and reconnaissance, during which their planes took enemy fire. *Id.* In Afghanistan, they flew over sixty sorties in thirty days. *Id.* Air Force Captain Kim Reed Campbell flew combat missions in Iraq, coming under enemy fire near Baghdad and while patrolling Iraq’s no-fly zones. Ryan Slattery, *US Fighter Pilot Recounts Her Harrowing Flight Over Iraq*, *BOSTON GLOBE*, Sept. 7, 2003, at A22.

274. Bender, *supra* note 270.

Johnson, were captured and held as prisoners of war by Iraqi troops.²⁷⁵ Over 200 female soldiers have been either wounded or permanently disabled.²⁷⁶

Underscoring the importance of female troops, the Army announced its decision to add female soldiers in January 2005 to newly created “forward support companies” in the Third Infantry Division in Iraq.²⁷⁷ These support units will be attached to infantry, armor, and Special Forces units whose mission is to engage in direct combat, placing women on the front line.²⁷⁸ The Army conceded that female troops were necessary because there are too few qualified males to fill these positions and to provide adequate support to combat troops.²⁷⁹ In response, in May, 2005, the House Armed Services Committee approved legislation to require the Army to prohibit women from serving in any company-size unit that provides support to combat battalions.²⁸⁰ Supporters of the legislation sought to prohibit the Army from assigning females to forward support companies.²⁸¹ Military leaders strongly opposed the legislation, however, stating the women were performing “magnificently” in battlefields without any clear front lines.²⁸² In the face of DOD’s opposition, the supporters of the legislation were forced to withdraw their proposal.²⁸³

B. Framing the Constitutional Wrong As Gender Stereotyping

Under *Virginia*, a constitutional challenge to DOD’s direct ground combat exclusion could be framed as a straightforward case of impermissible stereotyping. To justify the exclusion of women from direct ground combat, the military has relied upon outdated generalizations and stereotypes that women lack the physical, temperamental, cognitive, and behavioral traits necessary for combat.²⁸⁴ While opponents concede that some women are just as strong, aggressive, and able to perform well in combat, they nevertheless argue that the real question is not whether women are capable of being soldiers but “femaleness qua femaleness.”²⁸⁵ Introducing even qualified females to all-male combat units, opponents have argued, will disrupt unit cohesion, reduce the willingness of men to risk their lives, and make the military less attractive to potential male recruits.²⁸⁶

275. Slattery, *supra* note 273.

276. Moniz, *supra* note 199.

277. Bender, *supra* note 270.

278. *Id.*

279. *Id.*

280. Ann Scott Tyson, *Panel Votes to Ban Women From Combat*, WASH. POST, May 12, 2005, at A8.

281. *Id.*

282. *Id.*

283. James W. Brosnan, *Wilson Claims Military Victory Preserves Combat Roles for Women*, ALBUQUERQUE TRIB., May 25, 2005, at A8.

284. Browne, *supra* note 19, at 53.

285. *See, e.g., id.* at 56.

286. *Id.*

Within the anti-classification framework, the military's arguments cannot satisfy the *Virginia* requirement of an "exceedingly persuasive" justification that is necessary to uphold a gender-based classification.²⁸⁷ The arguments against women in combat are not based upon empirical evidence from studies of the performance of female troops in the Gulf War or other conflicts, but upon anecdotal evidence, personal opinion, and studies allegedly finding gender differences in non-military contexts.²⁸⁸ Moreover, there is ample evidence that the combat exclusion does not reflect studied analysis of women's actual combat performance, but instead rests upon overly broad stereotypes and traditional normative judgments about women's role in society.²⁸⁹

The 1980 report by the Senate Committee on Armed Services, cited by the Supreme Court in *Rostker*, reflects and incorporates traditional gender stereotypes and norms. The findings of the Committee regarding women's alleged unsuitability for combat (e.g. women are not physically fit for combat, will destroy unit cohesion, etc.) are precisely the type of overly broad generalizations that the Supreme Court rejected in *Virginia*. The Committee report also embodied traditional gender norms, specifically the "fundamental" belief that women should not engage in combat.²⁹⁰

The testimony of military commanders during the 1991 Congressional hearings on eliminating the combat exclusion is similarly replete with both descriptive and normative stereotypes about women. For example, General Merrill A. McPeak, the Chief of Staff of the Air Force, testified that he opposed combat roles for women because of his normative belief that women do not belong in combat.²⁹¹ General McPeak explained, "[I] took great comfort in [the combat exclusion] when it was on the books because [I] couldn't think of a logical reason, a logical argument, for defending a policy of excluding women from combat assignments. [I] didn't want to have to sit down and write out such a policy over there on the fourth floor of the Pentagon."²⁹²

McPeak admitted that his opposition to women in combat was based on his traditional normative views about the proper role of women, for example, that women should not kill:

287. *United States v. Virginia*, 518 U.S. 515, 545 (1996).

288. See KAREN B. DAVIS & BRIAN MCKEE, *THE WARRIOR FRAMEWORK UNDER FIRE: CHALLENGING TRADITIONAL DEBATES SURROUNDING THE ROLE OF WOMEN IN THE MILITARY, TODAY AND TOMORROW* 19-23 (2002), available at <http://www.rmc.ca/academic/conference/iuscanada/papers/DavisMcKee-warriorframeworks.pdf>.

289. *Id.* at 18.

290. See S. REP. NO. 96-826, at 157 ("The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.").

291. *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Pers. and Comp. and the Def. Policy Panel of the H. Comm. on Armed Servs.*, 102 Cong. 78-79 (1992) [hereinafter *House Hearings*] (statement of General Merrill A. McPeak, United States Air Force).

292. *Id.* at 78.

I still think it is not a good idea for me to have to order women into combat. Combat is about killing people; and *I am afraid that even though logic tells us that women can do that as well as men, I have a very traditional attitude about wives and mothers and daughters being ordered to kill people.*²⁹³

When asked what he would do if he had to choose between a qualified female and a less-qualified male to fill a combat role, General McPeak testified that he would select the male for reasons that were not rational.²⁹⁴ “I admit, it does not make much sense, but that is the way I feel about it,” he explained.²⁹⁵

General Carl E. Mundy, Jr., Commandant of the Marine Corps, similarly testified during the 1992 House hearings:

But when you get right down to it, as General McPeak just said, “*combat*” is killing. “Combat” in the sense that we usually associate with the direct combat role is looking another human being in the eye and killing him. It is not a pleasant job. It is not done with a precision-guided munition in all cases. Sometimes, it is done with your hands. It is done with a shovel. It is done at close range. It is not good. It is debasing.

It is something that I would not want to see women involved in and for which I do not believe—and I am grateful that this is my perception—that women are suited to do.²⁹⁶

Former Marine Commandant General Robert H. Barrow testified with emotion that women’s “very nature” disqualifies them from engaging in combat:

Combat is finding and closing with and killing or capturing the enemy. It is killing, that is what it is.

And it is done in an environment that is often as difficult as you can possibly imagine—extremes of climate, brutality, deaths, dying. *It is uncivilized, and women cannot do it. Nor should they be even thought of as doing it.* The requirements for strength and endurance renders them unable to do it.

293. *Id.* (emphasis added).

294. *Department of Defense Authorization of Appropriations for Fiscal Years 1992 and 1993: Hearings Before the C. Armed Services Comm.*, 102 Cong. 838 (1991) [hereinafter *Senate Hearings*] (statement of General Merrill A. McPeak, United States Air Force).

295. *Id.*

296. *House Hearings*, *supra* note 291, at 79 (statements of General Carl E. Mundy, United States Marine Corps) (emphasis added).

And I may be old fashioned, but I think *the very nature of women disqualifies them from doing it*. Women give life, sustain life, nurture life, they do not take it.²⁹⁷

Much of the testimony of male officers at the 1991 Senate hearings did not focus on particular instances where women interfered with military effectiveness, but rather reflected their own personal reluctance to work with female troops on an equal basis in combat. For example, a male Air Force pilot testified, "I guess I'm old-fashioned in my values, but I cannot see myself running around in my flight of four, doing the town in Song Tong City, if one of them was a girl . . . I think it would affect the effectiveness of my flight squadron."²⁹⁸ Putting women in ground combat, General Barrow testified, would "destroy the Marine Corps . . . something no enemy has been able to do in over 200 years."²⁹⁹

Much of legal scholarship that has analyzed the constitutionality of the combat exclusion discusses the empirical evidence that challenges the military's reliance upon overly broad stereotypes about the abilities of women and their supposed effect on military effectiveness.³⁰⁰ There is ample literature documenting the fact that the physical differences between men and women are overstated;³⁰¹ that with new modern technology, combat no longer requires the same type of physical strength as in past wars;³⁰² that female troops in forward units during the first Gulf War earned the respect of their male peers;³⁰³ and that women do not detract greatly from military readiness, cohesion, and morale.³⁰⁴

Opponents of women in combat concede that some women are physically qualified to participate in combat. They argue, however, that their presence will undermine male bonding and unit cohesion, undermining military effectiveness. With respect to this argument that women will impede male bonding and unit cohesion, studies have failed to demonstrate

297. *Senate Hearings*, *supra* note 294, at 895 (statements of General Robert H. Barrow, United States Marine Corps (Retired)) (emphasis added).

298. FRANCKE, *supra* note 219, at 248 (quoting the testimony of Captain David Freeney to the PRESIDENTIAL COMM'N, *supra* note 19).

299. HOLM, *supra* note 202, at 483 (ellipsis in original).

300. See, e.g., Leszkay, *supra* note 194; Michael J. Frevola, *Damn The Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621 (1996); Pamela R. Jones, Note, *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252 (1993); James D. Milko, Comment, *Beyond the Persian Gulf Crisis: Expanding the Role of Service-women in the United States Military*, 41 AM. U. L. REV. 1301 (1992).

301. See, e.g., Field & Nagl, *supra* note 201, at 7.

302. Frevola, *supra* note 300, at 637.

As the Persian Gulf conflict emphatically demonstrated, warfare has evolved into a highly technical and long range endeavor. In most cases, the formerly paramount attribute of overpowering physical strength needed by the warriors of yore has been replaced in importance by the superior technical skill, intelligence and training required in modern combat troops. Congress has acknowledged this fact in part, as witnessed by the recent repeal of the exclusion of women as combat pilots and onboard naval vessels which are deemed combatants.

Id. (footnotes omitted).

303. *Id.* at 650-51.

304. HARRELL & MILLER, *supra* note 263, at 99.

that the integration of women into combat units negatively affects unit cohesion or military readiness.³⁰⁵ As a threshold issue, it is important to define exactly what is meant by “unit cohesion.” Scholars distinguish social cohesion from task cohesion: Social cohesion refers to group members who like each other, while task cohesion refers to the ability of a small group to work together.³⁰⁶ Even assuming that the introduction of members who are different affects the social cohesion of a group, task cohesion is not affected.³⁰⁷ As Joshua Goldstein points out, “The members may not like each other as much if they feel they do not have values and experiences in common, but they still work together well because of discipline and leadership within a military organization.”³⁰⁸ Moreover, the notion that women would destroy unit cohesion ignores that combat itself creates cohesiveness because group survival depends on teamwork.³⁰⁹

Numerous studies by the military and others have found that gender integration does not adversely affect bonding among troops. The U.S. Army has conducted various studies of gender-integrated training and field exercises and concluded that unit cohesion was not affected.³¹⁰ As one report concluded, “it is the commonality of experience of the soldiers involved, rather than their gender, that produces cohesion.”³¹¹ Another report by the General Accounting Office in 1996 found that gender-integrated basic training does not adversely affect the performance of trainees.³¹² A 1997 RAND study found that gender by itself did not result in any decline in unit cohesiveness or military effectiveness.³¹³ Military leadership, on the other hand, was a significant variable that affected both.³¹⁴

Even assuming that the military’s generalizations are true, under *United States v. Virginia*, the military cannot categorically exclude from combat those women who are qualified based upon these overly broad generalizations about women’s abilities or traditional gender norms that women should be in the home, not in war.³¹⁵ The argument that women will impede male bonding and unit cohesion is the same argument rejected by the Court

305. Lorry M. Fenner, *Moving Targets: Women’s Roles in the U.S. Military in the 21st Century*, in *WOMEN IN COMBAT: CIVIC DUTY OR MILITARY LIABILITY?* 41 (Rita J. Simon ed., 2001).

306. GOLDSTEIN, *supra* note 267, at 199.

307. *Id.*

308. *Id.* Goldstein cites examples of the experience of racial integration of troops in World War II, when the Army sent fifty-three all-black platoons to serve with all-white companies. Postwar surveys found that “[c]ohesion did not suffer.” *Id.*

309. FRANCKE, *supra* note 219, at 248. As a colonel with the Defense Equality Opportunity Management Institute (DEOMI) explained, in Vietnam, “Race was much more of a problem if you were in Saigon in a support unit, or when you came back and went to the PX or for a swim Race was no problem if you were out in the jungle or in the weeds fighting an attack.” *Id.* (quoting the testimony of Colonel Ronald Joe at DEOMI).

310. GOLDSTEIN, *supra* note 267, at 199.

311. *Id.* at 201.

312. *Id.*

313. HARRELL & MILLER, *supra* note 263, at 54-55. The study concluded: “Our overall research findings are that gender differences alone did not appear to erode cohesion.” *Id.* at 54.

314. *Id.*

315. *See United States v. Virginia*, 518 U.S. 515, 546 (1996).

in *Virginia* as a doomsday prediction used throughout history to keep women out of all-male institutions.³¹⁶

In response, the military undoubtedly would argue that *Virginia* does not apply because VMI is a state college, not a military institution or federal service academy. Unlike decisions made by a state college, the decision whether women should engage in direct combat arguably is a decision made by the Department of Defense involving national security. The Supreme Court traditionally has afforded the military great deference in decisions related to the protection of national security, which it has broadly defined.³¹⁷ Federal courts have routinely deferred to military judgments about appropriate behavior and conduct of uniformed personnel, especially where the United States invokes claims of national security. In *Goldman v. Weinberger*,³¹⁸ for example, the United States Supreme Court upheld the Army's ban on service members wearing yarmulkes while on duty.³¹⁹ While acknowledging that the regulation infringed on the free exercise right of Jewish service members, the Court deferred to the military's judgment that the dress code was necessary to maintain order and discipline.³²⁰

In upholding the ban on yarmulkes and other military regulations, courts explicitly have recognized the military's asserted need for uniformity and cohesion within the armed services.³²¹ The Court in *Goldman* found that the "essence of military service 'is the subordination of the desires and interests of the individual to the needs of the [military] service.'"³²² Rather than tolerate individuality, the military "must foster instinctive obedience, unity, commitment, and esprit de corps."³²³ These arguments may be particularly persuasive during times of war, when concern for national safety is especially high.

As courts have recognized, however, the doctrine of judicial deference does not mean that federal courts lack the power to review military policies that allegedly violate constitutional rights.³²⁴ In *Goldman*, the petitioner did not contend that the military sought to categorically exclude Jewish service members.³²⁵ In contrast, the direct ground combat exclusion is a deliberate choice to categorically exclude qualified women from combat positions based upon stereotypical beliefs about women's abilities and roles, which has been routinely rejected by the Court. Under the standard of skeptical scrutiny applicable to gender classifications, a court may not simply defer to

316. See, e.g., *id.* at 542-43.

317. Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 703-05 (2002) (critiquing the Supreme Court's doctrine of judicial deference).

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

319. *Id.* at 509-10.

320. *Id.* at 508.

321. See, e.g., *id.* at 510; *Thomasson v. Perry*, 80 F.3d 915, 926 (4th Cir. 1996).

322. *Goldman*, 475 U.S. at 507 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

323. *Id.*

324. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); *Thomasson*, 80 F.3d at 927.

325. *Goldman*, 475 U.S. at 504.

military judgment—particularly where such judgment is based upon traditional gender norms and stereotypes consistently rejected by the Supreme Court. This applies with special force where, as demonstrated below, the military's exclusionary policy is not based simply upon mistakes in judgment as to the abilities of women, but is based upon and reinforces institutionalized hostility and animus toward women in the military.

The arguments raised by opponents of women in ground combat are similar to those raised against the integration of black and white troops. In World War II, the United States allowed a small number of African-American men to serve in combat, but only in separate, all-black units.³²⁶ Like the general public, the military command was deeply opposed to the integration of blacks, relying on degrading racial stereotypes that blacks lacked the cognitive, emotional, and moral ability to be effective soldiers and leaders.³²⁷ Secretary of War Henry Stimson and other War Department officials argued that black troops should be segregated in service support units. Stimson explained:

Leadership is not imbedded in the Negro race yet and to try to make commissioned officers to lead the men into battle—colored men—is to work disaster to both. . . . [I] hope to Heaven's sake they won't mix the white and the colored troops together in the same units for then we shall certainly have trouble.³²⁸

Like opponents of women in combat, military commanders warned that the integration of blacks would destroy unit cohesion and military effectiveness.³²⁹ After the end of World War II, President Truman appointed top U.S. military leaders to a military panel charged with studying his proposal to require the military to end the racial segregation of African-American

326. Robert F. Jefferson, *African-Americans in the U.S. Army During WWII*, in A HISTORIC CONTEXT FOR THE AFRICAN-AMERICAN MILITARY EXPERIENCE (Steven D. Smith & James A. Ziegler eds., 1998), available at <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/AAME/aame4.html#Quotas>.

327. *Id.* Jefferson argues:

Army plans for employing and training black troops during World War II were based largely on the testimonies of World War I commanders of black troops gathered by the Army War College, and on the racist mores of the period. Almost as soon as the smoke had cleared from the battlefields of Europe in 1919, the Assistant Commander of the General Staff College circulated surveys to officers who commanded black soldiers during the war, requesting them to comment on the troops' performances and to make recommendations for the use of black troops in the event of future wars. Their responses were largely negative. . . .

. . . Responding to the Army War College in April of 1920, former 92nd Division Chief of Staff Allen J. Greer wrote, "the average Negro is naturally cowardly and utterly lacking in confidence in his colored officer." "Every infantry combat soldier should possess sufficient mentality, initiative, and individual courage; all of these are, generally speaking, lacking in the Negro" he stated. Another former 92nd officer wrote, "my experience confirms the belief that, with Negro officers, the Negroes cannot become fitted as combat troops."

Id. (citations omitted).

328. *Id.* (quoting Letter from Henry Stimson, Sec'y of War (Sept. 27, 1940)).

329. Fenner, *supra* note 305, at 19.

men.³³⁰ The military committee appointed to study the proposed racial integration of the Navy in the 1940s reported:

Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks they work side by side; and in particular tasks such as those of a gun's crew, *they form a closely knit, highly coordinated team. How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course?* The General Board believes that the answer is "Few, if any," and further believes that if the issue were forced, *there would be a lowering of contentment, teamwork and discipline in the service.*³³¹

Speaking in support of the exclusion of black troops, Senator Richard B. Russell offered the same arguments now used to justify the exclusion of women from combat:

[T]he mandatory intermingling of the races throughout the services will be a terrific blow to the efficiency and fighting power of the armed services It is sure to increase the numbers of men who will be disabled through communicable diseases. It will increase the rate of crime committed by servicemen.³³²

Not surprisingly, the military has made the same argument in support of its exclusion of homosexual service members. While the appellate courts that have considered the issue prior to *Lawrence v. Texas*³³³ have upheld the ban, there have been some notable dissents that recognize that the military's asserted fear for "unit cohesion" is a disguised desire to preserve the military as male and heterosexual.³³⁴ In his dissent from the Fourth Circuit's decision in *Thomasson v. Perry*, Judge K.K. Hall rejected the military's claim that gays would erode unit cohesion and destroy military effectiveness, stating: "'Unit cohesion' is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs. The concept has therefore

330. Exec. Order No. 9981, 3 C.F.R. 722 (1948).

331. See *Thomasson v. Perry*, 80 F.3d 915, 952 (Hall, J., dissenting) (emphasis added).

332. Gregory Herek, Race and Sexual Orientation: Commonalities, Comparisons, and Contrasts Relevant to Military Policy, http://psychology.ucdavis.edu/rainbow/html/military_race_comparison.html (last visited Nov. 10, 2005) (quoting BINKIN ET AL., BLACKS AND THE MILITARY 26 (1982)).

333. 539 U.S. 338 (2003).

334. See, e.g., *Phillips v. Perry*, 106 F.3d 1420 (Fletcher, J., dissenting); *Thomasson*, 80 F.3d at 949-54 (Hall, J., dissenting).

been a favorite of those who, through the years, have resisted the irresistible erosion of white male domination of the armed forces.”³³⁵

In the Ninth Circuit’s decision in *Philips v. Perry*, Judge Betty Fletcher dissented from the majority’s decision upholding the military’s policy of “don’t ask/don’t tell,”³³⁶ arguing that the military’s ban on homosexuals failed to meet the rational basis test.³³⁷ In her opinion, she compared the rationale against homosexuals to the military’s historical ban on African-Americans:

As courts and commentators have noted, the “unit cohesion” rationale proffered in support of the “don’t ask/don’t tell” policy is disturbingly similar to the arguments used by the military to justify the exclusion from and segregation of African[-]Americans in military service. . . . Despite the deference due the military, there is no doubt that were the government today to exclude African-Americans from the military, the courts would easily reject the military’s assertions of “unit cohesion,” “morale,” and “discipline” and strike down the policy as violative of equal protection. While racial classifications are subject to a stricter level of scrutiny, these asserted interests, which are based on animosity towards the disfavored class, are no more acceptable when used to support the exclusion of gay men and lesbians from the military.³³⁸

Under *Virginia*, it is easy to frame the categorical exclusion of women from combat as impermissible gender stereotyping. To the extent that an anti-stereotyping approach invites the Court to determine whether the military’s judgment reflects overly broad generalizations about women, DOD can argue that the Court should not second-guess its judgments regarding personnel, especially in times of war. Because the combat exclusion is based upon traditional gender stereotypes and norms, courts could refuse to defer to the military’s judgment. A more persuasive approach, however, is to focus the courts’ attention on the combat exclusion as part and parcel of a system of gender subordination within the military as an institution. As I argue below, reframing the exclusion makes visible the underlying hostility and animus toward women and significantly undermines the military’s claim for judicial deference.

335. *Thomasson*, 80 F.3d at 952 (Hall, J., dissenting).

336. *Perry*, 106 F.3d at 1433 (Fletcher, J., dissenting).

337. *See, e.g., id.* at 1432-41 (Fletcher, J., dissenting).

338. *Id.* at 1439.

C. *Beyond Stereotyping: The Combat Exclusion and the Construction of Masculinity Within the Military*

Rather than focus solely on the military's stereotypical judgments of women's abilities, a more persuasive approach would seek to persuade the courts that the combat exclusion is part and parcel of an institutional system of gender subordination. Through a range of institutional practices, the military as an institution constructs men and women as fundamentally different, rationalizing the exclusion of women even when their courage under fire continues to be demonstrated.³³⁹ The refusal of military leaders to open their ranks to qualified women does not rest on mistaken judgments about their capabilities, but upon a deep-seated hostility toward females that is institutionalized through a range of social practices that privilege masculinity and demean femininity.

As Karst has argued, the combat exclusion operates the same as the historical exclusion of blacks from all-white units, which reinforced the racial subordination of blacks, and the exclusion of gays from military service.³⁴⁰ Like the military's now-discredited policy of racial segregation and its current ban on homosexuals, the categorical exclusion of women from direct ground combat rests upon invidious social distinctions between the privileged male warriors and the outsiders. Such distinctions create a caste system underlying a social belief that the outside group is inherently different from, and inferior to, the men who are warriors.³⁴¹

Kenneth Karst has argued eloquently that the exclusion of women from combat preserves the ideology of masculinity or "manhood," rationalizing male access to power.³⁴² Karst argues that the combat exclusion "symboliz[es] and reinforce[s] a traditional view of femininity that subordinates women."³⁴³ The exclusion of women is essential to enforce the bounds of gender that maintain separate spheres within the military—males as warriors, females as support personnel.³⁴⁴

Masculinity is not merely an ideology or belief, however, but a social practice within the military that constructs warriors as male and masculine. As Bourdieu argues, masculinity as a social practice rationalizes the inequality and subordination of women within the military and society.³⁴⁵ Warriors are gendered male and masculine.³⁴⁶ The military traditionally has

339. See, e.g., Fenner, *supra* note 305, at 30.

340. Karst, *supra* note 21, at 500.

341. Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 716-20 (1996).

342. Karst, *supra* note 21, at 502-10.

343. *Id.* at 525.

344. GOLDSTEIN, *supra* note 267, at 102-03; Morris, *supra* note 326, at 718-19.

345. See Vojdik, *supra* note 21, at 265 n.41 (citing BOURDIEU, *supra* note 148, at 8-12).

346. David J. Morgan, *Theater of War: Combat, the Military, and Masculinities*, in THEORIZING MASCULINITIES 165, 165 (Harry Brod & Michael Kaufman eds., 1994) ("Despite far-reaching political, social, and technological changes, the warrior still seems to be a key symbol of masculinity.").

considered basic training a “proving ground” for masculinity.³⁴⁷ Recruiting slogans for the military have featured slogans such as “The Marine Corps Builds Men” and “Join the Army and Feel Like a Man.”³⁴⁸ Recruiting advertisements historically have focused on challenging boys to become men. For example, an advertisement for the Army National Guard in the late 1980s was captioned “[k]iss your momma goodbye” and featured a photograph of a group of men wading through deep water.³⁴⁹ As recently as 2004, the Air Force Academy boasted a large sign that read, “Bring Me Men.”³⁵⁰

As Goldstein argues in *War and Gender*, the relationship between gender and war is reciprocal: Warriors are constructed as masculine, and masculinity is constructed through war.³⁵¹ According to David Marlowe, the Chief of Military Psychiatry at the Walter Reed Army Institute of Research, “[t]he soldier’s world is characterized by a stereotypical masculinity. His language is profane, his professed sexuality crude and direct; his maleness is his armor, the measure of his competence, capability, and confidence in himself.”³⁵²

Through a range of institutional practices, the military constructs masculinity as the opposite of femininity, establishing gender boundaries that denigrate females and the feminine while privileging males and masculinity.³⁵³ A variety of rituals and practices compel males to prove their social identity as men through both the symbolic and actual enactments of a hyper-masculinity that denigrates women.³⁵⁴ From the beginning, drill sergeants humiliate recruits by calling them “pussies,” “sissies,” “girls,” or “fags.”³⁵⁵ Cadence calls, called joadies, often denigrate women or celebrate male sexual domination of women. At the Naval Academy in the late 1980s, the glee club’s favorite tune was “The S&M Man,” sung to the tune of “The Candy Man.”³⁵⁶ The first verse went: “Who can take a chain saw/Cut the bitch in two/Fuck the bottom half/and give the upper half to you.”³⁵⁷ A formal photograph of a Marine platoon whose members graduated from recruit training

347. CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS 47 (1989).

348. Browne, *supra* note 19, at 110.

349. *Id.* at 202.

350. Christine Hansen, *A Considerable Sacrifice: The Costs of Sexual Violence in the U. S. Armed Forces*, Presented at the Military Culture and Gender Conference, Univ. of Buffalo, Sept. 16, 2005, <http://www.law.buffalo.edu/baldycenter/pdfs/MilCult05Hansen.pdf>.

351. See GOLDSTEIN, *supra* note 267, at 264-72.

352. See Browne, *supra* note 19, at 132.

353. See, e.g., WILLIAMS, *supra* note 347, at 47, 67 (discussing the “close association of the military with masculinity” that results in “contempt for femininity [that] is institutionalized in military policy”); Mady Wechsler Segal, *Military Culture and Military Families*, in BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 251, 256 (Mary Fainsod Katzenstein & Judith Reppy eds., 1999). (“The military traditionally has played a role as a gender-defining institution and socializing agent. Sociological analyses of this tradition emphasize the role of the military in creating or reifying masculinity among men through their processing by the organization. . . . The culture elevates maleness to a high level and devalues femaleness. Display of behavior considered feminine is cause for ridicule.”).

354. GOLDSTEIN, *supra* note 267, at 265.

355. *Id.*

356. FRANCKE, *supra* note 219, at 190.

357. *Id.* at 190-91.

in 1989 shows the men posed with their drill instructors “holding a blown-up picture of a naked woman and a hand-lettered sign reading ‘kill, rape, pillage, burn.’”³⁵⁸ In each case, masculinity is defined through its opposition to, and eradication of, the feminine.

The integration of women into the highly masculinized military culture fundamentally challenges the constructed identity of the warrior as male and the military as masculine.³⁵⁹ As retired Navy Admiral James Webb explains, the military historically provided a “ritualistic rite of passage into manhood.”³⁶⁰ According to Webb, the integration of women into the military makes male troops “feel stripped, symbolically and actually.”³⁶¹ Webb argued that the inclusion of women will disrupt the link between warfare and masculinity and reduce men’s motivation for combat.³⁶² He stated, “The real question is this: Where in the country can someone go to find out if he is a man? And where can someone who knows he is a man go to celebrate his masculinity?”³⁶³ As Kingley R. Browne explains, “If combat is no longer a ‘manly’ pursuit, then failure at it is no longer a failure of manhood.”³⁶⁴

The opposition of those male officers and members of the Joint Chiefs of Staff who testified against women in combat in Congressional hearings, illustrates this attitude. Though couched in terms of unit cohesion and effectiveness, their testimony reflects the underlying belief that a warrior is valuable precisely because women cannot do it. As a first sergeant in Special Operations testified, “[The] warrior mentality will crumble if women are placed in combat positions There needs to be that belief that ‘I can do this because nobody else can.’”³⁶⁵ A female Air Force pilot testified before the commission that a male in test pilot school told her, “‘Look, I can handle anything, but I can’t handle being worse than you.’”³⁶⁶ Marine Colonel Ron Ray testified, “Why do these women want to trade the best of what it means to be a woman, for the worst of what it means to be a man?”³⁶⁷ Even more bluntly, General Westmoreland testified against the repeal of the combat exclusion laws in 1979, stating, “[n]o man with gumption wants a woman to fight his nation’s battles.”³⁶⁸

Because of the fundamental challenge that women pose to the identity of the warrior as male and masculine, the military has responded to the integration of women through a range of practices that highlight the femininity of female troops and thereby preserve the boundaries of gender within the military as an institution. One fascinating example is the military’s adoption

358. *Id.* at 156-57.

359. *See* Karst, *supra* note 21, at 523-45.

360. *Id.* at 545 (quoting Webb, *Women Can’t Fight*, THE WASHINGTONIAN, Nov. 1979, at 280).

361. *Id.* (quoting Webb, *supra* note 360).

362. *Id.*

363. *Id.*

364. Browne, *supra* note 19, at 132.

365. FRANCKE, *supra* note 219, at 260.

366. *Id.*

367. HOLM, *supra* note 202, at 485 (quoting Marine Colonel Ron Ray).

368. FRANCKE, *supra* note 219, at 23.

of numerous dress and grooming codes that compelled female cadets and service members to appear socially feminine.

The Marine Corps responded to the integration of females by preserving visible distinctions between male and female Marines. The Marine Corps insisted on calling its females “Women Marines,” or “WMs.”³⁶⁹ Other terms for females used in the Corps were more derogatory, such as “BAMs or Bammies (an acronym for ‘Broad-Assed Marines’) and Marionettes.”³⁷⁰ These terms distinguish females as different from, and inferior to, “real” Marines, who are male. To further enforce the gender distinction, the Marine Corps required female recruits to wear makeup—at a minimum, lipstick and eye shadow.³⁷¹ Female recruits were also required to attend classes on makeup, hair care, poise, and etiquette.³⁷² The Air Force Academy required that women’s uniforms make apparent the gender distinction between male and female cadets; female cadets were required to look “feminine.”³⁷³ At West Point, the academy initially banned female cadets from wearing skirts to a school dance, only to reverse itself after observing “mirror-image couples dancing in short hair and dress gray trousers.”³⁷⁴ West Point also required the first class of female cadets to attend a lecture on make-up application sponsored by Revlon, the cosmetics manufacturer.³⁷⁵

By highlighting the gender of female cadets, the military enforced gender distinction within the military.³⁷⁶ Rather than include women as warriors, the military symbolically separated females from the “real” male warriors, preserving the masculinity of warriors and the hierarchy of gender within the institution.³⁷⁷

The integration of women into the military’s hyper-masculine culture has also resulted in widespread hostility and harassment of those women who transgress the boundaries of gender. Sexual harassment of military women is pervasive. According to a 1995 Department of Defense study, nearly 70% of military women have experienced sexual harassment in their workplace. An Army senior review panel similarly reported in 1997 that 80% of men and 84% of women in the Army reported experiencing inappropriate harassment such as “crude or offensive actions, sexism, unwanted sexual attention or more serious problems like assault.”³⁷⁸ The sexual har-

369. WILLIAMS, *supra* note 347, at 69.

370. *Id.*

371. *Id.* at 63.

372. *Id.*

373. Elizabeth L. Hillman, *Dressed to Kill*, in BEYOND ZERO TOLERANCE, *supra* note 353, at 67, 70.

374. MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY 24 (1992) (quoting CAROL BARKALOW WITH ANDRA RAAB, IN THE MEN’S HOUSE 53-54 (1990)).

375. *Id.*

376. *Id.* at 25 (stating that dress codes “simultaneously regulate and critique normative categories like rank (or its civilian counterpart, class) and gender”).

377. Hillman, *supra* note 373, at 74. Ironically, military dress and grooming regulations that require women to conform to male requirements have the same exclusionary effect. *Id.* at 75. “[D]ressing female bodies in men’s clothing often exaggerates rather than mutes women’s physical characteristics,” preserving gender distinctions within the ranks. *Id.* at 74; see also Vojdik, *supra* note 20, at 113-18.

378. Vojdik, *supra* note 21, at 268 (quoting Nolan Walters, *Army Announces Changes to Reduce*

assment and assault of military women sends the message that female troops are sexual objects, not warriors; harassment thereby polices the boundaries of gender within the military.³⁷⁹

The admission of women into the federal service academies in the 1970s has been met with similar hostility and harassment. The last all-male class at West Point declared themselves the “Last Class with Balls” and posed for a yearbook photograph holding all sorts of balls, including footballs, basketballs, and baseballs.³⁸⁰ At the Naval Academy, male midshipmen told jokes about “WUBAs,” a Navy acronym translated by male midshipmen to refer to female midshipmen as “Women Used By All,”³⁸¹ or “Women with Unbelievably Big Asses.”³⁸² Jokes included, “*What do you call a mid who fucks a WUBA?* Too lazy to beat off. *What’s the difference between a WUBA and warthog?* About 200 pounds, but the WUBA has more hair.”³⁸³ To this day, Air Force alumni sport license plates, t-shirts, and other paraphernalia that proclaim, “LCWB,” (for “Last Class With Balls” or “Last Class Without Bitches (or Broads)”), defiantly proclaiming their continued opposition to the admission of women.³⁸⁴ A panel appointed to evaluate the allegations of sexual misconduct at the Air Force Academy concluded:

While some may find this public display of animosity toward the presence of women at the Academy humorous, it contributes to an environment in which female cadets are made to feel unwelcome. In the Panel’s view, sanctioned displays which are derogatory toward women diminish the role and value of women, fuel the attitudes described by an alarming number of male cadets in the climate surveys [one out of four report that women should not be at the Academy] and contribute to an environment that is unwelcoming of women.³⁸⁵

More than twenty years after the admission of women, sexual abuse and harassment of females at the federal service academies continues to be substantial. Following the well-publicized reports in 2003 of the raping of Air

Sexual Harassment, Improve Gender Equality, KNIGHT RIDDER/TRIB. NEWS SERV., Sept. 11, 1997, at K8778).

379. Franke, *supra* note 145, at 764 (“Sexual harassment is the means by which the male harasser proves himself as properly and effectively masculine, while at the same time inscribes femininity on the female victim.”).

380. Vojdik, *supra* note 20, at 73 (citing LAURA FAIRCHILD BRODIE, *BREAKING OUT: VMI AND THE COMING OF WOMEN* 343-44 (2000)).

381. FRANCKE, *supra* note 219, at 161.

382. DEP’T OF DEF., *REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERV. ACADEMIES* app. N at 11 n.96 (2005) [hereinafter *DOD TASK FORCE REPORT*].

383. JEAN ZIMMERMAN, *TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK* 237 (1995).

384. *FINAL REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY* 59 (2005) [hereinafter *FOWLER COMMISSION REPORT*].

385. *Id.*

Force female cadets, a survey by the Defense Department Inspector General found that 19% of female cadets at the Air Force Academy said they had been assaulted while at the academy.³⁸⁶ Half of the women attending the Navy, Air Force, and Army service academies reported being sexually harassed on campus.³⁸⁷ In March 2005, the Department of Defense released a report documenting that one out of seven women in the federal service academies surveyed reported that they had been sexually assaulted by their male peers.³⁸⁸

In July 2005, the Department of Defense Task Force on Sexual Harassment and Violence in Military Service Academies concluded that the harassment and violence were partially rooted in the devaluation of women in the military.³⁸⁹ Despite the fact that women have been at the academy for over twenty years, DOD reported that one out of four male cadets surveyed reported that women do not belong at the Air Force Academy.³⁹⁰ The report cited the persistence of “hostile attitudes and inappropriate actions toward women, and the toleration of these by some cadets and midshipmen,” as interfering with a safe environment to create new military leaders.³⁹¹ The Task Force specifically recognized that the continued exclusion of women from “highly regarded combat specialties” fosters an environment of hostility and harassment.³⁹² The sexual harassment and assault of military women sends the message that female troops are sexual objects, not warriors.³⁹³

Violence toward female troops by their male officers and peers is similarly widespread.³⁹⁴ In a 2003 report by the Iowa City Veterans Affairs Medical Center, one-third of former military women treated by Veterans Affairs medical centers reported suffering rape or attempted rape during their military careers.³⁹⁵ Fourteen percent said they were gang-raped by co-workers.³⁹⁶ One in five women who reported being raped said they believed “rape was to be expected in the military.”³⁹⁷

386. Judith Graham, *Air Force Leadership Blamed for Sex Scandal: Academy's Climate of Abuse Traced to Officers' Inaction*, CHI. TRIB., Sept. 23, 2003, at C1.

387. *Id.*

388. *One in Seven Attending Military Academies Report Being Sexually Assaulted*, FEMINIST DAILY NEWS WIRE, Mar. 21, 2005, <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=8959>.

389. DOD TASK FORCE REPORT, *supra* note 382, at 8.

390. FOWLER COMMISSION REPORT, *supra* note 384, at 59.

391. *Id.* at ES-1.

392. *Id.*

393. Franke, *supra* note 145, at 764 (“Sexual harassment is the means by which the male harasser proves himself as properly and effectively masculine, while at the same time inscribes femininity on the female victim.”).

394. Deborah Funk, *VA: Better Sex-Assault Prevention is Needed*, MARINE CORPS TIMES, June 6, 2005, at 33 (“The problem has transcended service boundaries in recent years, including a scandal at the Army’s Aberdeen Proving Ground, Md., in which drill sergeants sexually assaulted trainees, and more recent allegations at the Air Force Academy and in the combat zones of Afghanistan and Iraq. ‘It’s not just one locale; it’s not just one service,’ [Retired Navy Captain Barbara] Brehm said.”).

395. Anne C. Mulkern, *Study: Sex Assault Prevalent in Military Defense-Funded Study Found 14% of Victims Reported Gang-Rape*, DENVER POST, Mar. 26, 2003, at B4.

396. *Id.*

397. *Id.*

Scandals at the Tailhook Association annual convention and the Aberdeen Proving Grounds graphically illustrated the widespread hostility and violence toward women in the military. At the 1991 convention of the Tailhook Association, an elite group of Naval pilots, including three-star admirals, dozens of women filed complaints that they had been sexually assaulted by male pilots on the urine- and beer-soaked floors of the third floor of the conference hotel, where hospitality suites featured female strippers and prostitutes.³⁹⁸ Women were forced to walk through a gauntlet of nearly 300 men who groped, pinched, and fondled their buttocks, breasts, and genitals.³⁹⁹ According to a subsequent Pentagon report, such attacks against women had occurred at Tailhook conventions since 1988 and many officers engaged in sexual misconduct “without fear of censure or retribution.”⁴⁰⁰ The Army suffered a similar scandal in 1997 arising from widespread reports of sexual harassment at the Aberdeen Proving Grounds, a training base for new Army recruits.⁴⁰¹

Most recently, U.S. female troops in the U.S. Central Command’s theater of operation in the Middle East, including Iraq and Afghanistan, have reported 112 incidents of rape, assault, and other forms of sexual misconduct during an eighteen-month period from August 2002 through February 2004.⁴⁰² The official number of reports likely understates the actual number of assaults because many women are reluctant to report such incidents, fearing reprisal. The Miles Foundation, a nonprofit group that assists soldiers who have been sexually assaulted, has received 307 reports of sexual assault from soldiers serving in Iraq, Afghanistan, Kuwait, and Bahrain—most of whom were female.⁴⁰³

By moving beyond stereotyping, the argument against judicial deference to the military’s discriminatory policy becomes substantially stronger. As Judge Fletcher observed in *Philips v. Perry*, judicial deference to a military policy that is based upon hatred of, and prejudice toward, an excluded class of people is unjustified.⁴⁰⁴ As Kenneth Karst has argued, the institutional opposition to women in direct ground combat is no different than the military’s former policy of excluding African-Americans or homosexuals.⁴⁰⁵

398. Mark Thompson, *Tailhook Case Lands 140; Inquiry Describes a Sexual “Free-Fire” Zone*, HOUSTON CHRON., Apr. 24, 1993, at A1.

399. *Id.*

400. *Id.* The year that the report was issued, fighter pilots at Miramar Naval Air Station hosted their annual “Tomcat Follies,” a similar event. One skit proclaimed, “Hickory dickory dock, Pat Schoreder [sic] can suck my cock.” Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1803 n.54 (1992).

401. Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST, Nov. 7, 1997, at B1.

402. Chris Shumway, *Sexualized Violence Against Female Soldiers Going Largely Unpunished*, NEWSTANDARD, June 14, 2004, http://newstandardnews.net/content/?action=show_item&itemid=549.

403. Corky Siemaszko, *G.I. Sex Predator Hunt: Pentagon to Investigate Soldiers Suspected of Rape*, N.Y. DAILY NEWS, Feb. 19, 2005, at 10.

404. See 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., dissenting).

405. Karst, *supra* note 21, at 509-10.

While each involves a classificatory scheme, each enforces a status hierarchy that preserves the military for white, heterosexual males.⁴⁰⁶

The harassment and violence toward military women illustrates the persistent hostility and denigration of female troops. By shifting the focus from gender stereotyping to the institutional practices within the military that construct warriors as male and masculine, the direct ground combat exclusion appears less like a mistake in classification and more like a fundamental means of enforcing the status of military women as second-class citizens. The military's discriminatory policy, like the use of gender-based peremptory challenges in *J.E.B. v. Alabama*, perpetuates the historical exclusion of women from the military and stigmatizes women as different and inferior, unworthy of the role of warrior.⁴⁰⁷

The combat exclusion constructs and preserves a gendered system of labor that reflects and perpetuates male supremacy and female subordination. In this sense, the combat exclusion functions in the same way as the anti-miscegenation laws struck down by the Supreme Court in *Loving v. Virginia*. In *Loving*, the Supreme Court relied on its anti-subordination doctrine to strike down Virginia's anti-miscegenation law as violating the right to equal protection.⁴⁰⁸ The Court rejected the notion of formal equality advanced by the state defendant that the law prohibited interracial marriages by both blacks and whites and therefore was racially neutral because it treated all persons equally without regard to their race.⁴⁰⁹ Prohibitions against interracial marriage, the Court held, were part and parcel of maintaining a system of racial distinction that perpetuated the subordination of blacks under the law.⁴¹⁰ Like the anti-miscegenation statute in *Loving*, the categorical exclusion of women from direct ground combat demeans and stigmatizes women as different and inferior.

A legal challenge to the combat exclusion, as illustrated above, does not merely vindicate the goals of formal equality. The constitutional wrong is not simply that the military has mistakenly concluded that no woman is capable of engaging in combat (although the exclusion clearly reflects overly broad gender stereotypes), but that the military, through a range of institutional practices, constructs and preserves a gendered caste system. By

406. *Id.*

407. *See J.E.B.*, 511 U.S. at 142.

408. *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967).

409. *Id.* at 8-10.

410. *Id.* at 11. The Court traced the history of Virginia's anti-miscegenation statute to the slavery era: Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

Id. at 6-7 (footnotes omitted).

making the military as an institution visible, the hostility toward women as a group becomes plain to see. Rather than accept the military's gender norms, opening the doors to women in combat fundamentally challenges the myth of masculinity inside one of the most powerful institutions that continue to deny women equal citizenship status.

CONCLUSION

While the Supreme Court has not embraced anti-subordination analysis, it has broadened equal protection discourse to express concerns about state action that demeans women as a class and stigmatizes women as inferior and undeserving of full citizenship. In this Article, I have attempted to re-read the Court's gender equality jurisprudence outside the conventional framework that assumes equal protection doctrine represents a dichotomous choice between anti-subordination and anti-classification theory. Such a thick reading, as Reva Siegel suggests, is better suited to developing legal arguments that shift the Court's attention from classificatory errors to concrete forms of subordination.

To the extent that equal protection doctrine is flexible, it is critical to identify the spaces within the discursive space to develop more particularized accounts of discrimination that can persuade the Court to conceptualize gender discrimination as a status-based harm. Focusing on the gendered nature of roles within social institutions and the particular ways that institutional practices enforce gender segregation in the workplace, is one effective strategy to enrich the courts' understanding of discrimination. The mechanism of harm is not merely mistaken stereotypes, but institutional practices that reinforce gender roles and certain institutions as male and masculine while simultaneously sending the message that women are different and inferior.

In this Article, I have sought to illustrate how this approach can be used to challenge the exclusion of women from combat. This type of particularized analysis of the institutional practices that construct gender as difference and rationalize women's inequality can be used to challenge other forms of gender discrimination in traditionally male workplaces and institutions. Dissolving the supposed dichotomy of anti-classification and anti-subordination is an important first step to rethinking new strategies to combat the many forms of state-sponsored discrimination.

