"A Constitutional Right to be Treated Like ... Ladies": Women, Civic Obligation and Military Service

Linda K. Kerber
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The language of citizenship is a language of claims—claims to civic identity, to authority, to reciprocal obligation, and to mutual consent. This language has been gendered since its origins, in ways that we are only beginning to comprehend. Citizenship involves claims of rights—notably suffrage, and also the right to pursue happiness in various ways, among them freedom of expression and of travel—but it also involves a wide range of civic obligations, including patriotic loyalty, the payment of taxes, service on juries and service in the military. White women have been citizens of the nation from the moment of its inception. Women could be naturalized; they were subject to the nation's laws and could claim the protection of its courts; as single adult women, they could be taxed. However, from the beginning, American women's relationship to the state was understood to be substantially different from men's. Rights and obligations have generally been framed in generic terms applying to all citizens, male and female, but they have been experienced differently by men and by women. There is a history of obligation just as there is a history of claims for rights.

Contest over civic obligation in American history has typically been framed by four issues: (1) allegiance and its counterpart—the obligation to refrain from treason, (2) the obligation to

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pay taxes, (3) the obligation to serve on juries, and (4) the obligation to risk one's life in military service. At first glance, each of these general obligations appears to weigh equally on all individuals. In practice, however, men and women historically have been subject to different civic obligations; obligations have also varied depending on race.

The obligation of allegiance was softened by gender during the revolutionary era. Wives of Tories were understood to owe their first allegiance to their husbands, and the revolutionary government protected their dower rights and the property they held outright even when seizing their husbands’ property. Americans spoke of “no taxation without representation,” but American women were largely disfranchised until the passage of the 19th Amendment in 1920, and African Americans in many regions were denied voting rights until the 1960s; still they were obliged to pay taxes. Women have always had the right to a jury trial, but until recently have been systematically discouraged from serving on juries or explicitly excluded from them, and so effectively stripped of the corresponding obligation. Although men of European ancestry could be obligated for jury service in the colonial era even if they did not meet property requirements for suffrage, African American men were rarely called for service even after they achieved suffrage in the Fifteenth Amendment. Not until the Jury Reform Act of 1966 was a national system in place which generally barred race discrimination in jury service. Only a few states obligated women to jury service when they achieved suffrage—what was understood to be an obligation for men was treated as a privilege for women. A wide range of gender-related exemptions characterized jury service throughout most of the twentieth century. Not until 1975 did the Supreme Court rule that men's and women's names must be placed in jury pools on an equal basis.

The obligation of military service, which involves substantial physical risk, has not rested evenly on the population as a whole.

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Women have been recruited by the military in all wars: as volunteers, to provide medical care, to prepare food, to spy. But in the United States women have always been exempt from the draft; their participation has been—to varying degrees—voluntary, occurring outside the boundaries of civic obligation, and, therefore, outside the boundaries of reciprocity and entitlement. The association between soldiering and entitlement runs very deep. The first large-scale public welfare system in the United States was invented for veterans of the Civil War, and, as Theda Skocpol has recently argued, the assumptions on which that system were grounded continued to shape Americans' thinking about welfare long after the Civil War veterans were dead.³ At the end of World War II, Americans continued to assume that civic obligations and entitlements varied according to gender. The state offered white men and women equal opportunity for suffrage, but gender played a defining role in virtually all other relationships—from social security entitlements to jury service to military obligation.

Although much talk proceeded as though the relationship between rights and obligations is reciprocal, the actual relationship between rights and obligations has often been tenuous. Indeed it is characteristic of American political theorizing to measure claims to rights not only against reciprocal duties or obligations, but also against the responsibility not to intrude on the competing rights of others.⁴ Excessive "rights talk" has been criticized, with good reason, for its tendency to privilege individual claims at the expense of the common good. But concentration on competing claims for rights can have the salutary effect of focusing debate on matters of equality; democracies are societies defined after all, by expansive rights. The language of obligation fits less comfortably into democratic conversation. Talk of obligation is as apt to lead to claims for entitlements as it is to responsibility. Although the reciprocal of the obligation to risk one's life for the state may be the right to bear arms, most veterans speak of the reciprocal of military service as entitlement to veterans' pensions, benefits and privileges. The reciprocities which obligations create are as likely to be hierarchical as they are to be


⁴ Among those who have emphasized this point recently are Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 45-46 (Free Press, 1992) and Rogers Smith, Rights Talk, in Richard W. Fox and James T. Kloppenberg, eds, A Companion to American Thought (Blackwell's, forthcoming).
egalitarian.

The work of feminists since 1970—often conducted in the courts—has done much to undermine gendered understanding of citizenship. But military service remains a major aspect of the citizen's relation to the state which is governed by gendered relationships and rules. Since the Gulf War, much discussion of women's relation to the military has focused on discrimination in promotion, sexual harassment, and the continued usefulness of the combat exemption. All of these discourses have taken place on the assumption that women's voluntary service is unproblematic. Most explicit discussion of combat participation and combat exemption has begun with the assumptions that women as a class want to eliminate the combat exemption, and that the army will remain an all-volunteer army in the foreseeable future. But the opinions of women officers and enlisted personnel diverge sharply on the matter of combat exemption; enlisted women are generally skeptical. Talk about the right to enter combat is not the same as talk about the obligation to enter combat at the behest of the state. As we discuss what is appropriate in an all-volunteer situation we are also setting the terms for what will be understood to be appropriate should Congress decide to replace the volunteer army with obligatory service.

The different obligation of men and women for military service—and the concomitant issues of men and women's different capacity for and control of violence, aggression and force—has been a minimally examined aspect of a gendered political culture. As I write, an intense debate on the range of gender identity which the military will permit is underway. This debate was initiated by the Secretary of Defense's order to reconsider the combat exemption for women serving as pilots and on warships, and by the reconsideration of the ban on openly gay and lesbian members of the military, resulting in the "don't ask, don't

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6 But see Charles Moskos, Army Women, Atlantic 70, 77 (Aug 1990) and Hearings on S 1507 before the Senate Committee on Armed Services, 102d Congress, 1st Sess 847-901 (1991).


Women, Civic Obligation and Military Service

This discussion is taking place in the context of an all-volunteer army, and has not yet addressed directly the implications of obligatory combat service for women.

In the essay which follows, I consider the most recent public debate on whether all citizens, including women, ought to be obligated to bear arms. This debate took place in 1979-81, in the context of President Carter's proposal for universal draft registration. That debate was embedded in the diffuse public discussion of the implications of the Equal Rights Amendment; in the focused debates in Congress, which passed a male-only draft registration law instead of Carter's recommendation (the title of this paper comes from a Congressional witness); and in arguments conducted within the Supreme Court, which denied the claim of a group of young men that male-only registration subjected them to unequal treatment under the law. In Section I, I describe the Vietnam era origins of the case that ultimately reached the U.S. Supreme Court as Rostker v Goldberg. In Section II, I offer some reflections on the relationship of women to war-making in the past. Section III discusses the military services women have performed in American wars. Section IV is an effort to set President Jimmy Carter's proposal of universal draft registration in the context of Rostker and follows the case to its conclusion; Section V offers some final reflections.

I

"[T]he teachings of history" observed Judge Dudley Bonsal of the U.S. District Court for the Southern District of New York in 1968, show "that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning." Bonsal rejected James St. Clair's claim that drafting only men constituted sex discrimination and a denial of equal protection of the laws. Even as Bonsal spoke, his words were becoming archaic; his footnotes cited not only a 1961 Supreme Court dictum that "woman is the center of home and family life" and therefore reasonably exempt from jury service should a state choose, but also a 1966 federal court opinion undermining that rule and requiring women's names to be placed in federal jury pools. Two years later, when Ruth Bader Ginsburg took over

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10 United States v St. Clair, 291 F Supp 122, 125 (S D NY 1968).
12 The court specifically cited Hoyt, 368 US at 62, to the effect that women are "still
the newly established Women’s Rights Project at the American Civil Liberties Union, two of the major cases on which Bonsal rested his reasoning—*Hoyt v Florida* and *Goesaert v Cleary*—were among her central targets; they would both be overturned within five years. But Bonsal could not know the future—James St. Clair, like many others, lost his challenge to the Vietnam draft.\(^4\)

Among those other cases was one initiated by a group of young Philadelphia men—Andrew Rowland, David Freudberg, David Sitman, and Steven Rowland—in the spring of 1971. The firm to which they turned—Kohn & Savett—had been taking many draft resistance cases pro bono; Stuart Savett felt a personal commitment, having himself narrowly escaped the draft by questioning misinformation he had been given by his own draft board, and having had his own success in overturning a draft classification placed on a mentally ill friend.\(^6\) Rowland’s case was turned over to the firm’s youngest associate, Donald Weinberg, who had graduated from Harvard Law School in 1970 and joined the firm after clerking for Judge Abraham Freedman of the Third Circuit. It was one of the very first cases of Weinberg’s career, and he would stay with it all the way to argument in the Supreme Court, a decade later. Within six months of the decision, Donald Weinberg would be diagnosed with lung cancer; he would die in 1983, at the age of 35.

The early briefs used something of a “kitchen sink” approach, Joanna Weinberg recalls now. Donald Weinberg had met his wife in law school; she was then teaching in the law and social policy program at Bryn Mawr, and she followed the case closely. “Everything went in: the war was unconstitutional; the draft was unconstitutional; the draft was gender specific for men.” But the people who brought the case were primarily conscientious objectors; “they really saw it as an anti-war case.”\(^7\)

regarded as the center of home and family life,” but even so, was constrained to mention the contrast with *White v Crook*, 251 F Supp 401, 410 (M D Ala 1966), which had undermined Hoyt’s exemption of women from jury service.

\(^{13}\) *Goesaert v Cleary*, 335 US 464 (1948).
\(^{15}\) Among the losing challenges to the Vietnam War draft were *United States v Fallon*, 407 F2d 621 (7th Cir 1969); *Suskin v Nixon*, 304 F Supp 71 (N D Ill 1969); *United States v Dorris*, 310 F Supp 1306 (W D Pa 1970); *United States v Baechler*, 509 F2d 13 (4th Cir 1974).

\(^{16}\) Telephone interview with Stuart Savett (Sept 1992).
\(^{17}\) Telephone interview with Joanna Weinberg (Feb 1993) ("Weinberg Interview").
The suit was initiated June 16, 1971, against Curtis Tarr, the National Director of the Selective Service system. Nearly a year later, Judge James H. Gorbey denied application for a three-judge panel and dismissed the complaint.\(^8\) Rowland appealed, and the following year the Court of Appeals for the Third Circuit denied—or held moot because of the end of the Vietnam War—most of the elements of the appeal. The court did think that the claim of unconstitutional discrimination between males and females continued to have vitality, and remanded for reconsideration.\(^9\) On remand, the court directed Gorbey to consider whether Rowland had standing and whether sex discrimination was a substantial constitutional question; upon such a finding, he was directed to convene a three-judge panel.\(^{20}\) Within a year, the panel—Max Rosenn, Joseph S. Lord, and Gorbey—denied Tarr's motion to dismiss the case as moot.\(^{21}\)

The reconstruction of the case sent shock waves through the original group of plaintiffs. The case had begun, after all, as an anti-war, anti-draft enterprise; gender discrimination was thrown in almost inadvertently. To argue primarily, or, as was now required, only on the grounds of gender discrimination meant to concede the rest: to concede that the government might justifiably declare war; to concede that the draft was not equivalent to servitude; to concede, in short, the substance of all that had driven them. To argue primarily on the grounds of gender discrimination conceded that if that discrimination were eliminated, if women were drafted, a draft would be acceptable. This was not at all what the Rowlands and Freundberg had signed on for. They dropped out. If Weinberg could not find another plaintiff, one who was comfortable with relying completely on gender discrimination, he would have no case to argue. Weinberg and his new colleague, Cecily Waterman, who had graduated from law school at Boalt Hall the year before, began to look for that plaintiff.

Robert Goldberg turned out to be that person. Cecily Waterman knew him as a friend who lived in her building; he was a medical school classmate of one of her friends. Goldberg was young to be in medical school. Politicized by the events of 1968-71, he had graduated from Haverford High School in 1971.

\(^{19}\) Rowland v Tarr, 480 F2d 545, 547 (3d Cir 1973).
\(^{20}\) Id.
\(^{21}\) Rowland v Tarr, 378 F Supp 766 (E D Pa 1974).
The draft lottery had just been instituted. "It was the first year when you couldn't avoid thinking about Vietnam because of student deferments; you had to confront what the war meant to you." Goldberg turned down a scholarship to Yale so he could enter an accelerated program at Penn State. He began college that summer, and immediately began to think through the possibility of conscientious objection. He would turn 18 in August.

"When I was 18 or 19," and thinking through the possibility of being a conscientious objector, Goldberg says now, "my issues were what they had been for the original plaintiffs. I had always opposed supporting the killing. . . . I had seen the Army medical manual—which conveyed that doctors were an integral part of the fighting force so they could repair people to go and kill. It said nothing about relieving pain and suffering. It was a perversion of medicine." Goldberg's lottery number was 300. He never completed the process of claiming conscientious exemption; draft needs were cut back in 1972, and Goldberg finished his liberal arts requirements and moved on to medical school. But even when the general draft ended and an all-volunteer army was substituted, physicians remained subject to the draft. By 1974, when Goldberg met Cecily Waterman, the lawsuit had refocused on sex discrimination; Goldberg felt it suited his thinking precisely. He was being trained side by side with women in medical school; if he were challenged to support the war he thought it reasonable that women receive a similar challenge.

"So I said to the lawyers, sure, why not? They didn't have to talk me into it. They didn't have to make arguments. I had no idea how big this thing would get, but it was what I was feeling. So I became part of it." When James St. Clair's lawyers raised the claim that the male-only draft represented unequal treatment of men and women under the law, they did so in a social context in which un-

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23 Goldberg Interview (cited in note 22).

24 Id. On June 25, 1975, Goldberg was permitted to intervene as a party plaintiff, the title of the case was changed, and the other plaintiffs dropped out. Goldberg v Tarr, 510 F Supp 292, 293 n 1 (E D Pa 1980).
equal treatment of women and of men was increasingly questioned, but in a legal context in which unequal treatment was pervasive. When Rowland and Goldberg and their colleagues raised the same question a few years later, the social and legal context had changed. By 1975, when Robert Goldberg joined the case, every one of the old precedents—*Muller v Oregon* (which had upheld protective legislation for women), *Goesaert*, and *Hoyt*—had been undermined or actually overturned. In the process, the traditional language of protection had eroded, at least so far as civil affairs were involved. If it could no longer be said with a straight face that women's civic obligation was "to keep the home fires burning" then of what did women's civic obligation consist? The remaining participants in the Goldberg suit were prepared to say that it consisted of going to war, along with everyone—read men—else.

II

The archetypal roles of women in wartime are two: both were named by the Greeks, and both position women as critics of war. Antigone and Cassandra are both outsiders, and therefore are less subject than men to ambivalence about doing their share or abandoning their comrades. They are free to concentrate on the price rather than the promise of war, secure in the knowledge that if the war turns out well for their families they will share in the advantages victory brings. Antigone confronts Creon with the demand that her brother's body be buried. Antigone understands that she cannot affect the outcome of battle, but she claims the power to set ethical limits on what men do in war. Cassandra, who foresees the tragic end of the Trojan War, expresses generalized anxiety and criticism of the war.

To define the woman citizen as Cassandra is to constrain her

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permanently to the role of outsider as well as critic; at her worst Cassandra merely whines. The role of Antigone, with its claim that women can judge men is perhaps more appealing, but it is best suited to exhausting moments of dramatic moral confrontation. Moreover, Antigone cannot make her claim effective until she is dead. Both roles maintain the classic dichotomy in which men are the defenders of the state and women are the protected. Neither addresses the role of the woman as citizen of a republic.

When the United States was founded, the theoretical understanding of the relationship of women to the war-making state retained much of its classical construction. The word “citizen” still carried overtones inherited from antiquity and the Renaissance, when the citizen made the continued existence of the city possible by taking up arms on its behalf. Arms-bearing was central to this strain of the republican tradition. This mode of thinking, this way of relating men to the state, had no room in it for women except as objects of contempt. The principal section on women and the state in Machiavelli’s *Discourses* is entitled “How States are Ruined on Account of Women.”

Hanna Pitkin has recently reminded us how central to Machiavelli’s thought was his comment that “[f]ortune is a woman, and it is necessary in order to keep her under, to cuff and maul her.”

The relationship between women and the State in the English colonies was governed by a patriarchal and hierarchical system which stretched down from King and Parliament to the “Little Commonwealth” that was the family. In this construction, King was to subject as father was to child—or, more precisely, as husband was to wife. “The woman’s own choice makes such a man her husband,” observed Governor John Winthrop of the Massachusetts Bay Colony, “yet being so chosen, he is her lord, and she is to be subject to him, yet in a way of liberty, not of bondage; and a true wife accounts her subjection her honor and freedom. . . . Even so, brethren, it will be between you and your magistrates.” For Winthrop, civil liberty “is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free.”

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The relationship between husband and wife that Winthrop described was embedded in the English common law of domestic relations, which transferred a woman's civic identity to her husband at marriage. Husbands were entitled to the use and control of their wives' property. From that principle, there unfolded an extensive array of practices which seemed to follow logically. Since a wife lacked power over property she lacked the ability to enforce a will independent of that of her husband. The best known of these practices, perhaps, is the rule that a wife was not held culpable for civil crimes committed in the presence of and with the encouragement of her husband, since she was presumed to act under his coercion. Whether logically linked to the absence of property, or developed out of ancient analogies with guardians and wards, it was also understood that husbands controlled the physical bodies of their wives, for sexual access or for corporal punishment.

Traditional constructions of state authority were destabilized in the pre-revolutionary years as patriot leaders struggled to articulate alternate and more satisfactory relationships between ruler and ruled, between the individual and state authority. As James Kettner has splendidly shown, they retained an old understanding of a link between arms-bearing and citizenship, but also moved from a medieval language of hierarchical relationship to a system which stressed reciprocity between state and citizen.

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20 A good source to observe the continuation of these practices in the early United States is in Tapping Reeve, The Law of Baron and Femme, Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of Courts of Chancery 73 (Chauncery Goodrich, 2d ed 1846). Reeve points out two exceptions to the practice of shielding wives on the grounds that they could not resist husbands' coercion: wives could be charged with treason, "an offence," writes Reeve, "so dangerous to society, that even the coercion of a husband is no excuse," and keeping a brothel. Even if the husband knew of her behavior, brothel-keeping "is an offence of which the wife is supposed to have the principal management." Id at 73. See also Marylynn Salmon, Women and the Law of Property 41-42 (North Carolina, 1986).

21 For general comments on the husband's power over the person of his wife, see Reeve, The Law of Baron and Femme at 64-66 (cited in note 30). For the relationship between the wife's lack of power to contract and the husband's power over her body, see id at 98: "It is a general rule that a wife cannot so contract, as to bind herself; her contracts are said to be void in law. The principles on which this doctrine is founded are two: 1st. The right of the husband to the person of his wife. This is a right guarded by the law with the utmost solicitude; if she could bind herself by her contracts, she would be liable to be arrested, taken in execution, and confined in a prison; and then the husband would be deprived of the company of his wife, which the law will not suffer. 2d. The law considers the wife to be in the power of the husband; it would not, therefore, be reasonable that she should be bound by any contract which she makes during the coverture, as it might be the effect of coercion. On the first ground she is privileged for the sake of her husband; on the last, for her own sake." Id.

22 James H. Kettner, The Development of American Citizenship, 1608-1870 143-79
American constitutional argument, like liberal political theory in general, has generally rested on the confidence that individuals can be authentically bound only by rules which they themselves have chosen, and that authentic government is shaped by freely chosen agreements among the ruled. Much American constitutional talk proceeds as though the Revolution had created a state of nature and as though the Constitution were a Social Contract. One sees this very clearly in the most widely circulated pamphlet of the Revolution, Thomas Paine's *Common Sense*.

Having consented to the political order, all obligation becomes individually elected obligation. The burdens of citizenship, in theory, rest on all citizens alike.

Social contract thinking in the early republic thus made space, as James Kettner has shown, for a newly developed concept of allegiance (as demonstrated by one's physical presence and emotional commitment), which gradually came to be given equal weight with old traditions of military service. An allegiance defined by location and volition was an allegiance in which women could join. While the old language of republicanism deeply distrusted women's citizenship, a liberal language of independence and individual choice could accommodate women as full participants in the life of the state.

Carole Pateman has warned, however, that men and women are differently situated in relation to consent theory; men are imagined as free agents, but most women enter the social contract already bound by marriage and by antecedent obligations to their husbands. Women have dropped out of the story well before men gather—in Thomas Paine's words—under "some convenient tree" to commit themselves to each other. Women's relation to men is understood to be both natural and subordinate; there is no place in the archetypal social contract for them to claim rights as men do.

Pateman's reading helps us understand why the founding generation did not simultaneously reform the law of domestic

(North Carolina, 1978). This modern and revolutionary understanding of the citizen reached back to the Renaissance to include those who would take up arms for the defense of the republic.


relations. Patriot men understood themselves to be sons breaking free of the control of their political fathers, but they did not abandon their own claims to domination over the women of their family. The founders brought the law of coverture virtually intact into the republic, maintaining the claims of the married man to his wife's body, her earning power, and her property. It was understood that she had traded these for his protection, both civic and personal; he was the protector, she the protected. Thus a toast offered on the first anniversary of the Declaration of Independence: "May only those Americans enjoy freedom who are ready to die for its defence." In a formulation like this one, to be free required a man to risk death. The connection between the Republic and male patriots—who could enlist—was immediate. The connection between the Republic and women—however patriotic they might feel themselves to be—was remote. Antique legal practices were slowly changing in response to eighteenth century conditions, but they were not revised directly or critically. Much of the old law of domestic relations survived, virtually unchanged, into the early republic. This asymmetry meant that men and women would be differently situated in relation to rights and obligations as they developed throughout the history of the republic.

As they emerged from the war of the Revolution, the founding generation transmitted to its successors the understanding that bearing arms was both a right and an obligation of citizenship. Indeed, this dual character of arms bearing is what has made the murkily drafted Second Amendment so hard to decode: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The generic terms, "people" and "citizens" blurred the issue of gender. Even Joseph Story, usually very careful about who he means when he says "citizen," left it vague when he discussed arms bearing in his magisterial Commentaries on the Constitution: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic." He probably meant only men. Madison probably

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27 Joseph Story, III Commentaries on The Constitution of the United States 746, §
meant only men. However, eventually other usages of “citizens” and “people” in the Constitution and in statutes would be understood as denoting both men and women.

What J.G.A. Pocock has called “the [American] language of myth and metahistory” continued to connect citizenship to military service, and to set the context in which the reciprocity of rights and obligations was understood. In the twentieth century, the relationship between citizenship and military obligation has generally been debated in the context of challenges to a wartime draft. Defending the draft during World War I, the Supreme Court expressed a capacious civic obligation to military service: “[t]he highest duty of the citizen is to bear arms at the call of the nation,” observed Chief Justice White, speaking for a unanimous Court. “[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.”

The debate over the relationship between citizenship and military obligation has rarely invoked gender. But, in 1928, the Supreme Court addressed women citizens’ obligation to bear arms. The pacifist Rosika Schwimmer applied for naturalization. Responding to the standard questionnaire, she answered “no” to the question “[i]f necessary, are you willing to take up arms in defense of this country?” No one had ever calculated the number of women who offered the same answer or left the question blank. But Schwimmer had an international reputation for pacifism and war resistance, and her application was treated as a political gesture from the outset. Her negative reply to question number 22 became the basis for denial of citizenship, even though, as Oliver Wendell Holmes would observe in his classic dissent when her case reached the Supreme Court, as a fifty-year

1890 (Da Capo, 1970)(1833).


39 Selective Draft Law Cases, 245 US 366, 368, 378 (1917). White cited Vattel, 3 Law of Nations, ch 1 & 2, and noted that nine of the original 13 state constitutions articulated the “duty of the citizen to render military service and the power to compel him against his consent to do so,” id at 380, mentioning particularly the Pennsylvania constitution of 1776: “That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary. . . .” Speaking for a unanimous Court, White confessed their inability “to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation,” can be construed as involuntary servitude. Id at 390.
old woman, she "would not be allowed to bear arms if she wanted to."40 The Court upheld the denial of citizenship, writing "[t]hat it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."41 Schwimmer's case was rare—an episode in the history of attacks on foreign pacifists. Although the idea of the citizen-soldier was vigorously deployed in discussions of the World War II draft, no serious efforts were made to draft women, even for non-combatant service in the women's auxiliary forces (e.g. WACS, WAVES), or as nurses.42

Talk about the relationship between citizenship and military obligation declined after World War II. Korea and Vietnam were not popular wars. During the Vietnam era, opponents of the war and draft resisters often stressed their loyalty to conceptions of citizenship which involved a critical allegiance and a refusal to participate in ill-considered, ill-founded national policies. Debate about the link between military service and civic obligation was dampened by the ability of many opponents of the war to avoid service by claiming student deferments or enlisting in the National Guard.43 The initiation of an all-volunteer military force after Vietnam ended the draft and with it most discussions of military obligation.

III

Though Americans have never embraced policies creating obligations for women to go into combat in the national defense, women have long been part of American military forces to a far greater extent than is usually appreciated.44 As Barton Hacker succinctly explained some years ago, early modern armies—including those in British America—lived off the country-

40 United States v Schwimmer, 279 US 644, 653 (1928).
41 Id at 650.
43 See Morris Janowitz, The Reconstruction of Patriotism: Education for Civic Consciousness 57-61 (Chicago, 1983); All-Volunteer Armed Forces, Hearing Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 95th Cong, 1st Sess 31 (1977) (Statement of Morris Janowitz, Professor of Sociology, University of Chicago).
44 I have discussed this matter in Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America ch 2 (North Carolina, 1980), and 'History Can Do It No Justice' at 10-23 (cited in note 26).
side and travelled with hundreds of civilians who made their livings cooking, selling small items, and laundering for the troops. Many of these civilians were women, but only a small proportion of these campfollowers were prostitutes.\textsuperscript{45} In British practice, with which the colonists had become familiar during the Seven Years War, each company had its own allocation of women, usually but not always soldiers' wives and occasionally mothers; when the British sailed their women sailed with them. In the original complement of eight regiments which the British sent to put down the American rebellion, each regiment had 677 men and 60 women, a ratio of approximately 1 to 10.\textsuperscript{46}

In the newly independent states, Patriots were skeptical about giving women official status in the army; Washington objected to a fixed quota of women. But the women followed nevertheless. By the end of the war, Washington's General Orders allowed no more than one woman to draw food rations for every fifteen men in a regiment. Some, no doubt, came for a taste of adventure. Generals' wives, like Martha Washington and Catherine Greene, took their right to follow as a matter of course, and spent the winters of Valley Forge and Morristown with their husbands. However, the vast majority of the women who followed the armies were impoverished. Wives and children who had no means of support when their husbands and fathers were drawn into service, followed after and cared for their own men, earning their subsistence by nursing, cooking and washing for the troops in an era when hospitals were marginal and the offices of quartermaster and commissary were inadequately run. Although these women—certainly many thousands, although estimates vary—were sometimes referred to as "women of the army," they had no official position, and they were never eligible for veteran's pensions or benefits.\textsuperscript{47}

Between 1750 and the American Civil War, western armies were radically transformed into modern bureaucratized institu-


\textsuperscript{46} Walter Hart Blumenthal, \textit{Women Camp Followers of the American Revolution} 16 (\textit{Women in America} reprint, Arno, 1974)(1952), and "Return of the Number of Men, Women and Children of the British and Foreign Regiments. . . .", in \textit{New York Historical Society 49 Collections} 84-89 (1916). See also Kerber, 'History Can Do It No Justice' at 11-13 (cited in note 26).

\textsuperscript{47} For a rare personal account of the experiences of one of these women, Sarah Osborn, who brought food to soldiers under fire at Yorktown, see John C. Dann, ed, \textit{The Revolution Remembered: Eyewitness Accounts of the American Revolution} 240-50 (Chicago, 1980).
Uniforms denoted status and campfollowers and hangers-on were energetically, though not always successfully, excluded. By mid-century, in the Crimean War and the American Civil War, armies had officially excluded all women but nurses; the exclusion of women was the mark of a "modern" army. George Washington's recruits were part of this transformation.

There were even more women at the front in the Civil War; Jane Schultz has found hundreds on the margins between civilian and camp life, cross-dressing as spies and soldiers, cooking and laundering. Based on federal card files of women who nursed, cooked and laundered in Union hospitals, Schultz estimates at least 20,000 women who worked at some time during the war in the military hospitals of the Union and the Confederacy. Women nurses and physicians who served in World War I maintained a long campaign to achieve military rank. Led in their campaign by the redoubtable Julia Stimson, they were granted only "relative" rank, that is, a male officer would always outrank a woman of similar status.

Not until World War II did women achieve, as Susan Hartmann has put it, "permanent, regular service in the military establishment." Some 350,000 women—4,000 of them African American—were involved in the four military services, in a wide range of military activities short of combat. At hearings on the reorganization of the selective service system in 1948, General Dwight D. Eisenhower spoke of women's wartime service with admiration and said that he was "convinced that in another war [women] have got to be drafted just like men."

The juxtaposition of women and military service profoundly disturbed the sexual order. The recruitment of women raised major questions about the relationship of gender to military obligation and service. In developing a rationale for women's units, military personnel and elected male officials stressed women's docility and usefulness to men. Regulations excluded women from

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48 Hacker, 6 Signs at 653, 666 (cited in note 45).
49 Jane E. Schultz, The In hospitable Hospital: Gender and Professionalism in Civil War Medicine, 7 Signs 363 (1992), and Women at the Front: Gender and Genre in Literature of the American Civil War, 70, 189, 197 (1989) (unpub Ph D Diss, Univ of Michigan).
51 Susan M. Hartmann, The Home Front and Beyond: American Women in the 1940s 31-32 (Twayne, 1982).
52 Hearings on S 1641 Before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services, 80th Cong, 2d Sess, 5563-84 (1948).
combat duty, limited the numbers who could be accepted and the
rank to which they could rise (until 1967 no woman could serve
in a command position) and offered fewer fringe benefits than
were received by servicemen of the same rank. Women Air Ser-
vice Pilots were forbidden from taking male passengers and from
sharing a cockpit with a male co-pilot.3 Women would never su-
pervise male personnel. “In 1944,” Susan Hartmann writes, “the
marine corps got around the ticklish problem of female authority
by ruling that it was proper for a woman officer to direct men
when her orders were construed to be emanating from her male
superior.”

To receive dependents’ assistance, service women had to
prove that they provided the major support; male servicemen did
not have to offer this proof.5 Women’s Air Service Pilots were
all white, denied military status and ineligible for veterans bene-
fits.6 For their part, advocates of women’s service have generally
stressed the willingness of women to share the responsibili-
ties of citizenship. They were cautious about how much equality
they asked for, and hesitated to criticize asymmetry of status
with men.

Demobilization at the end of World War II had seemed to
restore traditional gender relations to the military. In 1945, the
army included 153,600 enlisted women, which represented more
than two percent of the force. This number was quickly reduced
to 10,000; between 1945 and 1968 the number of women in the
Army ranged from 10,000 to 15,000, which accounted for only one
percent of the force. However, by the early 1960s, manpower
specialists in the Pentagon were beginning to worry about the

53 Hartmann, The Home Front and Beyond at 46 (cited in note 51).
54 Id at 38 (emphasis added). Gender and race intersected in the construction of mili-
tary status. Only female nurses received equal pay and allowances and full military rank.
Male nurses were not commissioned as Second Lieutenants in the Army or Ensigns in the
Navy but were used as corpsmen or medics even when they had nursing degrees. African-
American nurses were segregated, employed only to care for black wounded and for
prisoners of war. See Darline Clark Hine, Black Women in White: Racial Conflict and Co-
operation in the Nursing Profession, 1890-1950 165-66 (Indiana, 1989). In a strictly segre-
gated army, four black WACs were court-martialed when they refused to perform menial
hospital tasks instead of the medical technology for which they were trained; the sentence
of a court martial to one year at hard labor was overturned only after an outcry from
citizens’ groups including the NAACP. General Court Martial of Frances A. Futrell et al.,
Fort Des Moines, Iowa, Jan 8-10, 1945, (CM274866).
55 Although Frontiero v Richardson, 411 US 677 (1973), struck down a similar provi-
sion for those IN the service, it did not discuss dependents’ assistance for veterans.
56 Not until 1977, after a major lobbying campaign, and in a different political cli-
imate, would this be changed.
quality of male recruits, and the pressures of the Vietnam War eroded some of the traditional restrictions. As a result the percentage of women was allowed to rise to two percent, and women were found giving orders to men. Beginning in 1967, women could serve in command positions.57

The end of the Vietnam War and the shift to an all volunteer army in 1973 forced military planners to consider an increase in the recruitment of women. The Central All-Volunteer Force Task Force initiated by the Assistant Secretary of Defense for Manpower in 1972 was framed by people who predicted—with good reason—“shortages of male recruits after the end of the draft,” a shortage they predicted would last for at least five years. The Task Force anticipated that the passage of the Equal Rights Amendment would make different age, marital status, and educational standards for male and female recruits illegal. Recognizing that women generally brought to their military service higher levels of education than their male counterparts, the Task Force urged aggressive recruiting of women and the extension to women of benefits equal to those offered men.58

The development of an all-volunteer force led to extended analyses of whether women were capable of what were called “non-traditional” assignments, including jobs traditionally performed by men. Military women were less likely to be viewed primarily as people who freed men to do “men’s” jobs.59 The service academies—West Point, Annapolis, Colorado Springs—opened their enrollment to women in 1976; the Women’s Army Corps and other separate women’s units were absorbed by the male services.60 Women did indeed enlist in the

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57 See The President’s Task Force on Manpower Conservation, One-Third of a Nation: A Report on Young Men Found Unqualified for Military Service 1 (Jan 1, 1964); Women in the Military, Hearings before the Subcommittee on Military Personnel of the Committee on Armed Services, 96th Cong, 1st and 2d Sess 264 n 17 (1979 and 1980) (appendix to statement of Diana A. Steele, American Civil Liberties Union) (citing 81 Stat 374-84 (1967)).


59 See, for example, some of the early discussions of the role of women in an All-Volunteer Force: U.S. General Accounting Office, Report to the Congress, Problems in Meeting Military Manpower Needs in the All-Volunteer Force (Department of Defense, 1973).

60 In general, Air Force had more women than the others, but West Point caught up and is now at about the level with the Air Force academy. Annapolis continues to have considerably fewer women—both in absolute numbers and proportionately—than the others, because a higher proportion of naval jobs are defined as combat positions. There
armed services and the All Volunteer Force depended on their presence. Whatever costs the military had to pay for their enlistment—particularly those related to their discomfiting capacity to become pregnant—were counterbalanced by their substantially lower rates of AWOL and of violent off-duty behavior. Richard Danzig, who served as Deputy Assistant Secretary of Defense for Manpower in the Carter years, observed that, by the late 1970s, "it was evident to anyone that recruiting women was a good thing. You were [drawing in] more [recruits] from the higher [qualifications]; you were taking nine percent of the total force, and you didn’t have to reach in to the [less qualified men] in the pool. . . . Every woman was a substitute for a man at the bottom of the pool. . . . The women cost less to recruit; they stayed in longer. . . . Women were performing impressively. Statistical indicators [showed] that women were doing well. We [in the Office of Manpower] kept asking the services to add to the number of women they took; to raise their targets higher than ten percent. The Defense Department also asked Congress to repeal the laws excluding women from combat duty; Congressional committees refused. In 1981 nearly 74,000 women were in the army alone; there were more female army officers than there had been female enlisted personnel twenty years before.

The rule against assigning women to combat duty continued, and combat and combat related restrictions excluded women from a range of job positions that has been estimated as high as seventy-five percent. But the meaning of the combat exemption was increasingly contested, and what counted as combat positions increasingly fluid. As the boundaries between combat and non-
combat positions eroded, the combat/non-combat distinction was increasingly accused of functioning as a social marker. "If all the women were discharged tomorrow," Major General Jeanne Holm observed in 1982, "most of the distinctions would be abandoned the day after."66

IV

When President Jimmy Carter proposed universal mandatory draft registration in 1980, the obligatory dimensions of military service once again became the subject of widespread popular debate. Carter sought a measured response to the Soviet Union's invasion of Afghanistan, one which would not add to the conflagration but would send a signal that the United States took this invasion seriously. Universal mandatory draft registration was to be a sign of public readiness; conscientious objectors could register and appeal later. The Carter proposal of February 11, 1980 required women as well as men to register on their eighteenth birthday.67

Carter's proposal was consistent with his characteristic skepticism of the gendered traditions of the military services. His administration had previously criticized what it took to be excessive veterans' preference policies in civil service hiring.68 The federal government, every state, and many county and municipal governments, practice some form of veterans' preference in scoring civil service examinations.69 Most states follow the federal government in granting veterans a point advantage: disabled veterans often receive an additional ten points on their examination score, nondisabled veterans often receive a five point bonus. The advantages to veterans—who, until recently have been overwhelmingly male—are substantial. Women's rights groups shared

66 Karst, 38 UCLA L Rev at 531 n 46 (cited in note 36). The governing principle, Karst argues, is that "[w]omen can be in positions in which they will be targets, but cannot deliver violence in line of sight firing." Id at 532. See also Judith H. Stiehm, Arms and the Enlisted Woman 198-205 (Temple, 1989).


69 Fleming and Shanor, 26 Emory L J at 16-17 (cited in note 68).
Carter’s disappointment in the failure of his efforts to limit extensive veterans’ preference programs in the federal government and elsewhere. Veterans’ preference, after all, is a construction of the reciprocal obligations of military service. The practice is a gesture of gratitude by the community, which offers the tax-supported jobs in its control to those who have disrupted and risked their lives to protect it. However, in a context in which large numbers of men serve—most involuntarily—and small numbers of women serve, all voluntarily, the result of veterans’ preference is to permit one gender virtually to monopolize all positions on the public payroll except those “marked” female—switchboard operators, file clerks, secretaries—which men have determined they do not want. Only a year before Carter’s universal registration proposal, the Supreme Court upheld Massachusetts’ capacious veterans preference statute, which gave all veterans, whether or not they had seen combat duty, lifetime privilege in the competition for state positions.\footnote{Personnel Administrator of Massachusetts \textit{v} Feeney, 442 US 256, 281 (1979).}

Carter’s formal statement on his proposal to register women unwittingly embodied the ambivalence which even proponents of the measure felt. He began by describing universal registration as a recognition of changing times; then he called it an obligation:

My decision to register women is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious . . . that women are now providing all types of skills in every profession. The military should be no exception. In fact, there are already 150,000 women serving in our armed forces today . . . . There is no distinction possible, on the basis of ability or performance, that would allow me to exclude women from an obligation to register.\footnote{Hearings on Military Posture and HR 6495 before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong, 2d Sess 135 (1980) (statement of Jimmy Carter, President of the United States).}

He promised to retain women’s combat exemption but almost immediately added that women were already very close to combat exposure. He linked registration to women’s expanded willingness to meet “the responsibilities of citizenship. That is as true of the military services as it is of the political arena or the
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Then, Carter raised the political stakes by introducing the proposed Equal Rights Amendment into his argument: "Just as we are asking women to assume additional responsibilities, it is more urgent than ever that the women in America have full and equal rights under the Constitution. Equal obligations deserve equal rights." But, Carter emphasized, equal registration would not necessarily mean equal vulnerability to combat duty. "Equity" does not require, Carter said, "that men and women be inducted in equal numbers. . . . Equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively.

Richard Danzig and his colleagues thought that Carter's universal selective service registration represented common sense; they understood registration primarily as a symbolic matter—"the lead time was not great; the information eroded fairly quickly; at mobilization you could set up a system rapidly." They had, in fact, testified in favor of registering women even before Carter's proposal. They were surprised by the intensity of Congressional resistance.

The House and Senate Armed Services Committees held extended hearings on the President's proposal. The President and his supporters sought to separate the issue of universal registration from the issues of the actual draft and the use of women in combat. They argued that decisions on whether women would actually be drafted (and, if so, whether mothers would be exempted) and whether women would be placed in combat positions could be left for future debate. They also argued that registration did not necessarily mean that one would be drafted; men who

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72 Id.
73 Id.
74 Presidential Recommendations for Selective Service Reform at 23 (cited in note 67).
75 Danzig Interview (cited in note 62).
76 See Reinstitution of Procedures for Registration under the Military Selective Service Act, Hearings before the Subcommittee on Manpower Personnel of the Senate Committee on Armed Services, 96th Cong, 1st Sess 10-11 (1979) (statements of General Bernard W. Rogers, Chief of Staff, U.S. Army; Admiral Thomas B. Haywood, Chief of Naval Operations; General Lew Allen, Jr., Chief of Staff, U.S. Air Force; and General Louis H. Wilson, Commandant, U.S. Marine Corps). For Pirie's doubts that in the case of a draft, men would insist on combat duty for women, see Hearings before the Subcommittee on Military Personnel of the House Committee on Armed Services at 24-25 (cited in note 63).
77 Danzig Interview (cited in note 62).
planned to request exemption as conscientious objectors were still required to register.

Opponents insisted that the issues were linked. They argued that since the primary goal of Selective Service was to identify combat-ready men, there was no need to register women if they were not going to be used in combat. When both House and Senate committees rejected registering women, Senator Nancy Kassenbaum introduced a resolution on the floor of the Senate that "would have prevented the President from registering men unless he also registered women." 78

Ultimately, Congress authorized a male-only draft registration and Robert Goldberg and his colleagues challenged the constitutionality of selective service for men only in court. These debates—in Congress and in the courts—necessarily involved the expression of ideas about the appropriate military roles and obligations of men and women. The discourse revealed ambivalence and anxiety, both on the left and on the right, which filtered also into the contemporaneous debate on the Equal Rights Amendment. 79

Indeed, political scientist Jane Mansbridge has virtually blamed the defeat of the ERA on the failure of proponents to defuse the military issue, and has claimed that feminists "unconsciously and occasionally consciously" restricted debate about women in combat. 80 As Jane De Hart and Donald Mathews have recently shown, even when discussion of the implications of the ERA for military obligation was encouraged, as it was in North Carolina, opponents were not convinced. 81 One of the major rocks on which the ERA debates foundered was the claim that proponents were flinging innocent young girls into the military machine—there to be treated as no better than men, and to be brutalized. "Today', a mother wrote Senator Sam Ervin after the ERA had passed the Senate, 'I am ashamed and terrified at what the future holds for my three little girls. Will my shy, sweet

78 Herma Hill Kay, Text, Cases and Materials on Sex-Based Discrimination 21 (West, 2d ed 1981).
79 Carter had recognized this from the first; his statement had mentioned ERA as a necessary component: "Equal obligations," he said, "deserve equal rights." See Presidential Recommendations for Selective Service Reform at 23 (cited in note 67).
81 Mathews and De Hart, Sex, Gender and the Politics of the ERA at 138-40 (cited in note 80).
Tommy be drafted in six years? So modest I can’t even see her undress. Oh God!... I can’t stand it. I just can’t bear it.'... To this mother, ‘Sex’ meant the intimate privacy of shy little girls and equality meant ravaging them, stripping away the protection of innocence and thrusting them into battle. It is impossible to understand the opposition to the ERA without appreciating this dimension of military obligation: for opponents, the ERA stood for defilement; to resist the ERA was a rite of purification.\textsuperscript{82}

In the anxious debates on military service, the ancient connection, still not well understood, between arms bearing and citizenship, and between citizenship and manhood, remained a subtext. Occasionally the subtext was clearly revealed. Richard White, Chair of the Military Personnel Subcommittee, observed that choices about registration were contingent on whether one believed all young people “owe a certain number of years to the U.S. government.”\textsuperscript{83} The subtext had its own novel dimensions; since the administration was not challenging the combat exemption, the registration of women would actually increase the proportion of drafted men who would be exposed to combat or combat related positions.\textsuperscript{84} And, although supporters of registration tried to keep their distance from its implications for the exercise of violence by women, many regarded it as a slippery slope—from registration, to the voluntary exercise of violence by women, to a future in which women would be required to train for and exercise violence.\textsuperscript{85}

Feminists and liberals who testified on the issue rarely supported either registration or the draft. Most opposed the entire package. Pat Schroeder of Colorado sneered at draft registration as an idle gesture and a waste of money which could be better spent buying spare parts so that we really could frighten the Russians.\textsuperscript{86} However, when pushed into a corner, feminists generally conceded the legitimacy of a draft, and emphasized that if

\textsuperscript{82} Id at 162-63. On the cultural bases of resistance to the ERA, see ch 6.

\textsuperscript{83} Hearing on National Service Legislation before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong, 2d Sess 101ff (1980).

\textsuperscript{84} See Hearings on Military Posture and HR 6495 at 151 (cited in note 71). In 1980, six out of seven men were in non-combat positions; five percent of army occupational classifications were combat but they accounted for forty-three percent of all army jobs. Id.

\textsuperscript{85} “... [V]iolent sacrifice and state-disciplined service have been imagined in American culture to be masculine domains.” Cynthia Enloe, \textit{The Morning After: Sexual Politics at the End of the Cold War} 202 (Berkeley, 1993).

\textsuperscript{86} Selective Service Registration Hearing Before the Task Force on Defense and International Affairs of the House Committee on the Budget, 96th Cong, 2d Sess 1-5 (1980) (testimony of Patricia Schroeder, United States Representative, Colorado).
there had to be draft registration, it should include women as well as men. No one played Rosika Schwimmer. No one played Antigone, no one played Cassandra.

Judy Goldsmith, testifying for NOW before the House Armed Service Committee, was one of many liberals who linked military service to citizenship in very traditional terms. If there is to be registration and a draft, she said, "NOW believes they must include women. As a matter of fairness and equity. . . . Any registration or draft that excluded females would be challenged as an unconstitutional denial of rights under the fifth amendment."87

Goldsmith focused on what acceptance of a military obligation would do for women in a non-military context; it would enable them to claim the veterans' preferences which permeated the social order. These preferences were implicit: "Those who oppose the registration and draft for females say they seek to protect women. But omission from the registration and draft ultimately robs women of the right to first-class citizenship and paves the way to underpaying women all the days of their lives. Moreover, because men exclude women here, they justify excluding women from the decisionmaking of our Nation. . . ."88

Significantly, these preferences were also explicit, embedded in federal and state civil service laws which barred well-paying jobs in precisely those fields, like police work, which women were just beginning to enter, and in the jobs and training which the military itself offered:

Discrimination against women in the military depresses opportunities, career paths, training, and benefits for women. The military provides thousands of jobs, training programs, and educational opportunities which are, for the most part, presently closed to women. Military pay, which is on the average some 40 percent higher than female civilian pay could be the only way out of poverty for countless young women. Restrictions on women in the military, far from protecting them, serve to continue their second-class citizenship, pay and opportunity. And this discrimination exercised by the military affects women's lives, and employment opportunities and wages throughout their entire work lives because of veterans preferences.89

87 Id at 38 (testimony of Judy Goldsmith) (emphasis added).
88 Id at 40.
89 Id. In Hearings on Military Posture and HR 6569 at 82 (cited in note 71), Goldsmith makes the point that "approximately 83% of enlisted women are in the four lowest
Goldsmith concluded by returning to the combat exemption:

The discrimination against women in the military has other far-reaching consequences. Being told that they are unfit for combat training, that they need protection, women are more readily victims of violence of every kind. Without training and the confidence that they can defend themselves, most women live in daily fear of physical assault. One must ask... whether a would be rapist would be less likely to attack a woman if he thought she had been trained as a Marine.90

Comfortably misunderstanding the point, Kathleen Teague, representing the Eagle Forum in the absence of Phyllis Schlafly, replied, "[t]he purpose of the military, of course, is the defense of our country. It is not to provide upward mobility or career opportunities for women."91

Teague was an effective voice for the opposition. The "right" to be excused from the draft was a right "which every American women has enjoyed since our country was born," and she wanted to know what they would get for giving up their "constitutional right to be treated like American ladies."92 In seeking equitable treatment of men and women, Goldsmith and her colleagues had emphasized the equality of men and women. The implications of equality, as Assistant Secretary of Defense Richard Pirie observed during the hearings, led straight to a military obligation: "Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be

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90 Selective Service Registration at 41-42 (cited in note 86).
91 Id at 71.
92 "Our young women have a constitutional right to be treated like American ladies, with the respect and the chivalry that ladies are accorded in the Judeo-Christian culture. . . ." Hearings on Military Posture and HR 6569 at 105 (cited in note 89).
liable to serve as draftees if conscription is reinstated. Teague and her colleagues emphasized difference, a difference embedded in traditional patterns of “respect, chivalry,” and religious culture. “Servicewomen are not fungible with servicemen,” said Teague: “on the average, women have only 60 percent of the physical strength of men. . . . Motherhood is not fungible with fatherhood. . . . Our daughters are not fungible with our sons. The drafting of wives is not fungible with the drafting of husbands. . . .” Registration was no idle gesture; it was preparation for real conflict. Teague refused to treat it as an emblem of equal status under law. “We expect our servicemen to be tough enough to defend us against any enemy—and we want our women to be feminine and human enough to transform our servicemen into good husbands, fathers and citizens upon their return from battle.” Like Tommy’s mother, she harbored no illusions about military life; the Tailhook scandal a decade later would not surprise her. “We don’t want our daughters subjected to the Army environment where there is little or no privacy, where the rape rate is considerably higher than in civilian life, where there is open toleration of immoral sex . . . where illegitimate births receive equal honor and financial rewards with legitimate births.” For Teague, the maintenance of gender difference was a matter of civil rights: “Our young women have the right to be feminine, to get married, to build families and to have homes. Our daughters should not be deprived of rights which every American woman has enjoyed since our country was born. . . .”

Most importantly, in making this proposal, the opponents of the ERA had finally shown their hand: Teague and her colleagues were not going to give up this right to be free of a military obligation “just because a handful of women, unhappy with their gender, want to be treated like men.”

A few months before the invasion of Afghanistan, Donald Weinberg received a notice from the Clerk of Court for the Third Circuit. Since no action had been taken for a year, unless he did something in thirty days the Goldberg case would be dismissed. There was a “flurry of activity,” Joanna Weinberg re-

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93 Id at 7.
94 Id at 105.
95 Id at 103.
96 Id at 105.
members. The Selective Service Board asked for a summary judgement because of the shift to an all-volunteer army; the three judge panel denied their request. Weinberg and his colleagues prepared, finally, for their court appearance. As they did so, Carter proposed universal selective service registration and Congress began to debate it. "It hit the press; there was immense publicity," Joanna Weinberg recalls. Isabelle Pinzler of the American Civil Liberties Union and Barbara Brown of the Women's Law Center in Philadelphia began to work with Weinberg. Shortly before the case went to trial in 1980, President Carter's proposed universal selective service registration failed, and Congress had established a male-only draft.

Goldberg and his colleagues won. The District Court emphasized that "[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." It placed on the government the responsibility of establishing that "the exclusion of women is substantially related to an important governmental function." The court would not accept "outdated stereotypical notions" or "administrative convenience" as a basis for gender discrimination. "Equal protection involves protection from seemingly well-intended classifications that in fact relegate women to an inferior status." The Court concluded:

It is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants available for induction. Congress allocates funds so that the military can use and actively seek more female recruits but nonetheless asserts that there is justification for excluding females from selective service.

and found the Military Selective Service Act of 1980 in violation of the Fifth Amendment.

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98 Weinberg Interview (cited in note 17).
99 Id.
100 Goldberg v Rostker, 509 F Supp 586, 605 (E D Pa 1980).
101 Id at 593 quoting Feeney, 442 US at 273.
102 Id at 596.
103 Id at 594.
104 Id at 603.
105 Id at 605.
Suddenly it appeared that no one would have to register, at least for a while. Predictably, the Justice Department appealed to the Supreme Court. Justice William Rehnquist wrote the opinion, which stressed that since the “purpose of registration was to prepare for a draft of combat troops . . . [and] since women are excluded from combat,” it was reasonable for Congress to conclude “that they would not be needed in the event of a draft.” He denied that the draft was a differential burden on two similarly situated groups. An all-male draft was not like an “all-black . . . or an . . . all-Lutheran” army. “The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”

Justice Byron White dissented on the grounds that Congress had not “concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men”; since women were useful to the military, he thought they should be registered. But he did not think that excluding women would “offend the Constitution.” Only Thurgood Marshall was disposed to treat the matter as one of equal civic obligation. In a ringing dissent, Justice Marshall objected on principled grounds. He thought that in accommodating Congress, the Court was itself avoiding its own “constitutional obligation” to judge congressional enactments by “the standards of the Constitution,” which require equal protection of the laws. “The Court today places its imprimatur on one of the most potent remaining public expressions of ancient canards about the proper role of women,” he asserted. Upholding differential registration “categorically excludes women from a fundamental civic obligation.”

V

It took more than a century, from the Revolutionary era to the first decades of the twentieth century, before it was firmly established that women not only had a negative obligation to refrain from treason but a positive obligation to offer allegiance and loyalty. It took nearly a century to develop a precise understanding of the behaviors required of jury service and to arrive at a general consensus that jury service is an obligation

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107 Id at 83 (White dissenting).
108 Id at 112-13 (Marshall dissenting).
110 See Kerber, 97 Am Hist Rev 349 (cited in note 1).
which rests equally on citizens regardless of gender. But of bearing arms there is still nothing resembling a consensus. The obligation to military service, with all its risks, is part of the process by which, as Lauren Berlant phrased it, "nationality has been created, secured and deployed." If power is "continuously constructed in difference from and competition with other political and social formations," then the military is a central site on which we can examine its construction. In the progressive era, criticism of war was a major part of a feminist critique of the public order, as the career of Jane Addams attests. It was part of the feminist critique through the Vietnam era. But although many feminists maintained a pacifist skepticism deep into the 1970s, increasing numbers found that skepticism difficult to maintain in the presence of an all-volunteer army and the campaign for the Equal Rights Amendment. The first removed the threat of a draft; the latter drew them into a rhetoric of equal opportunity and equal obligation. By the late-1980s, virtually all liberal women's advocacy organizations were linking military participation to first-class citizenship.

There is no doubt that women form an increasing proportion of military strength and that they have been placed in positions which erode binary distinctions between "combat" and "non-combat." With increasing frequency in recent years, scholars and activists have suggested that by construing the Second Amendment to mean the right of men to be part of militias, the National Guard, and the Army, Navy, Air Force, and Coast Guard, men have been empowered to monopolize the agencies of state power and state violence. It seems increasingly clear that among the social implications of this monopoly is the valorization of male violence outside formal military institutions. Male monopolization of state violence is effectively contested on the site of urban police forces, where women—and lesbians and gay men—daily demonstrate their competence as agents of state

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111 See Kerber, A Right to be Ladies (cited in note 2).
113 Cynthia Enloe has remarked that peace activists find "the issue of women in the military . . . ideologically awkward." Enloe, The Morning After at 210 (cited in note 85).
114 Id at 210-11.
115 See Becker, Women's Wrongs (cited in note 7). Elizabeth Schneider suggests that Constitutional protections of privacy have also had the effect of making domestic violence harder to monitor and control. Elizabeth Schneider, The Violence of Privacy, 23 Conn L Rev 973, 984 (1991).
power.\textsuperscript{116} Even before the Gulf War, women were placed in positions on patrol ships and stationed on the fringes of the defense perimeter; they were in "combat support" units in Panama and in Saudi Arabia. In the Panama invasion of 1989, Army Captain Linda Bray led a military police unit in an exchange of fire while conducting what had been expected to be a police mission;\textsuperscript{117} in the Gulf War women were killed and at least one taken prisoner.\textsuperscript{118} The "lesson" of Vietnam, that units must be kept together, means that women members of companies will not be pulled out when the entire company is placed in increasingly vulnerable positions. At the end of the Gulf War, women pilots were demanding an end to the combat restrictions—although, notably, enlisted women were not. Embarrassment about the Tailhook scandal and what it revealed about the culture of heterosexuality in the military, and the current debates on the status of gay men and lesbians in the military has had the effect of deflecting argument about "straight" women's status in the military and eroding the line between "combat" and "non-combat" assignments.

The erosion of the category of "non-combat" means that it is harder to draw a distinction between military roles which both men and women may play and military roles reserved to men. That is why, I suspect, attention has turned to those who occupy ambiguous gender space. It also means—and, for all I know, may already have meant—that once a woman citizen has voluntarily entered the army and sworn a particular oath of obligation, she may not refuse an order from her commanding officer that she enter a combat situation. I expect that sooner or later we will find a court-martial testing this point. But the erosion of the combat exemption does not necessarily or directly tell us about Americans' understanding of whether all women, like all men, have an obligation to bear arms, to put their lives at risk when the Commander-in-Chief decides it is appropriate. The use of women in the Gulf War may increase the likelihood, but does not ensure, that women will also be drafted—that is, that all women will be understood to have a military obligation.

The relationship of women to state violence challenges us to know considerably more than we do now about the relationship


between gender and aggression and to consider more precisely the way this relationship has been, and ought to be, deployed by the state.\textsuperscript{119} We live at a time when traditional markings of systems of gender difference are changing. What we are learning—in the enrollment of women into other units of state force and violence, notably police departments and corrections forces, as well as the gradual absorption of women into military roles accompanied by scandals like Tailhook and the vulnerability of gay service people to violent physical attack—is that it is possible to revise even this most traditional system of gender difference while at the same time keeping systems of male domination intact. Robert J. Cottrol and Raymond T. Diamond have observed "[t]hroughout American history, black and white Americans have had radically different experiences with respect to violence and state protection. . . . For many of those who shape or critique constitutional policy, the state's power and inclination to protect them is a given. But for all too many black Americans, that protection historically has not been available."\textsuperscript{120} What we are learning now about the prevalence of domestic violence is making it increasingly clear that men and women have also had radically different experiences with respect to violence and state protection. Women, as a class, have not been able to count on the availability of state protection.\textsuperscript{121}

If I were to make a prediction, it is that we have already slid into a situation in which the protective exclusion of women from the obligation to enact state-directed violence is eroded. I think Judy Goldsmith was prescient in linking women's ability to use physical force with resistance to sexual violence. As our estimates of the vulnerability of women to domestic violence grows and the case for increasing women's capacity for physical resistance increases, the promise that women can rely on men for physical protection looks increasingly like an empty one. The process will be—as in the development of other civic obligations—a somewhat extended one. It is likely to be accompanied by hostility against feminists for their complicity in developing an ideology in which

\textsuperscript{119} For thoughtful reflections on the associations of race, sex and violence, see George L. Mosse, \textit{Nationalism and Sexuality: Middle-Class Morality and Sexual Norms in Modern Europe} (Wisconsin, 1985), and Karst, 38 UCLA L Rev 499 (cited in note 36).


\textsuperscript{121} See Elizabeth Schneider, 23 Conn L Rev at 985 (cited in note 115), and Susan Schecter, \textit{Women and Male Violence: The Visions and Struggles of the Battered Women's Movement} 3 (South End Press, 1982).
it appeared that traditional immunity against military obligation had been traded off for inchoate opportunities which many traditional women do not understand to be an advantage—an ideology which also abandoned Antigone's ancient claim to stand as skeptic and to voice the claims of higher obligations rather than those which the state would place upon them.