

1-1-2005

# Military Conscription in a Vacuum: Why Men and Women Should Insist on an Egalitarian Draft

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Professor Charles Ten Brink, Thesis Advisor

**MILITARY CONSCRIPTION IN A VACUUM: WHY WOMEN AND MEN SHOULD  
INSIST ON AN EGALITARIAN DRAFT**

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This paper will focus on the need to include women in the military draft. Although many women might not see this as a denial of equality, and in fact would rather not be included, the gender stratification of the draft is a glaring example of the patriarchal theory that a man’s civic obligation is filled by military conscription, and a woman’s is filled through childbirth and tending to domestic life. This paper will analyze this civic inequality by first looking at the legal history of women’s exclusion from registration, the dramatic inroads made by women in the military, and their continued exclusion from combat, and thus, registration.

Assuming that a social contract was created after the American Revolution which excluded women, this paper suggests that society needs to create a new social contract. I will utilize John Rawls’ theory of designing society in a vacuum; arguing that if people were to set out social benefits and obligations, unaware of their own gender, race, ethnicity, and other characteristics, they would likely support the idea that women and men should serve the nation’s military equally.<sup>1</sup>

**I. Introduction**

Over the course of the 20th Century, women struggled to obtain simple civic obligations and benefits, most notably the right to vote and equality in the workplace. Yet, women are still excluded from the most glorified--and the most damned--civic obligation that every American

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<sup>1</sup> This paper assumes that the draft will continue to be a civic obligation, and therefore it will not address issues surrounding the legality or appropriateness of the draft itself.

male over the age of eighteen contemplates: serving our nation in the military by way of the draft. Ideally, the draft does not care if the chosen men are rich or poor; African-American or Caucasian; a pacifist or a war monger. Many men have been sent to war that disdain its very cause; men who would rather use diplomatic measures to settle disputes, men who are terrified of dying for a cause they do not support. There are others, the soldiers who return from war, heroes to their family and the nation, or in the case of Vietnam, scorned for having served. Women have slowly entered the military voluntarily, quietly waging an interior battle against the Armed Services—that of creating a gender-integrated military. While women have not been granted the right to serve in ground combat positions, the Navy and the Air Force have opened positions for women to serve on war ships and as combat pilots, an uncontested giant leap for female enlistees.

**A. Women will not achieve full equality with men unless they are equally burdened by civic obligations**

Society at large should be troubled by the inequality presented by the male-only military draft. Men should be offended that they must bear the burden of conscripted military service; women should be offended that government officials still view all females as mere reproductive vessels, who are weak and warranting protection. Until women are burdened with the civic duty of conscripted military service, the equality movement will be seen as hypocritical. Women claim to want equal rights with men, yet the collective reinforcement of the status quo belies the continuing struggle to achieve that equality. If women are not willing to make the ultimate sacrifice for the rights and freedoms of being a United States citizen, true equality may continue to evade their grasp.

## II. A Modern History of Women and the Draft

### A. The Military Selective Service Act

The Military Selective Service Act of 1948<sup>2</sup> sets out in its declaration of policy:

The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.”<sup>3</sup>

In the backdrop of post-World War II, the language which assures that the “obligations and privileges” will be shared generally was likely understood to actually read “should be shared generally by men.” Yet, in today’s society, most readers of the above statement of purpose might read this to mean that a selective service system which is “free and just” would be shared generally by men and *women*. The statute quickly clarifies that “it shall be the duty of every *male* citizen of the United States, and every other male person residing in the United States...between the ages of eighteen and twenty-six, to present himself for and submit to registration....”<sup>4</sup> Although a 1943 bill was introduced to provide for national registration of all men between the ages of eighteen and sixty-five, as well as all women between the ages of eighteen and fifty (as long as they did not have children at home under the age of eighteen), it was attacked by an array of right wing organizations.<sup>5</sup> Even General Dwight D. Eisenhower

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<sup>2</sup> Military Selective Service Act, 50 App. U.S.C. A. § 451 *et seq* (2005).

<sup>3</sup> *Id.* at § 451.

<sup>4</sup> *Id.* at § 453(a), “Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101 [8 U.S.C.A. § 1101]), for so long as he continues to maintain a lawful nonimmigrant status in the United States.”

<sup>5</sup> Linda K. Kerber, “No Constitutional Right to be Ladies” 249-50 (1998). Kerber notes that both women’s peace organizations and fringe right wing organizations, such as Women’s Committee to Oppose Conscription and Mother’s of Sons, opposed the registration of women.

speculated that women would need to be drafted in the next large war, but the debate was not seriously considered in the drafting of the Selective Service Act.<sup>6</sup>

## **B. Supreme Court Jurisprudence: *Rostker v. Goldberg***

Throughout the 1970's, the United States Supreme Court decided several landmark cases involving the denial of equal protection within the military.<sup>7</sup> The most notable of this line of jurisprudence was *Rostker v. Goldberg*, a case which began in 1971 as *Rowland v. Tarr*, when a then 18-year old male draft registrant, on behalf of himself and three other men not yet draft eligible, filed suit against the director of the Selective Service.<sup>8</sup> The case was remanded to the District Court from the Third Circuit Court of Appeals, with only its Equal Protection claim surviving.<sup>9</sup> On remand, *Rowland* lay inactive until 1979, due to President Ford's 1975 discontinuation of registration.<sup>10</sup> Then, in December 1979, the Soviets invaded Afghanistan, and President Carter announced he would reauthorize registration in early 1980. Surprising both the nation and his administration, President Carter asked Congress in February 1980 for an increased budget to include women in the draft, noting: "My decision to register women is a recognition of the reality that both women and men are working members of our society.... There is no distinction possible, on the basis of ability or performance, which would allow me to exclude women from an obligation to register."<sup>11</sup> Carter's announcement brought a flurry of activity to the once dormant case. *Rowland*'s attorneys were flooded with offers by those who wanted to

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<sup>6</sup> *Id.*

<sup>7</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973). (The United States Supreme Court invalidated a federal statute permitting males in the armed services an automatic dependency allowance for wives but required servicewomen to prove that their husbands were dependent. The Court ruled that the classifications based on gender are inherently suspect and subject to close judicial scrutiny.) *Frontiero* is criticized as never achieving precedential value; instead, the Court began "deferring more to Congress and to internal military regulation in military matters." Pamela R. Jones, *Women in the Crossfire: Should the Court Allow It?* 78 CORNELL L. REV. 252, 271 (1993). See also *Schlesinger v. Ballard*, 419 U.S. 498 (1975). (The United States Supreme Court upheld a Naval promotion policy in which a male lieutenant who, if not promoted within 9 years, would be subject to discharge. However, women in the same position could remain lieutenants for 13 years without facing discharge. The Court used a rational relation analysis to find that the policy promoted the governmental interest in promoting women, who may not have compiled comparable service records as their male counterparts. Congress believed that this was consistent with their goal of giving women "fair and equitable career advancement programs.")

<sup>8</sup> *Rostker v. Goldberg*, 453 U.S. 57 (1981), see also *Rowland v. Tarr*, 378 F.Supp 766 (D.C. Pa. 1971).

<sup>9</sup> 453 U.S. at 62.

<sup>10</sup> *Id.*; see Proclamation No. 4360, 3 C.F.R. 462.

<sup>11</sup> Ellen Oberwetter, *Rethinking Military Deference: Male-Only Registration and the Intersection of Military Need with Civilian Rights*, 78 TEX. L. REV. 173, 209 fn. 27 (1999), citing 16 Weekly Comp. Pres. Doc. 290 (Feb. 8 1980).

join as plaintiffs, and the case name formally changed to reflect the new plaintiff and the new director of the Selective Service.<sup>12</sup> Congress chose not to implement the President’s registration recommendations, and instead reinstated the male-only draft. Although the District Court enjoined registration just days before it was to begin,<sup>13</sup> the Third Circuit stayed the district court’s decision. The Supreme Court heard oral argument on March 24, 1981,<sup>14</sup> and decided in June that the MSSA did not violate the Equal Protection component of the Fifth Amendment’s Due Process Clause.<sup>15</sup>

The Supreme Court’s analysis gave abundant deference to Congress—for not only was the Court reviewing a Congressional Act, it was also invading the Constitutional power of Congress to raise armies and provide for the national defense.<sup>16</sup> Whereas the District Court noted that such deference is only necessary when a court contemplates the day to day operations of the military, the Supreme Court found it wholly appropriate to analyze military operations and needs, specifically Congressional hearing testimony that a draft would only be necessary to raise *combat* troops.<sup>17</sup> The Senate Report documenting hearings on the modification of the MSSA summarized the Armed Services Committee’s view as “the policy precluding the use of women in combat is...the most important reason, for not including women in a registration system.”<sup>18</sup>

In a loose application of the “intermediate scrutiny” standard from *Craig v. Boren*, the Court easily agreed that the “Government’s interest in raising and supporting armies is a ‘important governmental interest.’”<sup>19</sup> After reviewing the recent Congressional hearing transcripts, which based its decision to continue to exclude women from registration on the fact

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<sup>12</sup> Kerber, *supra* note 5, at 288.

<sup>13</sup> Oberwetter, *supra* note 11, at 179; *see also Rostker*, 453 U.S. at 63 (the District Court held that the MSSA violated the Due Process Clause of the Fifth Amendment and thus permanently enjoined registration under the Act).

<sup>14</sup> 453 U.S. at 64.

<sup>15</sup> *Id.* at 57.

<sup>16</sup> *Id.* at 64-65.

<sup>17</sup> *Id.* at 76, *citing* S. Rep. No. 96-826, at 160 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2650. *See also* S. Rep. No. 96-226, at 2-3, 6 (1979).

<sup>18</sup> *Id.* at 78, *citing* S. Rep. No. 96-826 at 157.

<sup>19</sup> *Id.* at 70. Intermediate scrutiny will be further discussed in Section V.

that women are excluded from combat positions, Congress declared that the raising of combat troops was the entire purpose of the MSSA.<sup>20</sup>

The Court concluded that the combat restrictions on women effectively place men and women in separate spheres of eligibility for the draft, so that they were not similarly situated in terms of needing to register for the draft.<sup>21</sup> Finding that this was not a situation in which Congress arbitrarily decided to place the burden on “one of two similarly situated groups,” its decision to exclude women from the draft met the second prong of immediate scrutiny: the Court declared the exclusion was closely related to its purpose in authorizing registration.<sup>22</sup> The Court noted that President Carter’s recommendation that women be included in registration for the draft was a matter of equity, not military need.<sup>23</sup> As the Court bluntly surmised, “[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”<sup>24</sup>

The *Rostker* appellees argued against the Court’s heavy deference given to Congress; noting that the claimants were civilians, not military personnel.<sup>25</sup> The Court refused to view the challenge to registration in such a light; noting that “[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction....”<sup>26</sup> The *Roskter* ruling was not unanimous. Justice Marshall’s dissent brought the focus back to the plaintiffs’ Equal Protection claims, noting the irony in the majority’s reliance on the Congressional perspective that because

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<sup>20</sup> *Id.* at 78-79.

<sup>21</sup> *Id.* at 79. (“As was the case in *Schlesinger v. Ballard*, *supra* note 7, ‘the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated’ in this case.”)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 79, *citing* statements made by the Assistant Secretary of Defense Pirie and Director of Selective Service System Rostker, in House Hearings 7; *see also* Presidential Recommendations 3, 21, 22, App. 35, 59, 60.)

<sup>24</sup> *Id.* at 79.

<sup>25</sup> *Id.* at 68.

<sup>26</sup> *Id.*

women are not combat eligible, there was no need to register women for the draft.<sup>27</sup> Marshall concluded that the majority had misconstrued its inquiry; the proper focus was to determine whether the “gender-based classification is itself substantially related to the achievement of the asserted governmental interest.”<sup>28</sup>

### **C. Why Women are Still Exempt from Registration and the Draft: The Government’s Continued Reliance on *Roskter***

The 1990’s witnessed a re-examination of the exemption of women from registration and the draft. The Presidential Commission on the Assignment of Women in the Armed Forces was formed in 1992 to review the question of whether women should be allowed combat roles. The Commission predictably concluded that women were unfit for ground combat, noting that choosing candidates for combat training and war cannot be made by focusing on the “best or most capable individual.”<sup>29</sup> The Commission likened the desire to open up combat positions to “career aspirations,” which must take a backseat to what is best for the military. Curtly reminding the public that the military is not bound by Title VII, the Commission noted that the debate over allowing women in combat is not analogous to the fight for military integration by African American males. The Commission relied on the differences between the sexes to permit the exclusion: “Dual standards are not needed to compensate for the physical differences between racial groups, but they are needed where men and women are concerned. A proud history of successful warriors exists among men of different races, *but not among women.*”<sup>30</sup>

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<sup>27</sup> See *id.* at 90-91. (Justice Marshall’s dissent emphasized the large number of female enlisted volunteers (150,000) which at the time was only expected to grow exponentially. The Defense Department acknowledged should women be registered, approximately 80,000 could be used for military support roles. Marshall concluded that therefore, men and women are similarly situated as potential draftees, as both groups were qualified for at least 80,000 military positions.)

<sup>28</sup> *Id.* at 94. (Justice Marshall is referring to the misapplication by the majority of the “intermediate scrutiny” test from *Craig v. Boren*, see notes 182-83.)

<sup>29</sup> See 1992 Presidential Commission on the Assignment of Women in the Armed Forces, *The Case Against Women in Combat Executive Summary*, published at <http://www.cmrlink.org/WomenInCombat.asp?docID=65>.

<sup>30</sup> *Id.* The 1992 Presidential Commission Executive Summary explained why the military is allowed to discriminate on the basis of sex when excluding women from combat positions.

At the request of President Clinton, the Department of Defense reviewed the possibility of registering women for the draft, as females were no longer excluded from all combat positions.<sup>31</sup> However, the DOD did not waiver from their reliance on the circular *Rostker* rationale, which propounds that since women are not eligible for ground combat, there is no need to include them in draft registration.

### **III. Women as Warriors**

#### **A. Aren't Women Citizens Too? The Relationship Between Military Service and Citizenship**

The exemption of women from registration and the draft denies women of their full civic obligations and perpetuates the idea of romantic paternalism.<sup>32</sup> The non-citizen role of the 19th Century American female was elucidated by an 1870 *New York World* article: “Woman, being exempted by her sex from military duties and responsibilities, holds all her rights by sufferance....”<sup>33</sup> The paper sagely noted that in order for gender equality to exist, “female soldiering” must be undertaken.<sup>34</sup> During World War II, in which scores of women volunteered in various supporting capacities, the Republicans considered registration of women with no children under the age of eighteen for “national service.”<sup>35</sup> Even Undersecretary of War Robert Patterson apparently agreed with universal service to some degree: “[T]he democratic way is to recognize the equality in obligation of all to serve...in the way that will best serve the Nation.”<sup>36</sup>

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<sup>31</sup> The Air Force and Navy lifted combat restrictions to women in 1993 and 1994, respectively. These policy changes are further discussed in Section IV.

<sup>32</sup> The notion of romantic paternalism is likely best described rather than defined. Justice Brennan’s opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973), quoted from the concurring opinion by Justice Bradley in *Bradwell v. State of Illinois*, 16 Wall. 130, 141 (1873), succinctly describes the notion: “Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband....The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”

<sup>33</sup> Lorry M. Fenner & Marie E. DeYoung, *Women in Combat: Civic Duty or Military Liability?* 55 (2001).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 64, citing Kerber, *supra*, note 5.

<sup>36</sup> *Id.*

Apparently, not all men were opposed to sharing the burden of war with women, nor were all women willingly to do so.<sup>37</sup> In fact, members of the War Manpower Commission criticized those who clung to such roles for “thinking entirely in terms of the privileges and freedoms which a democracy is created to protect, but [ignoring] completely the fundamental obligations on which the success of any democracy rests.”<sup>38</sup>

### 1. The ancient link between men and war

The relationship between citizenship and military service can be traced back to ancient Sparta.<sup>39</sup> According to historian Peter Riesenber, “citizenship developed against the backdrop of war ... civic virtue [was] defined in terms of absolute military efficiency.”<sup>40</sup> In Rome, common men were given the opportunity for citizenship in exchange for acting in the emergency defense service.<sup>41</sup> By the time of the Renaissance, Machiavelli made clear the tie between military service and citizenship as being available to only those male property owners who defended the state and its sovereignty.<sup>42</sup> Women lost any right to citizenship based first on gender, then on lack of rights to own property.

### 2. The American Revolution: Independence for Whom?

Even as the fledgling colonies broke away from the English crown, women had no political or economic rights independent of their husbands or fathers.<sup>43</sup> Ironically, the colonists only fought for the rights of white men, leaving women and minority men as wards of their

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<sup>37</sup> *See id.* (Fenner references quotes from women opposed to registration: “women are naturally and rightly the homemakers.... They play their part during the war by ‘keeping the home fires burning’ ... and by carrying on the services that hold the community together.”)

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 52. (Fenner references Historian Peter Riesenber’s research on citizenship and military obligation.)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 52-53.

<sup>43</sup> *Id.* at 53.

husbands/masters.<sup>44</sup> Linda Kerber attributes this ongoing paternalism to the principle of coverture.<sup>45</sup> Due to coverture, women owed their loyalty to their husbands; their only duty was to the family and home. To allow for a more expansive definition of “citizenship,” America’s founders based inclusion on the notion of allegiance.<sup>46</sup> Nonetheless, allegiance was typically shown by military service,<sup>47</sup> so that women and minority men were still excluded. Thus, the nation’s social contract was struck among white, property-owning men, rewarding only those who were privileged to fight with greater social privilege.<sup>48</sup>

Unfortunately, although progress has been made, some people still view the proper place for women as in the home. As stated by Marine Corps Commandant General Robert Barrows (Retired) while testifying before Congress in 1991, “combat is uncivilized and women cannot do it. Nor should they be even thought of as doing it. . . . I think the very nature of women disqualifies them from doing it. Women give life, sustain life, nurture life, they do not take it.”<sup>49</sup>

### 3. The Civil War: A Double Battle for African American Men

The post-Civil War era showed that black soldiers were seen to have “bought their rights with blood”.<sup>50</sup> Not surprisingly, the former slaves were well aware of the association between military service and citizenship. Thus, as Fredrick Douglas saw it, these men fought a “double

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<sup>44</sup>*Id.* at 56.

<sup>45</sup> Kerber, *supra* note 5, at 12. Kerber notes that: “Coverture was theoretically incompatible with revolutionary ideology and with the newly developing liberal commercial society. But patriot men carefully sustained it.” See *Women in American History by Encyclopedia Britannica*, <http://www.britannica.com/women/articles/coverture.html>. (Coverture is the common law custom derived from Norman feudal culture which meant that a woman’s legal existence as an individual, upon marriage, “as suspended under ‘marital unity,’ a legal fiction in which the husband and wife were considered a single entity: the husband. The husband exercised almost exclusive power and responsibility and rarely had to consult his wife to make decisions about property matters.)

<sup>46</sup> Fenner & DeYoung, *supra* note 33, at 54.

<sup>47</sup> *Id.* Fenner notes that nine of the original states’ constitutions mandated the “duty of the citizen to render military service” and compelled that service when necessary.

<sup>48</sup> Social contract, in this context, refers to John Rawls’ conception that it is the underlying social agreement, not to what form of government or society will be formed, but as to what the “fundamental terms” of their society will be—the division of rights and duties among all people. See John Rawls, *A Theory of Justice*, Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism, Robert L. Hayman, Jr., Nancy Levit, & Richard Delgado, eds, 2002 West Group, St. Paul.

<sup>49</sup> Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 *HAMLINE J. PUB. L. & POL’Y* 199, 210 (Spring 1994), *citing* Hearings on H.R. 2521, Pts. 4 & 6, Before the Senate Comm. on Appropriations Hearings, Department of Defense Appropriations, 102d Cong., 1st Sess. 998 (1991). One then has to wonder what it is that men who share such sentiments are afraid of? Is it that women can protect themselves, or that women might gain equality in protecting the nation? The author notes that ground combat is ultimately the last male stronghold—over the course of the 20th Century, women chipped away at the vestiges of romantic paternalism—the male ego is not likely to give it up without a fight.

<sup>50</sup> Fenner & DeYoung, *supra* note 33, at 54, *citing* Kerber, *supra* note 5, at 243.

battle”]; not only to preserve the Union, but to end slavery and racism.<sup>51</sup> Although the Union enlisted African American soldiers at the end of 1862, it was only to fill the ranks left open by the many fallen white soldiers, who were not being replaced by white Northerners.<sup>52</sup> Nonetheless, by war’s end, it is estimated that between 200,000 and 400,000 served the Union forces.<sup>53</sup> The former slaves ultimately earned full citizenship, even though it was at law and not by fact. While African American soldiers continued to “fight for the right to fight,”<sup>54</sup> racial desegregation in the military would not be achieved until 1948, when President Truman called for “equality of treatment and opportunity” in the military.<sup>55</sup>

## **B. Military Service and Veterans’ Preference**

### **1. The link between military service and entitlement**

Jimmy Carter’s push for universal registration was in part fueled by his criticism of “excessive veterans’ preference” among civil service hires.<sup>56</sup> President Carter’s attempt to so fundamentally modify America’s social contract, which still defines military conscription as an entirely male obligation by which one then receives recognition and privilege, surprised both society and decision makers. By 1980, women were not full participants in only one of the four main civic obligations which persist in American society: the duty to serve in the military.<sup>57</sup>

Linda Kerber asserts that the link between military service and entitlement is embedded in our society.<sup>58</sup> Many view military service as the natural condition precedent to the various benefits

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<sup>51</sup> Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L.REV. 499, 510 (1991).

<sup>52</sup> *Id.* at 512-13.

<sup>53</sup> *Id.* at 512.

<sup>54</sup> *Id.* at 518.

<sup>55</sup> *Id.* at 521, citing Exec. Order Nos. 9980 & 9981, 3 C.F.R. 720-22 (1948).

<sup>56</sup> Linda Kerber, *A Constitutional Right to be Treated Like...Ladies: Women, Civic Obligation, and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 115, citing John H. Fleming & Charles A. Shanor, *Veterans’ Preferences in Public Employment: Unconstitutional Gender Discrimination?* 26 EMORY L.J. 13-64 (1977). Kerber noted that the Carter administration sought to set a 10-year limit on the length of time a veteran could benefit from the additional 10 points awarded them on civil service exams. Congress set the limit at 15 years.

<sup>57</sup> *Id.* at 95-96. The other civic duties are allegiance, the duty to pay taxes, and the duty to serve on a jury.

<sup>58</sup> *Id.* at 97. Kerber notes that public welfare came about on a large scale for veterans of the Civil War. After World War II, society continued the assumption that civic entitlements varied by gender.

and privileges given to veterans.<sup>59</sup> Kerber observed the irony of the wide range of veterans' preferences given in exchange for military service by men, most of who served involuntarily. Nonetheless, scores of female volunteer enlistees were denied any such preferences, and were shut out of most tax-supported jobs, save those traditionally "female" occupations, such as "switchboard operators, file clerks, secretaries."<sup>60</sup>

Military service is likely the most prestigious of all the civil obligations, as the sacrifice of one's life for their country is of the highest order. Indeed, Supreme Court Justice White defended the draft during World War I, stating, "the highest duty of the citizen is to bear arms at the call of the nation. The 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."<sup>61</sup> Nonetheless, women have yet to be compelled to serve this "highest duty." Instead, judges continue to equate a man's duty to provide for the nation's defense with a woman's biological duty to childbirth and family as "reciprocal obligations to the state."<sup>62</sup> As noted by the National Organization of Women in their Amicus Brief submitted for *Rostker*, "The cycle of old expectations and behaviors cannot be broken as long as the government, through the exclusion of women from registration, continues to lend unwarranted credence to the stereotypes that fuel that cycle."<sup>63</sup> Yet, our government is a representative democracy; at some point, if there is a fundamental change in our social contract, our decision makers must listen and act accordingly.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 116. Calling universal registration an "obligation", President Carter recognized the growing willingness of American women to "meet the responsibilities of citizenship."

<sup>61</sup> *Id.* at 108, citing *Selective Draft Law Cases*, 245 U.S. 366, 378 (1917).

<sup>62</sup> Fenner & DeYoung, *supra* note 33, at 66, citing Kerber, *supra* note 5, at 271-72.

<sup>63</sup> Brief of Amici National Organization of Women at 9, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

## 2. Military Service as funding “political capital”

Although women have served in many wars; as spies, nurses, and secretaries, the voluntary nature of their service has kept them outside the boundaries of veterans’ benefits.<sup>64</sup> Such benefits included hiring preferences in the civil service; educational assistance; housing assistance, and political clout. There is no mistaking the advantages gained by men who served their nation. As noted by historian Sheila Tobias, “service in war gives [male] veterans a stock of ‘political capital’ that they can use as evidence of experience, patriotism, and claims to ‘competence in matters of foreign and military policy.’<sup>65</sup> As illustrated in the 2004 presidential campaign, the military service records of both John Kerry and George W. Bush faced constant scrutiny. John Kerry’s campaign platform gained him scorn and praise for his service in Vietnam. A Kerry spokesperson noted: “John Kerry has always said military experience is not a pre-requisite for the presidency, but it informs the tough questions he asks and it certainly gives him the first-hand perspective you can’t learn in the situation room. He is the only person running for president who combines military experience, broad foreign policy experience and a tested commitment to Democratic values....”<sup>66</sup> John Kerry’s military experience was not as a nurse or a supply unit member, but as a volunteer on a “Swift Boat,” whose primary purpose was to draw out enemy fire.<sup>67</sup> While women are now eligible to serve on Naval warships, even today, women would likely not be able to serve on a mission such as a Swift Boat. John Kerry earned a Purple Heart, an honor that became a centerpiece of the Senator’s campaign. Although women now have an unprecedented number of opportunities in the military, not many female politicians have

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<sup>64</sup> See Kerber, *supra* note 5, at 223-25.

<sup>65</sup> *Id.* at 260, citing Sheila Tobias, “Shifting Heroisms: The Uses of Military Service in Politics,” in Elshtain and Tobias, 180. Kerber notes that as of the year 2000, ten of forty-one United States Presidents have been generals.

<sup>66</sup> See <http://releases.usnewswire.com/GetRelease.asp?id=22022>, Sam Dealey, “The Hill: Dean Assails Kerry on Vietnam War U-turn” October 14, 2003.

<sup>67</sup> See [http://www.johnkerry.com/about/john\\_kerry/service.html](http://www.johnkerry.com/about/john_kerry/service.html).

had the chance to volunteer--not only to serve our nation in a time of war--but to serve in one the military's most dangerous missions. How else can a political candidate show their unwavering patriotism if not by military service? Moreover, where does military service come into play between college and the beginning of a career? If the candidate is a male of a certain age, his military service likely came from being drafted or volunteering for service at a time of war. Perhaps the tide is changing, as more women are honored for their courage in the line of duty, they too will have an account of "political capital" to spend in an election. However, decades and even centuries have passed where women's involvement in war was largely ignored; it was simply seen as an extension of the domestic duties that so many believed they were put on earth to do.

### 3. The Civil Service: Looking for a Few Good Men

Helen Feeney, the widow of a veteran from Massachusetts and a permanent civil service employee, became the plaintiff in a case that polarized feminists and veterans.<sup>68</sup> Ms. Feeney's struggle to attain a position within the Massachusetts Civil Service system, which gave an absolute preference to veterans, exemplified the added obstacle women faced in attempting to achieve equal opportunity in the public sector workplace.<sup>69</sup> Feeney's story illuminated the irony of the reciprocity of military service—despite her repeated high exam scores, Feeney remained unemployed.<sup>70</sup> Among the civil servants in Massachusetts, at least half of the men were veterans, but less than two percent of female employees were.<sup>71</sup> The military limited female

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<sup>68</sup> Kerber, *supra* note 5, at 231. Feeney received hate mail during the litigation, like the following quip from one woman: "I hope you are thoroughly ashamed of yourself. If you aren't, you should be for objecting to giving veterans first choice of jobs. You seem oblivious of the fact that those men fought and died for you." *Id.* at 235-36. See also *Feeney v. Personnel Administrator of the Commonwealth of Massachusetts*, 442 U.S. 256 (1979).

<sup>69</sup> Kerber, *supra* note 5, at 229. Feeney took the 1973 examination for a top administrative job at a state mental health hospital; although her score placed third among examinees, she was ranked fourteenth, behind twelve male veterans with lower scores. Again, in 1974, Feeney took the exam for a broad range of administrative support positions; instead of her scored rank of 17th, she was placed 70th, with 63 male veterans placed ahead of her. 50 of the 63 had examination scores lower than Feeney's. See Brief for Plaintiffs, p. 9, *Feeney*, 445 U.S. 901.

<sup>70</sup> *Id.* at 232.

<sup>71</sup> *Id.*

enlistment to two percent until well past World War II, and even when this barrier was lifted, female enlistees were still required to have more education and higher aptitude test scores than male enlistees.<sup>72</sup> Feeney contended that she was stuck—she had attempted to enlist but was prohibited due to her age, and women were instead encouraged by the state to marry and have families, thus being “protected” from military service.<sup>73</sup> Feeney noted that her choice in fact penalized her “for having exercised her fundamental constitutional right to marry and have children.”<sup>74</sup>

Feeney’s attorneys tried to distinguish the notion between veterans’ benefits, such as educational assistance and health care, and the system of veterans’ preference, such as awarding veterans extra points or giving them absolute preference in the civil service.<sup>75</sup> In the end, the Supreme Court held for the veterans; but Justices Marshall and Brennan sided with Feeney.<sup>76</sup> The dissent summarized the oppressive effect of the veteran’s preference law on women:

In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid.<sup>77</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* Women under the age of 21 required parental consent to enter the military.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 233.

<sup>76</sup> 442 U.S. 256, 282 (1979).

<sup>77</sup> *Id.* at 286.

### C. The Equal Rights Amendment and the Draft

Active feminists and ERA supporters seem to have purposefully downplayed the effect passage of the ERA would have on the conscription of women.<sup>78</sup> Although history shows that feminists were divided on the issue, ERA supporters nonetheless understood that a universal draft would not alter combat exclusions, nor would they void the possibilities for military deferment or exemptions that male draftees were privy to.<sup>79</sup> In the two years prior to Congressional passage of the ERA in March 1972, opponents tried to gain momentum by alerting Congress to the “terrifying consequences” of drafting and sending women into combat.<sup>80</sup> However, few members of Congress chose to debate democratic Representative Shirley Chisholm’s sentiment that: “Each sex, I believe, should be liable when necessary to serve and defend this country.”<sup>81</sup> Instead, Congress looked not to politics, but to legal authority to draw an opinion on the probable effect an ERA ratification would have on the military draft. In April 1971, Justice William H. Rehnquist (then Assistant Attorney General) informed the House Judiciary Committee of the Justice Department’s legal opinion:

The question here is whether Congress would be required either to draft both men and women or to draft no one. A closely related question is whether Congress must permit women to volunteer on an equal basis for all sorts of military service, including combat duty. We believe that the likely result of passage of the equal rights amendment is to require both of those results...[T]hat would not require or permit women any more than men to

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<sup>78</sup> Jeanne Holm, *Women in the Military: An Unfinished Revolution*, 351 (1982). Holm posits that President Carter’s 1980 call for a universal draft threw feminists off guard, as many of the then-leaders of the movement were pacifists, having lead the anti-draft and anti-war protests during the 1960’s and 70’s. Holm further notes that the registration/draft issue was an “emotional stumbling block” to ratification, with a negative impact, so that most ERA supporters avoided the issue.

<sup>79</sup> Lorry M. Fenner, *Either You Need These Women or You Do Not: Informing the Debate on Military Service and Citizenship*, in *Women in the Military*, 351 (Rita James Simon, ed., 2001). Fenner notes that some feminists completely opposed drafting women, but agreed that “qualified women” should equally share the burden of national defense. Other feminists contended that until the ERA passed, women could not be burdened by military duty.

<sup>80</sup> Gilbert Y. Steiner, *Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment*, 53 (1985).

<sup>81</sup> *Id.* citing *Congressional Record*, Vol. 116 (1970) p. 28029.

undertake duties for which they are physically unqualified under some generally applied standard.<sup>82</sup>

The Senate's report on the ERA clearly showed that ratification meant that an egalitarian draft would be necessary. The report also expressed that women draftees would be eligible for the same deferments (college) and exemptions (conscientious objectors and those with dependents) as would male draftees.<sup>83</sup> While Congressional opposition to a potential gender-blind draft existed, it was weak. In fact, two amendments to the ERA introduced by Senator Sam Ervin to exempt women from the draft and from combat failed miserably.<sup>84</sup>

While the anti-ERA scare tactics could not diffuse Congressional support, ERA opponents, lead by Phyllis Schlafly,<sup>85</sup> attempted to thwart ratification by spreading fear among the masses that an ERA passage would expose women to the military draft.<sup>86</sup> Opponents relied on patriotic arguments to counter the feminist call for an egalitarian draft, as well as a Department of Defense communiqué which suggested “that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.”<sup>87</sup> However, by 1973, the statutory life of the draft had ended; the military became an all volunteer force, and the truce with Vietnam was signed. Coupled with President Ford's 1975 moratorium on registration, Schlafly's anti-combat rally against the ERA became less and less useful.<sup>88</sup> As the 1970's wore on, the ERA had yet to be ratified, and President Carter signed a

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<sup>82</sup> Holm, *supra* note 78, at 263, citing U.S. Congress, *Congressional Record*, Vol. 118, S. 4403 (Daily Edition, 21 March 1972).

<sup>83</sup> *Id.*, citing *Equal Rights for Men and Women*, 92nd Congress, 2nd Session, Report 92-689, p.13.

<sup>84</sup> *Id.* at 264. Ervin relied heavily on emotional ploys to garner support, arguing to pass the amendments so “to prevent sending the daughters of America into combat to be slaughtered or maimed by the bayonets, the bombs, the bullets, the grenades, the mines, the napalm, the poison gas, and the shells of the enemy.” The draft amendment failed 73 to 18, and the combat exemption amendment failed 71 to 18.

<sup>85</sup> Schlafly, Phyllis (1924- ), American author and political activist, known for her fierce opposition to the Equal Rights Amendment. Schlafly's anti-ERA platform focused on maintaining women's rights as she saw them; primarily, the right *not* to serve in the military, the right to not work outside the home, and the right to be taken care of by one's husband. See Steiner, *supra* note 80, at 48. For a short biography of Ms. Schlafly, see [www.distinguishedwomen.com/biographies/schlafly.html](http://www.distinguishedwomen.com/biographies/schlafly.html).

<sup>86</sup> Steiner, *supra* note 80, at 57.

<sup>87</sup> *Id.*, citing *Congressional Record*, Vol. 118 (1972), 9347. Schlafly contended that forcing weak women in to the military and combat would have disastrous consequences for the country's military strength.

<sup>88</sup> *Id.*

39-month extension resolution of the ratification deadline.<sup>89</sup> The anti-ERA opponent's arguments against the draft reemerged with President Carter's recommendation for a universal draft, but the debate was ultimately settled by the Supreme Court's decision in *Roskter v. Goldberg*.

Judith Hicks Stiehm noted the interesting intersection of the end of the draft and the passage of the ERA. Many recognized that ratification of the ERA would then mandate changes in the military; including parity between men and women's enlistment qualifications in terms of education and parental permission, as well as issues regarding gender integration of units and opening more military occupations to women.<sup>90</sup> Instead of waiting out ratification, the armed services made voluntary changes where analysts expected military policies to be challenged.<sup>91</sup> While it is apparent the anti-ERA camp used the threat of women in combat and the draft for shock value, it is difficult to assess how large a part it played in the ERA's demise. ERA supporters may not have found the ultimate success in ratification, but the movement can be credited with spurring change in the modern military.

#### **IV. Major Policy Changes for Women in the Military<sup>92</sup> and the Erosion of the Combat Exclusion**

##### **A. The Creation of the Women's Military Corps**

Women throughout the ages have served the military, yet it was not until 1941 that a bill to establish the Women's Army Auxiliary Corps (WAAC) was introduced by Congresswoman Edith Nourse Rogers to incorporate women in the military in a meaningful way.<sup>93</sup> Rogers took

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<sup>89</sup> *Id.* at 76.

<sup>90</sup> Judith Hicks Stiehm, *Arms and the Enlisted Woman*, 112 (1989).

<sup>91</sup> *Id.*

<sup>92</sup> As any sort of comprehensive history is beyond of the scope of this paper, this section will simply highlight several aspects of women's military progress from World War II to present.

<sup>93</sup> Holm, *supra* note 78, at 21.

the lead in moving this legislation forward after witnessing the return of military women from World War I, who received neither financial relief nor veterans' benefits. Rogers insisted that "women would not again serve with the Army without the protection that men got."<sup>94</sup> However, Congressional opposition was fierce, especially in the House. Not surprisingly, fears regarding women fighting in combat alongside men resurfaced. As one Congressman stated,

I think it is a reflection upon the courageous manhood of the country to pass a law inviting women to join the armed forces in order to win a battle. Take the women into the armed service, who then will do the cooking, the washing, the mending, the humble homey tasks to which every woman has devoted herself. Think of the humiliation! What has become of the manhood of America?<sup>95</sup>

The WAAC bill was approved in May 1942; by June 1943, Congress moved to establish a Women's Army Corps with full military status.<sup>96</sup> At the outset, women occupied gender-traditional roles as nurses and secretaries. As the war dragged on, the military was short by nearly 500,000 men, and military roles historically closed to women opened like never before.

Jeanne Holm notes that:

women were serving in virtually every occupation outside of direct combat—as control tower operators, Link-trainer instructors, radio operators and repairmen, parachute riggers, gunner instructors, naval air navigators, engine mechanics, celestial navigation instructors, aerophotographers, and the like.<sup>97</sup>

Studies conducted during World War II to determine the suitability of women in military jobs delivered a shock to the Army when initial conclusions showed some four million jobs

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<sup>94</sup> *Id.* at 22, citing Mildred McAfee Horton [Capt., USNR (Ret.)], *Recollections*, 17 (1971).

<sup>95</sup> *Id.* at 24.

<sup>96</sup> *Id.* at 25. In July 1943, the Navy established the Navy Women's Reserve (Women Accepted for Volunteer Emergency Service or "WAVES"); the same bill also established a Marine Corps Women's Reserve. Four months later, the Coast Guard followed suit with the establishment of a women's reserve, "Semper Paratus—Always Ready."

<sup>97</sup> *Id.* at 60.

could be performed by women.<sup>98</sup> The Marine Corps used “innate female capabilities” to classify jobs for women, varying from “Jobs in which women are better, more efficient than men,” i.e., clerical jobs, to “Jobs in which women cannot or should not be used at all,” such jobs requiring extreme physical strength, combat duty, and jobs that required work at “unfavorable hours.”<sup>99</sup> By far, women serving in the Army Air Forces as “Air-WACs” and “WASPs” (Women’s Airforce Service Pilots) broke down the most boundaries. WASPs ferried military planes and taught AAF cadets to fly, and they logged almost 300,000 flying hours in three years.<sup>100</sup>

The many successes of women’s involvement in World War II led to the passage of the Women’s Armed Services Act of 1948.<sup>101</sup> Passage of the Act was not without its battles; enlisted men argued against the bill, alarmed that they might be supervised by women; the American public was exhausted by the last war effort and had little interest in supporting a large peacetime military force.<sup>102</sup> The Act, as passed, was to simply “provide a means of mobilizing womanpower in the event of general war.”<sup>103</sup> Shortly after enactment, numbers of military women had dwindled to 1,296 officers and 6,746 enlistees.<sup>104</sup> Many female veterans were less than enthusiastic about the possibilities of a military career; their World War II service went largely unrecognized by the public and the Veterans Administration.<sup>105</sup> From the advent of the

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<sup>98</sup> *Id.* at 62. The Army first classified all occupations as either “suitable” or “unsuitable” for women, which resulted in four million jobs falling within the “suitable” category. It then whittled the number down to 1.3 million jobs, after further classifying positions as unsuitable, such as where women would be in supervisory positions over men, or where women would be resented by men for having a woman classify them for combat duty.

<sup>99</sup> *Id.* at 62-63.

<sup>100</sup> *Id.* at 64.

<sup>101</sup> *Id.* at 113. P.L. 625 was passed by a vote of 206 to 133.

<sup>102</sup> *Id.* at 114.

<sup>103</sup> *Id.* at 119. Specific objectives of the Integration Act were: To assist in filling current personnel requirements and lessen the need for a peacetime draft; to provide a trained nucleus, a basic reservoir for future expansion, in time of national emergency; to find out how and where women could best be used before an emergency arises—to catalog skills, to develop abilities, and to find what types of training were needed for women; and to provide for greater economy in the use of all personnel by using women in the jobs for which they were better suited than men.

<sup>104</sup> *Id.* at 128.

<sup>105</sup> *Id.*

Cold War until the early 1970's, opportunities for women in the military during peacetime and war diminished significantly.<sup>106</sup>

## **B. The 1970's: Women Were Not Just a Contingency Plan**

By the early 1970's, the government turned to increasing voluntary recruitment activities and looked to winding down the draft. The Department of Defense initiated a task force to examine how military women might be used in the future as "contingencies" to be used if necessary, should the military be faced with a shortage of male volunteers.<sup>107</sup> While the task force recommended that the Army, Navy, and Air Force<sup>108</sup> all double their women's programs by 1977, a Congressional subcommittee called the DOD out on their passivity towards recruiting and utilizing women in the military.<sup>109</sup> Expecting ratification of the ERA and additional Congressional pressure, the military made plans of action instead of contingency plans. By 1976, one in every thirteen enlistees was a woman, compared to one in thirty in 1972.<sup>110</sup> A study implemented by the Department of Defense confirmed that by turning to an all volunteer force and opening more positions to women, recruitment costs were lowered.<sup>111</sup> Not only did the change prove beneficial for defense budgets, enlisting larger numbers of women

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<sup>106</sup> *Id.* at 175. A January 1966 *Washington Post* article insinuated that American military women "were unprepared to go to war because they had gone soft; instead of "soldiers in skirts," they had become "typewriter soldiers' more concerned with the arts of makeup than the arts of war."

<sup>107</sup> *Id.* at 249.

<sup>108</sup> *Id.* at 250. The Marine Corps was instructed to increase its women's programs by 40% in the same time period, presumably because of the fewer positions open to women in the Corps.

<sup>109</sup> *Id.* at 249-50. The subcommittee's report concluded: "We are concerned that the Department of Defense and each of the military services are guilty of "tokenism" in the recruitment and utilization of women in the Armed Forces. We are convinced that in the atmosphere of a zero draft environment or an all-volunteer military force, women could and should play a more import role. We strongly urge the Secretary of Defense and the service secretaries to develop a program which will permit women to take their rightful place in serving in our Armed Forces."

<sup>110</sup> *Id.* at 250.

<sup>111</sup> *Id.* at 253. Dr. Richard W. Hunter's research focused on how many of the military's 1.8 million open positions could be filled by women. He concluded that recruiting more female high school graduates would improve quality and save money.

raised the quality of enlisted personnel, as women faced higher education eligibility standards.<sup>112</sup>

### **C. Combat: Women are Closer to the Edge than Ever**

#### **1. What is Combat?**

In *Roskter v. Goldberg*, opponents of universal registration hammered their circular logic that the proper starting point to determining whether women should be registered for the draft is whether women could fill combat positions. As noted above, the Supreme Court gave utmost deference to the military in adopting Congress' opinion that because women were excluded from combat, and the draft was used to fill combat positions, there was no reason to register women.

Thus, to begin a discussion of why the combat exclusion should be lifted, one must know exactly what *combat* is, to understand what women are excluded *from*. The difficulty in defining combat stems from the fact that Congress, by way of the Integration Act of 1948, gave the Armed Forces great discretion in categorizing "combat" and "combat-support" positions.<sup>113</sup> Rather than place a broad Congressional ban on women in combat, the Act stated, "[t]he Secretary of the Army shall prescribe the military authority which commissioned officers of the Women's Army Corps may exercise, and the kind of military duty to which they may be assigned."<sup>114</sup> By way of defining combat, the Armed Forces do not describe what is combat, but rather describe combat by "where it takes place."<sup>115</sup> At the request of Congress, the Department of Defense in 1978 created a definition of "combat" in order for Congress to analyze women in

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<sup>112</sup> *Id.* Holm notes that at the time, 91% of female recruits graduated high school compared to less than 67% of males and the female recruits' intelligence levels were all either average or above average.

<sup>113</sup> Jones, *supra* note 7, at 254.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 254-55.

the military.<sup>116</sup> The DOD defined “close combat” as including the probability of three elements: “engaging the enemy, coming into direct contact with the enemy, and risking capture by the enemy.”<sup>117</sup>

## 2. The “Risk Rule”

In 1988, a DOD Task Force studied women’s roles in the armed forces. The Task Force developed the “Risk Rule,” which set a single standard for evaluating positions and units. The Rule states that “non-combat units can be closed to women on grounds of risk of exposure to direct combat, hostile fire or capture provided that the type, degree and, to a lesser extent, duration of risks are equal to or greater than direct combat units in the same theater of operations.”<sup>118</sup> As a result, nearly 24,000 military jobs opened to women.<sup>119</sup>

## 3. Women in the Panama Invasion and the Persian Gulf War

Just as World War II provided the platform for women to make drastic inroads to military roles outside of the administrative and nursing arenas, more recent military operations showcase how women have survived and thrived in perilous conditions. In December 1989, the United States invaded Panama (“Operation Just Cause”); of the nearly 800 female military troops involved, the operation included 174 women of the Army military police and combat support units.<sup>120</sup> Two female UH-60 Blackhawk helicopter pilots were heavily fired upon while taxiing soldiers to combat.<sup>121</sup> The Panamanian operation also highlighted the ways in which the combat exclusion discriminates against women in employment. Sergeant Rhonda J. Maskus, a

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<sup>116</sup> *Id.* at 255.

<sup>117</sup> *Id.*

<sup>118</sup> D’ann Campbell, *Combatting the Gender Gulf*, in *Minerva*, 15, Fall/Winter 1992 Vol. X, Nos. 3 & 4.

<sup>119</sup> *Id.*

<sup>120</sup> Kathy L. Snyder, *An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Policies that Exclude Women from Combat in the United States Military*, 93 W. VA. L. REV. 421, 449-450 Winter 1990/1991.

<sup>121</sup> *Id.* at 450. Snyder notes that Warrant Officer Debra Mann’s helicopter was damaged to the extent it had to be grounded.

paratrooper and intelligence analyst with extensive knowledge of Panamanian intelligence, worked on the invasion plans for three months.<sup>122</sup> Nonetheless, when an intelligence analyst was requested from her unit, Maskus' commanding officers sent male soldiers with no particular expertise on Panama.<sup>123</sup>

In the 1990-91 Persian Gulf War (Operations Desert Shield and Desert Storm) 40,782 female military troops were deployed; 13 were killed and two were taken as prisoners of war.<sup>124</sup> Women from all four of the armed forces and the coast guard were deployed in record numbers. Female Army personnel were involved in the initial invasion of Kuwait and Iraq; two women were battalion commanders, other woman headed up companies, aircraft, and virtually all types of military units.<sup>125</sup> Women of the Navy and Marines served on supply and ammunition ships, flew helicopters and reconnaissance aircraft.<sup>126</sup> Although not "officially" combat eligible, Rosemary Skaine notes that the "lines were blurred," due to long-range artillery and surface-to-surface missiles.<sup>127</sup> Major General Jeanne Holm wryly noted that "'unisex weapons' did not distinguish between combat and support troops."<sup>128</sup>

The Persian Gulf War shattered many more barriers for military women. According to Carolyn Becraft's report on women in the Persian Gulf War, no statute existed to bar women in the Army from combat, but it was and presumably is today excluded by policy under Title 10 of the United States Code §3012.<sup>129</sup> At the time of the Gulf War, the Navy & Marine Corps and the

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Captain Lory Manning and Vanessa R. Right, *Women in the Military: Where They Stand*, A Women in the Military Project report for the Women's Research and Education Institute, 7 (Third Ed. 2000).

<sup>125</sup> Rosemarie Skaine, *Women at War: Gender Issues of Americans in Combat*, 65 (1999), referencing Carolyn Becraft, *Women in the U.S. Armed Services: The War in the Persian Gulf*, Women's Research and Education Institute, Washington, D.C., March 1991.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 64.

<sup>128</sup> *Id.*, citing Holm, *supra* note 78.

<sup>129</sup> *Id.* at 67.

Air Force all had combat restrictions in place per Title 10 §§ 6015 and 8549, respectively.<sup>130</sup>

The commendable and irrefutable involvement of military women in the Persian Gulf War reignited the combat issue. Congresswoman Pat Schroeder noted the inconsistencies within the military; women were in just as much danger as men yet were not given the “status, recognition, or benefits that accompany positions carrying the ‘combat’ designation.”<sup>131</sup> In turn, Congress repealed the statutory ban on female pilots of combat aircraft, and Defense Secretary Les Aspin subsequently ordered an end to military bans on women’s service on combat aircraft and naval warships.<sup>132</sup>

#### 4. The Repeal of the Risk Rule and the Implementation of the Collocation Rule

As quickly as the Risk Rule was promulgated, it was repealed. In 1993-94, the Defense Department, under the direction of Les Aspin, developed a new rule which allowed for the assignment of women to all ground units except those “below the brigade level whose primary mission is to engage in direct combat on the ground....” The new rule defined direct ground 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 ground combat takes place well forward on the battle field while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.<sup>133</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> Peach, *supra* note 49, at 206.

<sup>132</sup> *Id.* See also Manning & Wright, *supra* note 124, which notes that Congress passed the 1992-93 Defense Authorization Act, including the Kennedy-Roth Amendment which repealed the statutory probation against women flying combat aircraft in combat missions. Congress then passed legislation in 1994 which repealed the Naval combat ship exclusion, 10 USC § 6015.

<sup>133</sup> Skaine, *supra* note 125, at 28. See also Les Aspin, Secretary of Defense, “Direct Ground Combat Definition and Assignment Rule,” memorandum for Secretaries of the Army, Navy, and Air Force, Chairman, Joint Chiefs of Staff, Assistant SECDEF for Personnel and Readiness, and Assistant SECDEF for Reserve Affairs, January 13, 1994.

However, even if women soldiers are not assigned below brigade level, the new rules left an entire grey area—where women are assigned to support units which must “collocate” with combat units. According to LTG Theodore G. Stroup, Jr., Deputy Chief of Staff for Personnel, USA:

Collocation occurs on the battlefield when units operate in such a close proximity to the other direct ground combat units that they are almost indistinguishable from direct ground combat units—in terms of the physical demands on the soldier, source of support, possible physical contact with the enemy force.<sup>134</sup>

Most recently, the Army proposed the inclusion of women in “mixed sex” support companies which would collocate with combat units in the field in Iraq. The Army reported to the Pentagon in May 2004 that if women were not allowed to serve in such support units, there would be an immediate readiness issue, i.e., the Army would be faced with a shortage of male soldiers to fill these positions.<sup>135</sup> The Army recommended to Defense Secretary Donald Rumsfeld that the collocation rule be lifted in order to create such mixed sex companies.<sup>136</sup> The question thus raised is, if the Army is willing to allow women to serve in mixed sex support companies, why does such a disconnect exist between the military leaders and the federal government? The natural inclination is to assume politics plays a substantial role in the decision; military commanders do not risk the loss of re-election for pushing for such a change. As the United States continues to wage war in Iraq and Afghanistan, as well as engage in anti-terrorism efforts around the globe, military human resources will be strained. The Department of Defense seems to be delaying the inevitable: giving official recognition that women *are* under hostile fire and that they are capable of defending themselves. Perhaps the true fear is that with the downfall

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<sup>134</sup> *Id.* at 25, citing U.S. Congress, House Committee on Armed Services, Military Forces and Personnel Subcommittee, *Assignment of Army and Marine Corps Women Under the New Definition of Ground Combat*, 103d Cong., 2d Sess. October 6, 1994, 20.

<sup>135</sup> Rowan Scarborough, “Army Charged With Ban Violation”, *The Washington Times*, December 9, 2004. Currently, the Department of Defense forbids the military from placing women in units which collocate with combat units.

<sup>136</sup> Rowan Scarborough, “Female Soldiers Eyed for Combat”, *The Washington Times*, October 22, 2004.

of the combat exception and thus the necessary inclusion of women in the draft, society must accept the fact that women are fulfilling their civil obligation and can no longer be denied full equality.

Bowing to pressure from pro-combat exclusion activists such as Elaine Donnelly's Center for Military Readiness,<sup>137</sup> the Secretary of the Army Francis Harvey announced in January 2005 that he has "[d]eclined to adopt a recommendation from Army officers to abolish a 1992 rule that prohibits women from 'collocating' with combat troops."<sup>138</sup> Nonetheless, many former and current Army female soldiers attest to collocation. Army officials attribute the blurring of the battle front and rear to the non-traditional battlefield in Iraq, where soldiers are faced with guerrilla-type ambushes.<sup>139</sup>

#### **D. Do Enlisted Women Want to Enter Combat?**

Laura Miller conducted research among enlisted military women between 1992-1994, in an attempt to ascertain their attitudes and opinions regarding the battle to repeal remaining combat exclusions. Miller noticed that although many of the "activists" pushing for a lift to combat exclusions are former military personnel,<sup>140</sup> these "representatives of military women" were neither chosen by military women nor were they selected by any "external authority" to so represent military women.<sup>141</sup> According to Miller's research, a majority of women across the

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<sup>137</sup> Ms. Donnelly is the President of the Center for Military Readiness, formerly a member of the Pentagon's Defense advisory Committee on Women in the Services (DaCOWITS), and also served on the 1992 Presidential Commission on the assignment of Women in the armed Services. For more information, see <http://www.cmrlink.org/elainebio.asp>.

<sup>138</sup> Bryan Bender, "Army Secretary Rejects Change in Policy on Women in Combat," *The Boston Globe*, January 29, 2005.

<sup>139</sup> *Id.*

<sup>140</sup> Laura L. Miller, *Feminism and the Exclusion of Women from Combat*, in *Women in the Military*, 108-109 (Rita James Simon, ed., 2001). Miller includes Air Force Major General Jeanne Holm, Ret., Army Brigadier General Evelyn Pat Foote, Ret., Army Captain Carol Barkalow, Army Captain Carolyn Becraft, Ret., as some of these self-selected representatives.

<sup>141</sup> *Id.* at 111. Miller quotes a NCO (non-commissioned officer) with Desert Storm experience, "Who does that Pat Schroeder think she is? Has she ever talked to me? To her? To any of us? If she came here I'd sure give her a piece of my mind."

ranks supported a voluntary option for qualified women to obtain combat duty positions.<sup>142</sup>

Miller discovered that women officers tend to support egalitarian policies for enlisted men and women which could call on either gender to serve in combat if necessary.<sup>143</sup> One captain reasoned:

I do not think it would be equitable to allow women to volunteer for combat roles. The only equitable treatment is for both men and women to be compelled to serve in combat. [I]f only those women who wanted to were allowed to volunteer, there would be resentment among the men who can be compelled.<sup>144</sup>

When Miller asked “if the draft were reinstated, which of the following policies would you support?,” rank and race proved to be divisive factors. Miller found that forty-three percent (43%) of the officers polled agreed that “women should be drafted and eligible for combat roles,” whereas approximately one quarter (25%) of enlisted women and non-commissioned officers polled agreed with the statement.<sup>145</sup> When opinions were stratified by race, forty percent (40%) of white women agreed with the previous statement over twenty-five percent (25%) of minority women.<sup>146</sup>

Jean Elshtain noted that the Persian Gulf War actually stirred up much resentment among women who were compelled to go to war; particularly reservists.<sup>147</sup> This attitude begs the question, why would you sign up in the first place? For others, such as Major Rhonda Cornum, a flight surgeon, she wanted to “see action” in the Gulf War and was not afraid of losing her life. Cornum was taken prisoner by the Iraqis after a helicopter crash, but she had been prepared to

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<sup>142</sup> *Id.* Although a majority of military women polled supported a voluntary combat role policy for women, many responses were qualified by stating that these female volunteers must meet the physical requirements of the job: “I think if a woman wants to serve in a combat unit and can meet the physical standards, she should be allowed to. There are some women in the Army more capable than some men. I want the most capable soldier up front defending me.”

<sup>143</sup> *Id.* at 114.

<sup>144</sup> *Id.* at 114-15.

<sup>145</sup> *Id.* at 115.

<sup>146</sup> *Id.* A white female lieutenant stated, “If women want equal rights in this country, they’re going to have to accept equal responsibility.”

<sup>147</sup> Jean Bethke Elshtain, *Women and War: Ten Years On*, in *Women in the Military*, 44 (Rita J. Simon, ed., 2001).

“go to war...Fly and fight. I loved it.”<sup>148</sup> Cornum and her husband share the same ideals, they “feel the same way about the big things: duty, honor, country, loyalty...[my daughter] would have thought I was a wimp if I stayed home.”<sup>149</sup>

Laura Miller’s research showed the disconnect between the push for full combat integration urged by feminist activists and military officers; yet a disconnect also exists among feminists as to whether the combat restrictions should be abolished. Marie DeYoung, a feminist scholar, contends that assigning women to ground combat positions will be detrimental to the military and to the women forced to serve.<sup>150</sup> While women are excluded from infantry and armor battalions under the collocation rule, women may work at combat engineer battalion headquarters because “the headquarters does not engage in direct ground combat and does not routinely collocate with maneuver battalions.”<sup>151</sup> DeYoung’s first-hand experience serving in an engineer battalion shattered this argument. Although a headquarters unit does not move, individuals within the unit must work with those serving in direct combat.<sup>152</sup> Simply because women soldiers were not members of the infantry, many in support positions go to combat.<sup>153</sup> DeYoung notes that “the fact remains that we were and will continue to be the weakest link in the chain...”<sup>154</sup> Apparently women are acceptable compatriots during peacetime,<sup>155</sup> but “they have no place during successful prosecution of direct ground combat.” In DeYoung’s experience, she never witnessed female soldiers or officers in the field during combat battalion training exercises.<sup>156</sup> DeYoung emphasized that “[n]o female assigned to the headquarters

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Fenner & DeYoung, *supra* note 33, at 110. DeYoung was the first woman regimental support squadron chaplain for the 2nd Armored Cavalry Regiment from August 1993 to January 1995.

<sup>151</sup> *Id.*, citing testimony by Lieutenant General Theodore G. Stroup, Jr., in a hearing for the US House Armed Services Committee 1994a.

<sup>152</sup> *Id.* at 115.

<sup>153</sup> *Id.* DeYoung explains: “Low-ranking cooks, administrative clerks, nuclear-biological-chemical trainers, intelligence analysts, communications specialists, medics, truck drivers, and mechanics to combat...as individuals or as part of service support teams.”

<sup>154</sup> *Id.* at 118.

<sup>155</sup> *Id.* DeYoung asserts: “Women make strong contributions as classroom instructors, counselors, technical writers, and a trainers.”

<sup>156</sup> *Id.* at 118.

element has ever complained to me about this chauvinistic protection from field duty.”<sup>157</sup> This observation seems to mirror the attitudes of many young women when one mentions that men are disproportionately burdened by registration and the draft. Women are often relieved by preservation of the status quo and would encourage others not to “rock the boat”.

### **E. Enlisted Men Speak Out**

That discord exists among the ranks of women soldiers as to whether they should be involved in combat is not too surprising; nor should it surprise us that male soldiers’ attitudes toward women in combat differ as well. Michael Frevola, a Lieutenant in the Naval Reserve and a lawyer, proposes that “it is time for the repeal of nearly all regulations restricting women from fighting for our country as equals alongside their male counterparts.”<sup>158</sup> Frevola postulates that the Persian Gulf War helped lift air and naval combat restrictions on women soldiers based on two factors: “First, it is likely that female servicemembers as a whole were rewarded for the excellent performance under fire of those women exposed to battle conditions. Second, the performance of those women demonstrated the various concerns used to justify excluding women from combat were at least partially unfounded.”<sup>159</sup>

Nonetheless, opposition to women in combat (and likely the military as a whole) exists. One of the most notable male opponents to women in the military is Brian Mitchell, an Army veteran. In 1992, Mitchell testified to the Presidential Commission on the Assignment of Women in the Armed Forces, where he argued that neither God nor the United States Constitution demands that women be allowed in the military. Mitchell also noted: “To obligate the military to employ certain people is to make the military the servant of its members, a

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<sup>157</sup> *Id.* DeYoung’s argument for keeping women out of field combat is based on assertions that it averts “untimely out-of-wedlock pregnancies” and “men avoid accusations of sexual harassment when they attempt to hold women to the same performance standards as men.” It is interesting to note that while a woman might experience separation from the battlefield in training, based on the collocation rule, this does not seem to match the reality of female soldiers in Iraq.

<sup>158</sup> Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621, 622 (Spring 1996).

<sup>159</sup> *Id.* at 625-26.

complete reversal of the natural relationship between the service and the serviceman.”<sup>160</sup> In Mitchell’s opinion, the combat exclusion discussion is meaningless; he believes the military services are “*in toto*, combat organizations.”<sup>161</sup> In defense of excluding women from the military, Mitchell notes the typical arguments: pregnancy, sexual harassment, physical weakness, and fraternization with male counterparts.<sup>162</sup> In fact, Mitchell can find only one advantage to having women in the military, that they are better “behaved” than male soldiers. Were the decision left up to Mitchell, women would only serve as military medics and nurses, or other areas where the “cost” could be justified.<sup>163</sup>

Marine Corps Major Arthur Corbett focuses his argument against women in combat by relying on empirical data, mostly which supports the contention that men and women are simply “wired” differently, making women ill-suited for combat. Corbett makes much of the disruption to male cohesion that women cause. Corbett cites to Darwinian research which backs up the argument that women destroy male cohesiveness in mixed sexed units, noting that tribal women “are the constant cause of war both between members of the same tribe and between distant tribes”.<sup>164</sup> Moreover, Corbett contends that women do not bond well with other women; backing up this assertion is a 1988 survey which shows that female military personnel overwhelmingly prefer male leadership.<sup>165</sup> Another interesting proposition that Corbett asserts is that to whatever degree women may succeed in gaining entrance onto the battlefield, both men and women will value the work less.<sup>166</sup> Yet, if women’s work is always held in “low esteem,” (to use Corbett’s language), have women demeaned every occupation? Women work in every imaginable civilian

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<sup>160</sup> Mitchell, Brian, *Women in the Military: Flirting with Disaster*, 346 (1998). Mr. Mitchell’s opinion offers a sharp dissent to the testimony of the War Manpower Commission, which argued for an egalitarian draft, noting that the notion best serves democratic principles. See page 10.

<sup>161</sup> *Id.* at 347.

<sup>162</sup> *Id.* at 348.

<sup>163</sup> *Id.* at 350.

<sup>164</sup> Arthur J. Corbett, *Women in Combat: The Case for Combat Exclusion*, 52 NAVAL WAR COLLEGE, 1993, citing Christopher Badcock, *Evolution and Individual Behavior*, 144 (1991).

<sup>165</sup> *Id.* at 128, citing Kathleen F. Kirk, *Women in Combat?* Defense Technical Information Center (1988). According to Kirk’s findings, 82% of military women surveyed preferred male leadership, as compared to 61% of men.

<sup>166</sup> *Id.* at 171-72.

field and it can hardly be argued that female doctors, engineers, or lawyers have lowered the esteem of any of those professions.

Additional research by Laura Miller and Margaret Harrell questioned the attitudes of enlisted men on whether women should be allowed to serve in their occupational or career field.<sup>167</sup> Army men were separated by combat and non-combat positions; sixty-six percent (66%) of Army men in combat occupations agreed that women should be allowed into their field; in non-combat Army roles, eighty percent (80%) of men agreed.<sup>168</sup> When Miller and Harrell separated the enlistees by race, the percentages of men who agreed with the above statement was noticeably higher among minorities. In fact, ninety-six percent (96%) of African-American men believe that women should be allowed into their occupational or career field, while only seventy-nine percent (79%) of Caucasian men agreed.<sup>169</sup> Hispanic enlisted males fell somewhere between these two groups, with eighty-six percent (86%) agreeing that women should be allowed into their occupational field.<sup>170</sup> This disparity between races can likely be linked to the fact that minority men understand that perceived differences are often imaginary, created by stereotype. As it took nearly a century of fighting white mens' wars before gaining full integration into the military, it is therefore not surprising that African-American males believe that women should have equal access to their occupational field.

Regardless of the angle chosen by opponents to women in the military, they fail to recognize that women are in the military, and the decades of achievement will not be undone by arguments that women think differently or that male soldiers will inevitably be attracted to them.

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<sup>167</sup> Margaret C. Harrell & Laura L. Miller, *New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale*, MR-896-OSD, 1997. Available online at <http://www.rand.org/publications/MR/MR896/index.html>.

<sup>168</sup> *Id.* at 48. Not surprisingly, 89% of men in the Navy agreed with the statement that women should be allowed into their occupational/career field; and a solid 73% of Marines men agreed.

<sup>169</sup> *Id.* at 49.

<sup>170</sup> *Id.*

## V. Analysis

### A. Whether men and women are so “dissimilarly situated” as not to warrant Equal Protection

The notion that all men are ready, willing and able to serve our nation at war is absurd, just as the notion that all women are nurturing peacemakers, better suited to tend to their reproductive cycles and the home. Although women are still excluded from “front line” combat, even non-combat positions put them in “harm’s way.” The Supreme Court’s Equal Protection jurisprudence focuses on whether men and women are “similarly situated” and thus deserving of similar treatment under the law. Justice Stewart, in his concurrence to the opinion of *Michael M. v. Superior Court of Sonoma County*, stated “[w]e have recognized that in certain narrow circumstances men and women are not similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious and a legislative classification realistically based upon those differences is not unconstitutional.”<sup>171</sup>

Equal Protection analysis involves differing levels of scrutiny by the courts; whereas a racial claim of inequality under the law necessitates strict scrutiny, gender claims have not achieved such a heightened standard. Instead, gender claims settled at the level of “intermediate scrutiny,” as set out by the Supreme Court in *Craig v. Boren*.<sup>172</sup> A law which differentiates benefits or burdens disproportionately based on gender “must serve important governmental objectives and must be substantially related to an achievement of those objectives.”<sup>173</sup> The *Roskter* Court relied heavily on the Congressional viewpoint that it is unnecessary to register women, because as a class, they were prohibited from combat in each segment of the Armed

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<sup>171</sup> 450 U.S. 464, 478 (1981). The case involved the constitutionality of a California statute which provided for criminal prosecution for statutory rape (that of a woman under the age of eighteen). The Court concluded that sexual intercourse is one such area where men and women are not similarly situated, because women disproportionately bear the physical, emotional, and financial repercussions of an unplanned pregnancy.

<sup>172</sup> 429 U.S. 190 (1976). *Craig* settled the question of whether an Oklahoma state law which banned the sale of 3.2% beer to men under the age of twenty-one, but which allowed the same to be sold to women eighteen and older was violative of Equal Protection. The Court concluded that it was indeed.

<sup>173</sup> *Id.* at 197.

Forces. By deferring to Congress' circular logic, the Court was therefore able to avoid the constitutionality of combat exclusions for women; although the underlying question, it was not the question before the court. Nor was the Court willing to make "gestures of superficial equality";<sup>174</sup> meaning they were unwilling to order Congress to register women and men, only to not draft women.

The notion of "similarly situated" has a rather circular meaning. Catherine MacKinnon<sup>175</sup> posits that "'people who are the same should be treated the same,' that persons in relevantly similar circumstances should be treated relevantly similarly."<sup>176</sup> Of course, men and women are similarly situated in terms of being able to drive an automobile, drink alcohol, or attend college; but when the analysis centers around a civic obligation, should it be acceptable to exempt a class of citizens from fulfilling a duty? If so, then perhaps a similarly situated analysis of whether women should be drafted would simply ask if both classes of persons are citizens and whether one of these classes was disproportionately burdened under the law. The obvious answer to these rhetorical questions is yes; men must alone carry the burden of conscription and women continue to evade fulfilling a civic duty.

1. Are women and men more similarly situated today?

If the *Rostker* claim was brought before the Supreme Court today, the Court could yet again avoid wading into the murky waters of differences between the sexes in terms of biology, psychology and sociology. Since 1981, women have made slow and steady progress in the military; as previously noted, women have broken barriers as fighter pilots and now serve on war ships. Based on the Court's own reasoning from *Rostker*, at which time no combat positions

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<sup>174</sup> *Rostker*, 453 U.S. at 79.

<sup>175</sup> Catharine A. MacKinnon is currently a Professor of Law at the University of Michigan, and is recognized as having created the legal claim for sexual harassment. Along with fellow feminist legal scholar Andrea Dworkin, the duo drafted legal ordinances which established pornography as a civil rights violation. (For a more detailed biography, please see [www.umich.edu](http://www.umich.edu))

<sup>176</sup> Zilla Eisenstein, *The Female Body and the Law*, 57 (1988), citing Catherine MacKinnon, *Sexual Harassment of Working Women*, 107 (1979).

were open women, today, only direct ground combat prohibitions remain. Instead of asking whether women and men are “similarly situated,” the court should ask whether men and women are so dissimilarly situated that it is necessary to treat them differently.

Today, it would be a difficult, if not nearly impossible argument to make that men and women are so dissimilarly situated in terms of combat eligibility to exclude women from registration and the draft. As argued below, direct ground combat roles from which women are prohibited encompass an ever-narrowing field of occupations in the military. Based on sheer numbers, the Supreme Court could not continue to ignore the fact that men and women are not dissimilarly situated for 80% of military positions.<sup>177</sup>

2. Combat prohibitions aside, women and men are similarly situated in a vast majority of military occupations

The old Army adage that “every soldier is an emergency infantryman” is at best a romanticized view that all soldiers could perform in combat.<sup>178</sup> In the modern military, technology abounds; while physical endurance and mental resolve are still critical, men and women join the military to advance their careers in intelligence, nuclear research, law, and medicine. Setting aside the fact that women are still prohibited in “direct combat,” any argument which contends that women should not be included in registration and the draft because they cannot be used for combat is completely contradictory to the ongoing need for female enlistees.<sup>179</sup> As noted by the District Court in *Rostker*:

[i]t 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. [C]ongress rejects the current opinion of

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<sup>177</sup> Harrell & Miller, *supra* note 146, Table 2.1, at 12.

<sup>178</sup> Frevola, *supra* note 157, at 639.

<sup>179</sup> Women enlistees account of 20% of the total.

each of the military services and asserts that women can contribute to the military effectively only as volunteers and not as inductees.”<sup>180</sup>

The statistics of today contrast starkly with the notion that women would not be needed should a draft be necessary—since the military law and policy changes which occurred in the early 1990’s, 259,199 new positions have opened to women in the military.<sup>181</sup> While percentages of open positions for women in the Marines still hover at sixty-two percent (62%), women are eligible for ninety-nine point four percent (99.4%) of positions in the Air Force.<sup>182</sup> Congress’ circular rationale for barring women from registration (because they were barred from combat) however shaky when used to deny the registration of women in 1980, stands on even tremulous ground today.

Ellen Oberwetter contends that the *Rostker* Court misinterpreted congressional factual findings when it concluded that men and women are not similarly situated in terms of registration for the draft.<sup>183</sup> While congressional testimony indicated that the *primary* need for the draft would be to secure soldiers for combat, testimony also confirms that if 650,000 troops were drafted, women could fill up to 80,000 support positions.<sup>184</sup> Had the *Rostker* Court instead given weight to the fact that both men and women were similarly situated for 80,000 military positions, rather than solely emphasizing that women were barred from combat, may have rendered the combat exclusion argument moot. As noted above, the numbers of military occupations that women are eligible for has tripled since the *Rostker* decision. That Congress and the Supreme Court chose to narrowly focus on filling combat roles gives short shrift to the fact that the military cannot wage war with combat soldiers alone.

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<sup>180</sup> *Goldberg v. Rostker*, 509 F.Supp. 586, 603 (1980).

<sup>181</sup> Harrell & Miller, *supra* note 146, Table 2.1 at 12.

<sup>182</sup> *Id.*

<sup>183</sup> Oberwetter, *supra* note 11, at 195.

<sup>184</sup> *Id.*, citing S. Rep. No. 96-826, at 158 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2648.

For instance, the United States has occupied Iraq for nearly two years. Although it has been necessary for many enlistees and reservists to extend their tours during this time, it is doubtful any soldier in a combat position or in a support position will stay for the duration of the occupation. Therefore, non-combat positions must be replenished just as those in direct combat roles must be. As of December 2004, the number of troops in Iraq was to be escalated to 150,000 until March 2005, in order to provide extra security for the Iraq elections. At that point, those troops whose tours were in large part previously expired and extended, will return to America, with total troop numbers to fall back below 140,000.<sup>185</sup> The military does not differentiate between a military dentist's tour of duty and that of a soldier in the field—when a tour is over (barring extensions), the soldier returns home.

Lastly, although in war loss of life is inevitable, modern warfare has greatly reduced the number of casualties as compared to the numbers of troops that perished in World War II or Vietnam.<sup>186</sup> As of May 2005, 1,606 American soldiers have lost their lives in Iraq.<sup>187</sup> Nonetheless, the nation's troops are spread too thin between the ongoing Iraq occupation, the "War on Terror" in Afghanistan, and continued monitoring from military bases around the globe. If the United States is to continue this military presence, personnel of all kinds are needed to keep the troops fresh and responsive. Analyzing military need from all sides, and not only the front line, shows that women are similarly situated with men in scores of military jobs should registration and a draft become necessary in the future.

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<sup>185</sup> See <http://abcnews.go.com/US/wireStory?id=295667>. Reuters story by Charles Aldinger, "US Troop Numbers in Iraq to Hit Record 150,000" December 1, 2004.

<sup>186</sup> The United States lost a staggering 405,399 soldiers in World War II, and 58,193 in the Vietnam War. See the National Archives website at [http://www.archives.gov/research\\_room/research\\_topics/vietnam\\_war\\_casualty\\_lists/statistics.html](http://www.archives.gov/research_room/research_topics/vietnam_war_casualty_lists/statistics.html) for war casualty statistics; see also the American Battle Monuments Commission website at <http://www.abmc.gov/abmc45.htm>.

<sup>187</sup> CNN's main website for the Iraq War tracks the numbers and faces of fallen United States soldiers, another way technology changes war and brings the realities closer to those at home. See <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/>.

### 3. The weaker sex: Weak by whose standards?

Zilla Eisenstein explains it is seldom appropriate to use a similarly situated analysis when discussing women in combat, because from “an engendered point of view, men and women will very seldom be similarly situated; indeed, standards are articulated from the male point of view, which defines combat as man’s territory to begin with.”<sup>188</sup> In the advent of modern warfare, replete with its long-range missiles, heavy night-time air raids, and lightweight artillery, brute strength should not be the standard when assessing combat eligibility. As aptly put by Major General Jeanne Holm (Ret.), “intellect has replaced brawn.”<sup>189</sup> Yet, regardless of the history of exclusion, women must be fit for combat; arguments that lower standards are needed will not likely convince male combat soldiers or the DOD that women should be allowed to serve in ground combat units. As expounded by Brigadier General Evelyn Foote, “Never compromise standards. Be sure that anybody in any MOS [Military Occupational Specialty] can do everything required in that MOS.”<sup>190</sup>

Two military men, Lt. Michael Frevola, Naval Reserves, and Captain Adam N. Wojack, U.S. Army, both approve of integrating women into combat units. While Frevola appears to promote a gender neutral physical fitness test to determine combat eligibility,<sup>191</sup> Wojack promotes a pre-infantry training for women only, in which they must train to “men’s standards”.<sup>192</sup> Given the competitive nature of the military, and the absolute need for cohesion in a combat unit, the idea of forcing women to perform to men’s standards is likely not the right approach. Such a standard will likely make the male soldiers feel better about the fact that women are tested like men, but this may still cause friction between the male and female

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<sup>188</sup> Eisenstein, *supra* note 175, at 63.

<sup>189</sup> Snyder, *supra* note 120, at 432 (discussing traditional arguments for excluding women from combat and their weaknesses).

<sup>190</sup> *Id.* at 433.

<sup>191</sup> Frevola, *supra* note 157, at 640.

<sup>192</sup> Captain Adam N. Wojack, *Integrating Women in the Infantry*, MILITARY REVIEW, 6 (November–December 2002).

soldiers. Frevola postulates that since the physical fitness standards would be the same, “the weakest woman in the ranks would be not be weaker than the weakest man and thus any worse off than her fellow male soldiers.”<sup>193</sup> Yet, Frevola did not make any proposals as to how to achieve this sameness.

The Army Physical Fitness Test (APFT), which all recruits must endure to pass basic training, remains gendered. For example, the minimum passing time for the two-mile run for men is 16:36 (sixteen minutes, thirty-six seconds), but for women, the minimum time is 19:42 (nineteen minutes, forty-two seconds).<sup>194</sup> To neutralize the playing field, the Army should re-evaluate its standards for both men and woman to ensure that the standards used to determine combat fitness are realistic and necessary. Lorry Fenner notes that physical fitness standards are typically not used as occupational qualifications.<sup>195</sup> The last few decades of female integration in the military offer many examples of how women have used creative methods to perform tasks which were typically performed more readily by men.<sup>196</sup> As Wojack postulates, women need to be challenged far more than the current military standards in order to be combat eligible.<sup>197</sup>

I propose creating a fitness standard spectrum, which is gender neutral yet which does not lower standards so that weaker men or women could pass.<sup>198</sup> This levels the field by eliminating

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<sup>193</sup> Frevola, *supra* note 157, at 640.

<sup>194</sup> These numbers represent the scores necessary for the youngest age group, the 17-21 year olds. The APFT also includes push ups and sit ups. For a complete list of standards, please see the Army’s website at <http://www.usarec.army.mil/hq/apa/rc/apft.htm>.

<sup>195</sup> Fenner & DeYoung, *supra* note 33, at 7.

<sup>196</sup> *Id.* at 8. Fenner explains how in the 1970’s, the Navy began studying strength requirements for particular jobs. Starting with postal workers, they set up an experiment by placing forty pound mailbags on the floor and told postal workers to weight them. The male worker hoisted the bag to the counter and weighed it. However, the female worker instead took the scale, placed it on the floor and then weighed the bags.

Another example comes from a young female airman on her first day of work as a B-52 mechanic. At four feet, eleven inches tall, the mail mechanics felt she was sure to fail. Not only was she able to carry her fifty pound toolbox out to the runway without assistance, she refused to ask for favors. Even better, her male counter-parts realized how beneficial someone of her size and ability was for the team—she was able to maneuver herself into tight spaces in the airframe and engines where the men could not reach without injury.

<sup>197</sup> Skaine, *supra* note 125, at 176. In 1995, Army researchers began a study focused on building strength of female soldiers, hoping to destroy the myth that women are physically unable to handle the most rigorous jobs in the military, including combat. Training consisted of a ninety minute regimen, five days per week, including a two-mile trail run, fit with a seventy-five pound backpack. The soldiers also did squats with a one-hundred pound barbell on their shoulders. By the end of the study, seventy-five percent of the forty-one women were “found fit for traditional male military duties.”

<sup>198</sup> The author notes that a male soldier might well have an interesting Equal Protection claim if he were in fact prohibited from a military occupation because he did not meet the minimum physical fitness standards for men, but nonetheless fell within the range of the women’s standards.

the gender of the soldiers; instead, everyone is subject to the same test and women are not judged by a men's standard. There is no obvious reason why a man should be excluded from a military occupation simply because his fitness levels match that of a woman. If the minimum standard is the same for both sexes, presumably only those men and women that can reach these levels of fitness will be pass basic training or be qualified for a particular occupation.

Therefore, a single, non-gendered standard should not be impossible to reach for women who aspire to combat positions. Female firefighters have slowly infiltrated fire stations across the country.<sup>199</sup> While their numbers may be low, these women qualified for the position by successfully performing the same Candidate Physical Ability Test ("CPAT") as male candidates do. The CPAT includes such tasks as the "stair climb" in which a candidate climbs on a Stairmaster for nearly three and one half minutes while wearing seventy-five pounds additional weight. Another CPAT task simulates a rescue, in which the candidate must drag a one-hundred-sixty-five pound dummy seventy feet.<sup>200</sup> Thus, women might be slow to gain access to combat positions as well, but as testified to by the capabilities of female firefighters, women should not be categorically exempt from combat positions based on perceived physical differences.

## **VI. How to defeat romantic paternalism: Choosing civic rights and obligations behind Rawls' "Veil of Ignorance"**

A mental exercise that may help convince those in opposed to the idea of drafting women along with men is to use the approach of John Rawls' "A Theory of Justice," the concept of "justice as fairness".<sup>201</sup> Rawls' theory, though abstract, presents a form in which society, as individuals, can re-imagine how they may have created civic rights and obligations had all

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<sup>199</sup> According to an article on the website [www.womensenews.org](http://www.womensenews.org), as of March 2004, approximately 6200 firefighters were female, representing 2% of the total. David Gottlieb, "Career Climb Slow for Female Firefighters", March 25, 2004.

<sup>200</sup> See the Oklahoma City Fire Department website, <http://www.okc.gov/fire/employment/> for the complete CPAT test, which includes a hose drag and an equipment carrying task, among others.

<sup>201</sup> Hayman, Levit, Delgado, *supra* note 48, at 18.

members of society chosen them from behind a “veil of ignorance”. While the Theory of Justice is a social contract, it is not intended to create any one type of society or government; rather, it is the supreme foundational social contract from which all other social contracts are made from.<sup>202</sup> The veil of ignorance assumes that no one knows their place in society, wealth, status, gender, race, ethnic background, all are unknowns. Thus, all persons are similarly situated, so that “no one is advantaged or disadvantaged in their choice of principles by the outcome of natural chance or the contingency of social circumstances.”<sup>203</sup> By using this veil, society would choose civic rights and duties that are fairly distributed among all. Behind it, anyone could be a woman or a minority; it would be dangerous for individuals to gamble and burden only men with military obligation, or to choose to disproportionately burden Hispanics or other minorities.

Rawls enunciated two principles of justice, and the one apropos to this discussion is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>204</sup> Rawls roughly defines these liberties as the right to vote and hold public office, freedoms of speech, thought and assembly, and the freedom to own personal property. Although Rawls does not discuss specific duties, because they are generally reciprocal obligations for rights in society, this analysis presumes that the civic obligations such as who should pay taxes and serve the military are to be decided as well.

Rawls notes that the parties in the social agreement should be rationally and mutually disinterested. So, one could assume that the when parsing out civic obligations, the rational approach would be to agree that everyone should provide for the national defense in times of emergency or other dire need. Being mutually disinterested necessitates that a party does not wonder what other individuals’ interests are—it is actually more self-serving than utilitarian.

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<sup>202</sup> *Id.* Rawls himself notes that this exercise is highly abstract and hypothetical.

<sup>203</sup> *Id.* at 21.

<sup>204</sup> *Id.* at 19.

Nonetheless, this element of self-interestedness should help, not hinder, equality of rights and obligations. If all parties are selecting choices which afford the individual chooser (who knows nothing about their gender, socio-economic status, race, etc.) the most opportunity for equality, it results in a greater good for society. While creating the foundational agreement, it would not be necessary for the parties to go as far as choosing whether to have a standing military, or how to select soldiers for different roles. This would be done by future agreement.

**A. How Will This New Social Contract Be Formed, And By Whom?**

1. Why is a new social contract necessary?

Critics of course will argue that this exercise is futile, as no one can drop their pre-conceived notions about how society *is* structured, in order to hypothesize as to how it *should* be structured. Others might argue that equal rights did not exist at the dawn of our society, instead, groups had to fight long and bitter battles for them. However, this exercise is a mere starting point, an opening to a new dialog which goes beyond arguing about women's physical abilities, men's ego, and which gender can better handle the atrocities of war.

The dialog harkens back to the creation of the fundamental social contract to which women were not a party to; an agreement in which men viewed women as their property, where women were not part of the "men" who were all created equal. At the time of the American Revolution, women were not considered citizens; romantic paternalism dominated, and as such, the nation's social contract never considered if women would ever want something more than domesticity and childrearing.

## 2. Who decides the new social contract?

Although Congress and the Supreme Court have attempted to include women as parties to the nation's social contract,<sup>205</sup> until individual members of society agree among themselves that it needs to be changed to encompass equal rights and equal obligations, women's equality will not be achieved. Today, a new social contract needs to be struck, not among the members of Congress, but among society as a whole. In the twenty-first century, our society is diverse; its citizens are no longer simply wealthy land-owning men, but women, minorities, and recent immigrants from developing nations. Nonetheless, creating an underlying social contract need not be complex; it can be as simple as granting fundamental rights and obligations to all citizens.

## 3. So how will change come?

The simple answer is that society in general must take a sharp about face, and shake loose the grip that romantic paternalism has on it. But how? History cannot be undone, and "Joe Citizen" may actually be easier to convince of the need of an egalitarian draft than will be "Jane Citizen". Younger men seem to be more self-aware, and are not afraid to say that "it is not fair that I have to serve the nation's defense but my sister does not".<sup>206</sup> Most young adult women are perfectly content with the status quo of male-only registration and draft; perhaps to them the trade off (relief from a tremendous obligation versus entitlement as a full citizen) is worth it. Yet, if both men and women could use the "veil" exercise to step outside of their own interests, they might actually realize that distributing rights and obligations equally is truly in their own best interest.

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<sup>205</sup> Title VII's purpose is to level the playing field for women in the workforce, and the 19th Amendment guaranteed women the right to vote.

<sup>206</sup> See *Samuel Schwartz et al. v. Lewis C. Brodsky, Director of the U.S. Selective Service and Thomas Reilly, MA Attorney General*, Civil Action No. 03-10005-EFH, May 29, 2003. Schwartz, a then-18 year old male from Massachusetts, devised the idea of the lawsuit as he pondered why he had to register for the draft, yet his sister did not.

#### 4. Would Congress allow the new social contract to stand?

The fair distribution of civic obligations, including military conscription, will deliver a final blow to the threads of romantic paternalism that decision makers have held on to in order to justify gender inequality. If society as a whole is unwilling to tolerate the inequality of burdens and benefits based on military conscription, could Congress nonetheless refuse to honor the new contract? Herein lies the disconnect between society and its political representatives; often the politicians are older, wealthier, white men, who have enjoyed *not* deciding the question of registering women. Instead of putting the question to a vote, Congress has continually deferred to the Department of Defense, which propounds that as long as combat exclusions still exist, there is no need to register and draft women. Congress is then insulated from making the decision and from having to answer to its constituents.

The question we must ask is if the notion of romantic paternalism has been sufficiently quashed at all levels of society, including among the policy makers. Thirty years ago, Congress was willing to pass the ERA, as the threat of sending women into combat was not a pressing reality, not because most politicians believed in an egalitarian draft. Today, including women in a draft could put women in positions of danger not easily comprehended by non-military personnel, yet enlisted women are closer to the frontline than ever before. Interestingly, the military branches, (much to the dismay of many women) are less inclined to cling to the outdated reality of romantic paternalism. As noted by the Army's recent quest to bring women closer to the battlefield, the military needs its female soldiers, and not only for administrative or medical duties. Of course, the military does not have constituents to be concerned with; its concern is military effectiveness and readiness. If women will help achieve its goals, then it seems more than willing to continue to advance the role of women in military operations.

Congress would seemingly have no good reason to deny an egalitarian registration and draft. A new social contract, which burdens women with military obligation, combined with the realities of modern warfare, should effectively override the remaining shreds of romantic paternalism. Moreover, if society itself has determined that an egalitarian draft is acceptable, Congress no longer must fear the political fallout, and should be free to legislate accordingly.

## **VII. Conclusion**

Women have made tremendous inroads towards military integration. Yet, until women are compelled to serve the nation on par with the civic obligation of men to register for the draft, women will not have achieved first class citizenship. Both men and women need to alter their perception of citizenship, rights, and obligations before such a change will occur.