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Article

**Fighting Women: The Military, Sex, and
Extrajudicial Constitutional Change**

Jill Elaine Hasday[†]

INTRODUCTION

Americans often celebrate military service as a badge of honor and an emblem of full citizenship. Though potentially dangerous and difficult, even brief service in the armed forces offers valuable training, employment benefits, and reputational advantages, opening doors to civilian careers. Yet for generations Congress, the executive branch, the military, and the courts denied women equal access to the benefits and burdens of military service. Laws requiring men to register for possible conscription excluded women. Men could serve in combat, but women could not. Men could rise through the ranks, but the military relegated women to lower-status positions. Men could simultaneously be soldiers and fathers, but military service and motherhood were generally deemed incompatible. Underlying this regime of separate status was a pervasive belief that women's true responsibilities were domestic and precluded full participation in public life, including military service.¹

Some of the most important historical restrictions on women's military role persist: women are still excluded from military registration, draft eligibility, and some combat positions. These explicitly sex-based distinctions have become increasingly anomalous over time. The rise of the modern women's rights movement in the 1970s led legislatures and courts to repeal or

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1. See *infra* Part I.

invalidate almost all laws subjecting men and women to explicitly different rules. Yet despite this wave of reform, Congress in 1980 rejected President Jimmy Carter's proposal to register women with the Selective Service System.² A year later, the Supreme Court held in *Rostker v. Goldberg* that male-only registration was consistent with equal protection, and also endorsed male-only conscription and combat positions.³ Since *Rostker*, few court cases have challenged restrictions on women's military service,⁴ and none have reached the Supreme Court.

Notwithstanding the lack of judicial intervention, however, many aspects of women's legal status in the military have changed in striking respects since *Rostker's* decision to protect the status quo. Congress, the executive branch, the military, and the public have become much more supportive of women's military service, including in combat. The proportion of women in the active United States Armed Forces has risen from approximately 8.4% just before *Rostker*,⁵ to 14.6% in the most recent statistics.⁶ Congress repealed the last statutory prohibition on women holding combat positions in 1993,⁷ and the military has opened a wide range of combat roles to women. Today, women serve—and die—in combat, as the present war in Iraq has amply demonstrated.⁸ Women are barred from an unprecedentedly small and steadily decreasing number of military positions, and only by military regulation rather than statute.⁹ Public opinion surveys find markedly increased support for women's military service, including in combat.¹⁰

Legal scholars, whose agendas often track judicial dockets, have paid little attention to women's legal status in the military since *Rostker*, even when focusing on discrimination in the military. For example, scores of scholars have examined the Solomon Amendment, which requires institutions of higher edu-

2. See *infra* text accompanying notes 71–104.

3. 453 U.S. 57, 75–77, 83 (1981).

4. See *infra* notes 155, 157–160 and accompanying text.

5. See OFFICE OF THE ASSISTANT SEC'Y OF DEF. (MANPOWER, RESERVE AFFAIRS, & LOGISTICS), BACKGROUND REVIEW: WOMEN IN THE MILITARY 13 (1981).

6. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 332 tbl.498 (2007).

7. See *infra* text accompanying note 206.

8. See *infra* notes 225–230 and accompanying text.

9. See *infra* text accompanying notes 209–224.

10. See *infra* text accompanying notes 231–243.

cation receiving certain federal funds to grant military recruiters the same access to students that other recruiters enjoy.¹¹ Many scholars criticize the Amendment for pressuring schools to admit military recruiters when those schools otherwise ban recruiters who discriminate based on sexual orientation. Military policies disfavoring gay servicemembers have been frequently litigated, although repeatedly upheld,¹² and they loom large in academic debates. Yet these same scholars routinely fail even to mention that military recruitment on campus might also violate school policies banning recruiters who discriminate based on sex.¹³

This Article brings long overdue attention to the record of women's legal status in the military in order to make three broad theoretical and historical points. *First*, the record of women's legal status in the military is important counterevidence to the prevalent assumption that sex equality already exists, at least in formal legal rules. *Second*, this record helps illuminate how extrajudicial events can shape the Supreme Court's constitutional interpretation and then make that interpretation much less plausible over time. *Third*, and most strikingly, this record illustrates how extrajudicial actors can develop and enforce their own evolving understanding of sex

11. See 10 U.S.C. § 983 (2006); see also *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) (holding that Solomon Amendment does not violate law schools' First Amendment rights).

12. See, e.g., *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1127–28 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996).

13. See, e.g., J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 947–48 (2006) ("The Solomon Amendment requires universities to allow the military access to campus to recruit students, even though the military violates a school's policy prohibiting employer discrimination on the basis of sexual orientation, or face loss of federal funds."); Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205, 211 (2004) ("[The Solomon Amendment] quickly became entangled with the burgeoning gay rights movement and non-discrimination policies, as many universities, both public and private, objected to the Pentagon's anti-gay policies Those universities, in turn, banned military recruiters from campus because the military discriminates based on sexual orientation."). One Solomon Amendment defender notes that military recruitment on campus violates "law schools' policies against discrimination based on age and disability," but fails to mention sex discrimination. Gerald Walpin, *The Solomon Amendment Is Constitutional and Does Not Violate Academic Freedom*, 2 SETON HALL CIRCUIT REV. 1, 9 (2005).

equality norms, sometimes becoming a more important source of those norms than courts. The extrajudicial transformation in women's military role has shifted the foundational normative commitments that shape the evolving meaning of constitutional equal protection.

The Persistence of Legalized Sex Inequality. Women's continued exclusion from registration, draft eligibility, and some combat positions contradicts any assumption that legalized sex inequality has faded into history.¹⁴ Indeed, *Rostker* illustrates how the notion that legalized sex inequality has been left in the past can facilitate the perpetuation of unequal regimes. In upholding male-only registration, *Rostker* asserted that Congress rejected President Carter's 1980 proposal to register women for entirely new and modern reasons untainted by invidious sex stereotypes. The clear purpose of this contention—which scholars have uncritically accepted—was to insist that any constitutionally problematic modes of reasoning about women were safely confined to the past, and to establish that women's continued exclusion from registration was not a mark of second-class citizenship. In fact, this Article demonstrates—contrary to current literature—that the record of Congress's 1980 decision to exclude women from registration is most notable for its consistency with earlier congressional decisions to restrict women's military role that were rooted in the conviction that women's familial responsibilities precluded their full participation in public life. In 1980, political and popular forces—on both sides of the debates over registering women—remained committed to restricting women's military service on the belief that women's real responsibilities were domestic and private rather than political and public.¹⁵

The Court's Constitutional Interpretation and the World Outside the Court. The record of women's legal status in the military also illuminates the influence that extrajudicial forces can have on the Court's constitutional jurisprudence. The *Rostker* Court explicitly grounded its decision to uphold male-only registration on congressional, executive, military, and popular opposition to women in combat.¹⁶ *Rostker's* interpretation of constitutional equal protection built upon a point of considerable extrajudicial consensus—that women should not be in com-

14. On this assumption in the family law context, see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 833–70 (2004).

15. See *infra* Part I.A.

16. See *infra* text accompanying notes 151–154.

bat—and staked a position on a point of intense extrajudicial disagreement—whether women’s exclusion from combat justified male-only registration and conscription eligibility.¹⁷

Since *Rostker*, the record of women’s military status illustrates how extrajudicial developments can undermine the plausibility of the constitutional interpretation in the Court’s precedents. Without any constitutional amendment or reversal in the Court’s jurisprudence, *Rostker*’s constitutional interpretation has become much less compelling and convincing over time. *Rostker*’s understanding of equal protection was not timeless and ahistorical; it was inextricably intertwined with the factual premise that opposition to women’s combat service was widespread and the cultural assumption that this opposition was too reasonable to need explanation. As Congress, the executive branch, and the military are well aware, the extrajudicial transformation in women’s military role since *Rostker* has seriously undercut the transitory premises and assumptions behind *Rostker*’s interpretation of equal protection. This transformation makes clear that *Rostker* is inconsistent with the rest of the Court’s sex discrimination jurisprudence.¹⁸

The influence that extrajudicial forces can exert on the Court’s constitutional interpretation has not gone unnoted,¹⁹

17. See *infra* Part II.

18. See *infra* Part III.B.

19. Scholars, particularly outside the legal academy, have long observed that politics and popular culture could influence the Supreme Court. See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) (“[T]he Court has seldom lagged far behind or forged far ahead of America.”). For example, extrajudicial forces could influence the Court indirectly through the appointments process, in which Presidents nominate and Senators confirm Justices. See U.S. CONST. art. II, § 2, cl. 2; sources cited *infra* note 143. Extrajudicial forces could also directly influence Justices, perhaps because the same waves of evolving opinion that affect other Americans also affect the Justices or perhaps because Justices prefer deferring to popular or political sentiment out of respect for democratic processes or fear of retaliation. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) (“The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”). Some social scientists focus on documenting correlations between the Court’s constitutional interpretation and public opinion polls. See sources cited *infra* note 150. The Court has occasionally acknowledged the influence that changes in legislative and popular opinion exert on its constitutional jurisprudence, whether in adjudicating the Eighth Amendment’s prohibition on “cruel and unusual punishments,” U.S. CONST. amend. VIII; *Roper v. Simmons*, 543 U.S. 551, 561 (2005), determining if material is obscene and therefore outside First Amendment protection, *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 574 (2002), or finding that criminalizing consensual sodomy violates the Due Process Clause, *Lawrence v. Texas*, 539

but it is frequently forgotten or denied. Especially in recent years, the Court has more often insisted on its distance from extrajudicial influence. For instance, little ground united the majority and Justice Antonin Scalia's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* except the contention that what the majority characterized as "social and political pressures" would not and should not affect the Court's constitutional judgments.²⁰ "How upsetting it is," Scalia agreed, "that so many of our citizens . . . think that we Justices should properly take into account their views."²¹

Legal scholars, too, often appear to write on the assumption that knowledge and insight flow from courts to the society outside and not the reverse. The relatively few legal scholars to consider women's military role since *Rostker* have focused on advising courts about the future direction of their jurisprudence.²² The most influential article in this tradition concludes by encouraging courts to invalidate discrimination in the military, explaining "*our judges can teach their fellow Americans the vital lesson that we are one nation, indivisible.*"²³ In fact, the record of women's military status reveals extrajudicial actors advancing a vision of equality that is farther-reaching and more inclusive than the judiciary's, and that offers courts potential lessons.

Extrajudicial Constitutional Change. While the existing legal scholarship on women's military role is oriented toward the judiciary, courts actually have not been central to the transformation of women's military service since *Rostker*. *Rostker* found male-only registration, conscription, and combat consistent with equal protection, creating no pressure for change. Congress, the executive branch, and the military have dramatically altered women's military role since *Rostker* through processes in which courts have been remarkably marginal.

U.S. 558, 579 (2003).

20. 505 U.S. 833, 865 (1992).

21. *Id.* at 999–1000 (Scalia, J., concurring in the judgment in part and dissenting in part).

22. See, e.g., Marilyn A. Gordon & Mary Jo Ludvigson, *The Combat Exclusion for Women Aviators: A Constitutional Analysis*, 39 NAVAL L. REV. 171, 175–85 (1990); Karla R. Kelly, *The Exclusion of Women from Combat: Withstanding the Challenge*, 33 JAG J. 77, 87–108 (1984); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 332–49 (2005).

23. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 581 (1991) (emphasis added).

Commentators often praise the Court's ability to settle constitutional disputes,²⁴ but *Rostker's* judgment that women's rights to equality were not at risk did not stop Congress, the executive, and the military from debating the issue, or enforcing their own evolving judgment that sex equality, along with the volunteer military's personnel needs, called for granting women an increasingly large military role, including in combat. Women's military role has expanded despite *Rostker* because the Court is not the only institution committed to sex equality, actively considering how to advance that commitment, or willing and able to enforce its judgments.

The record of women's legal status in the military demonstrates how equality norms can change, and find legal enforcement, without any change in Court jurisprudence or any Court involvement. The claim that restrictions on women's military role impinged upon sex equality moved from the Court to other parts of government, and was enforced there. Extrajudicial actors have developed and enforced their own evolving understanding of sex equality norms.²⁵

One pressing question this record raises is whether the extrajudicial transformation in women's military role since *Rostker* should be understood as constitutional change.²⁶ An emerging legal literature explores extrajudicial constitutional change. But this literature has focused on the courts' power to invalidate or constrain government action, and the extent to which extrajudicial institutions can, should, or do resist exertions of that judicial power.²⁷ *Rostker* upheld and placed no restrictions upon government activity, yet the extrajudicial transformation in women's military status is contrary to *Rostker's* reasoning, premises, and expectations. This transformation highlights a question on which the literature about extrajudicial constitutional change has not adequately focused: what counts as constitutional change outside the courts? The record of women's legal status in the military illustrates how the answer to that question depends on the purposes for which it is being asked.

The transformation in women's military status does not count as constitutional change if the question is meant to establish whether courts would have ordered this transformation if

24. See *infra* note 163 and accompanying text.

25. See *infra* Part III.A.

26. See *infra* Part IV.

27. See *infra* text accompanying notes 254–258.

Congress, the executive, and the military had not acted. The transformation also does not count as constitutional change if the question is meant to establish whether Congress, the executive, and the military stated that they were constitutionally obligated to make the changes they made.

But the transformation in women's military status does count as constitutional change if the question seeks to understand the foundational normative commitments that shape the meaning of constitutional equal protection as it evolves. This transformation has made limits on women's military service that seemed just and reasonable in the 1970s and 1980s to many people determined to establish sex equality in constitutional and statutory law, now appear wrong, inequitable, and even invidious. Over time, that shift in perspective is likely to affect the demands for further change and the judgments made about how the Constitution's open-textured language of equal protection applies to specific questions about women's military role.

The courts' constitutional jurisprudence is one place this shift in perspective might register. The transformation in women's military status has undermined *Rostker's* foundation, making restrictions on women's military service that *Rostker* did not explain because they seemed so commonsensical now demand explanation and appear constitutionally vulnerable.

However, given the judiciary's frequent underenforcement of constitutional rights in the military arena, the shift in perspective is likely to be most important—at least in the short term—in shaping the constitutional arguments that can be directed to extrajudicial actors. The claim that limits on women's military service are inconsistent with constitutional equal protection has become a much more cognizable, even powerful, claim to make before Congress, the executive, and the military. In the coming years—as the transformation in women's military role continues to destabilize understandings of which arrangements are reasonable and which wrong—Congress, the executive, and the military will be pushed to decide what additional changes in women's military service to enact in the interest of constitutional equal protection.

The Article concludes by exploring some of the practical consequences of the extrajudicial shift in perspective on women's military service. As Congress, the executive, the military, and the public increasingly recognize women's military service, including in combat, as a natural expression and reflection of

women's equality, male-only registration, draft eligibility, and combat positions become more difficult for extrajudicial decisionmakers to defend and sustain as consistent with constitutional norms of sex equality. To be sure, some members of Congress, the executive, the military, and the public remain resistant to further change, or eager to avoid issues for as long as possible, so sex-based restrictions on women's military service may not end overnight. In the near term, however, the extrajudicial shift in perspective on women's military service, combined with the near absence of judicial review over women's legal status in the military since *Rostker*, provide the foundation for a strong argument that Congress, the executive, and the military should assume a heightened responsibility to review and oversee military decisions about which positions will be closed to women to ensure their rationality, freedom from bias, and consistency with constitutional norms of sex equality. This shift in perspective and absence of judicial review also provide the basis for a strong argument that Congress, the executive, and the military should assume in the interest of constitutional norms of sex equality a heightened responsibility to review and oversee facially sex-neutral military policies that disproportionately hamper servicewomen's opportunities.

Let's turn to the record of women's legal status in the military, starting before *Rostker*.

I. MILITARY SERVICE, CITIZENSHIP, AND DOMESTICITY: WOMEN AND THE MILITARY BEFORE *ROSTKER*

Military service represents a complex mix of benefit and burden. The ratio of benefits and burdens varies depending on whether one is a volunteer or conscript. But both volunteers and draftees share some obvious burdens, like time away from civilian pursuits and risk to life and limb. The benefits of military service are also striking. They include concrete material advantages, such as vocational training and extensive veterans' benefits and preferences.²⁸

Another critical benefit is cultural and political: Americans have long understood military service to be a central avenue for establishing and confirming full citizenship. Ten of the first thirty-three Presidents were military generals.²⁹ Overall, twen-

28. See, e.g., *Pers. Adm'r v. Feeney*, 442 U.S. 256, 261 (1979) ("The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.").

29. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE*

ty-eight Presidents served in America's armed forces.³⁰

Courts have stressed the connection between military service and full citizenship in cases upholding conscription from World War I to the Vietnam era. They have explained that military service is the citizen's "supreme and noble duty,"³¹ adding "that 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."³² In *Scott v. Sandford*, which held that black people were not American citizens,³³ the Supreme Court cited as important evidence a state law limiting military service to "free white citizens." As the Court reasoned, "[n]othing could more strongly mark the entire repudiation of the African race." A member of "the African race" "is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."³⁴

Discussions of military service and full citizenship have historically made little, if any, mention of whether women were full citizens. In fact, women's military service was severely restricted historically in order to express and enforce the conviction that women's special domestic responsibilities precluded full participation in public roles. Women did not gain permanent status in the military until 1948,³⁵ and the operative sta-

THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 157 (1957).

30. See JOSEPH NATHAN KANE ET AL., *FACTS ABOUT THE PRESIDENTS: A COMPILATION OF BIOGRAPHICAL AND HISTORICAL INFORMATION* 589 (7th ed. 2001).

31. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

32. *Id.* at 378; see also *United States v. Fallon*, 407 F.2d 621, 622–23 (7th Cir. 1969) (quoting this passage from *Selective Draft Law Cases*).

33. 60 U.S. (19 How.) 393, 404–07 (1857).

34. *Id.* at 415.

35. See *Women's Armed Services Integration Act of 1948*, Pub. L. No. 80-625, 62 Stat. 356. During World War II, women in the military served on a temporary basis. See *Act of May 14, 1942*, ch. 312, 56 Stat. 278 (*Women's Army Auxiliary Corps*); *Act of July 30, 1942*, ch. 538, 56 Stat. 730 (*Navy Women's Reserve*). However, the government did seriously consider drafting female nurses. In a January 6, 1945 message to Congress, President Franklin Roosevelt "urge[d] that the Selective Service Act be amended to provide for the induction of nurses into the armed forces," explaining that "[t]he need is too pressing to await the outcome of further efforts at recruiting." H.R. REP. NO. 79-194, at 2 (1945). On February 22, 1945, the House Military Affairs Committee recommended the *Nurses Selective Service Act*, which would have conscripted female nurses. See *id.* at 1. The committee explained that there was "a large group of female citizens who [were] registered nurses," and "these nurses [could not] be obtained in sufficient numbers within the time needed

tute—the misleadingly named Women’s Armed Services Integration Act—capped women’s participation at a maximum of two percent of the military;³⁶ excluded women from registration, conscription, upper officer ranks,³⁷ and combat positions;³⁸ and permitted involuntary discharge for motherhood or pregnancy.³⁹ The Integration Act’s supporters insisted that women’s ultimate responsibilities were familial. General Dwight D. Eisenhower assured Congress that “few” women would accumulate the thirty years of military service necessary for earning retirement benefits. Instead, women “will come in and I believe after an enlistment or two enlistments they will ordinarily—and thank God—they will get married.”⁴⁰ Rear Admiral T.L.

except through selective service legislation.” *Id.* at 6. The bill passed the House, and the Senate Military Affairs Committee recommended it on March 28, 1945. *See* S. REP. NO. 79-130, at 1 (1945). But the bill lost momentum after the war in Europe ended in May 1945. It is now little-known, even among historians. *See* Linda K. Kerber, “A Constitutional Right to be Treated Like . . . Ladies”: *Women, Civic Obligation and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 109 (“Although the idea of the citizen-soldier was vigorously deployed in discussions of the World War II draft, no serious efforts were made to draft women, even for non-combatant service in the women’s auxiliary forces (e.g. WACS, WAVES), or as nurses.”).

36. *See* Women’s Armed Services Integration Act § 102 (Army); *id.* § 202 (Navy); *id.* § 213(b) (Marines); *id.* § 302 (Air Force).

37. Only one Army woman could serve as a colonel, and that was a temporary rank limited to her tenure as director of the Women’s Army Corps, *see id.* § 103(a), the separate corps for Army women, *see id.* § 101. Only one woman in the Air Force and one female Marine could have the temporary rank of colonel. *See id.* § 303(g) (Air Force); *id.* § 213(d) (Marines). Only one Navy woman could have the temporary rank of captain. *See id.* § 205.

38. Women in the Air Force and the Navy (which includes the Marines) could not be assigned to duty on aircraft engaged in combat missions, *see id.* § 307(a) (Air Force); *id.* §§ 210, 212 (Navy), and Navy women could not be assigned to Navy vessels except for hospital ships and naval transports, *see id.* §§ 210, 212. The Secretaries of the Air Force and Navy could further limit women’s assignments. *See id.* § 307(a) (Air Force); *id.* §§ 210, 212 (Navy). There were no explicit exemptions for Army women. The Secretary of the Army had complete discretion, *see id.* § 104(g), on the understanding that defining the scope of the Army combat exclusion was more difficult, *see Women’s Armed Services Integration Act of 1947: Hearings on S. 1103, S. 1527, and S. 1641 Before the S. Comm. on Armed Services*, 80th Cong. 88 (1947) (statement of Colonel Mary Hallaren, Director, Women’s Army Corps).

39. The service secretaries had full discretion to discharge women, as long as the secretaries complied with any presidential regulations. *See* Women’s Armed Services Integration Act §§ 104(h), 105(b), 106(b) (Army); § 214 (Navy and Marines); § 307(b) (Air Force). As anticipated, President Harry Truman’s 1951 executive order provided that the secretaries could discharge servicewomen for motherhood or pregnancy. *See* Exec. Order No. 10,240, 3 C.F.R. 749, 749 (1949–1953).

40. *To Establish the Women’s Army Corps in the Regular Army, to Author-*

Sprague explained that the military would involuntarily discharge pregnant servicewomen because “under those circumstances, a woman’s loyalty and duty are to her family and no longer to the service.”⁴¹

Women’s military status remained essentially unchanged for decades, with women constituting approximately one percent of the military.⁴² A 1957 recruiting pamphlet documented the military’s commitment to preserving civilian social and economic patterns. The pamphlet included two drawings side-by-side, each picturing a working woman. The only difference was that the first woman was wearing civilian clothes, and the second was in military uniform. Each was sitting before the same typewriter, with the same expression on her face, apparently doing the same work.⁴³



Fig. 1.

ize the Enlistment and Appointment of Women in the Regular Navy and Marine Corps and the Naval and Marine Corps Reserve, and for Other Purposes: Hearings on S. 1641 Before the Subcomm. on Organization and Mobilization of the H. Comm. on Armed Services, 80th Cong. 5564 (1948) (statement of General Dwight D. Eisenhower).

41. *Women’s Armed Services Integration Act of 1947: Hearings on S. 1103, S. 1527, and S. 1641 Before the S. Comm. on Armed Services, supra note 38, at 67 (statement of Rear Admiral T.L. Sprague, Chief of Naval Personnel).*

42. *See On Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1979 Also Assignment of Women on Navy Ships: Hearings on H.R. 10,929 and H.R. 7431 Before the H. Comm. on Armed Services, 95th Cong., pt. 5, at 195 (1978) (statement of John P. White, Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics); CENT. ALL-VOLUNTEER FORCE TASK FORCE, OFFICE OF THE ASSISTANT SEC’Y OF DEF. (MANPOWER & RESERVE AFFAIRS), UTILIZATION OF MILITARY WOMEN: A REPORT OF INCREASED UTILIZATION OF MILITARY WOMEN FY 1973–1977, at vi (1972); OFFICE OF THE ASSISTANT SEC’Y OF DEF. (MANPOWER, RESERVE AFFAIRS, & LOGISTICS), supra note 5, at 12.*

43. *See DEP’T OF DEF., CAREERS FOR WOMEN IN THE ARMED FORCES 18 (1957).*

By the early 1970s, however, women's legal status in the military had begun to attract unprecedented attention for two reasons. First, the modern women's rights movement, which challenged the social and legal norms confining women to narrow roles in the family and workplace, had emerged as a powerful social movement and sparked the mobilization of an opposing movement intent on preserving women's existing roles, especially in the family. Second, the end of the draft in 1973 made the military more eager to attract women.⁴⁴ The military progressively increased its recruitment of women in the 1970s, citing the demands of the women's movement and the need for more military volunteers given the abolition of the draft.⁴⁵

The first decade of modern political and popular debates about women's military role focused on the Equal Rights Amendment (ERA) and President Carter's 1980 proposal to implement by statute and military regulation what many ERA supporters contended the Amendment would establish: women's inclusion in registration and conscription eligibility, and continued exclusion from combat. These debates were tightly

44. For the statute ending the draft as of July 1, 1973, see Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 348, 353 (codified at 50 U.S.C. app. § 467(c) (2000)).

45. See CENT. ALL-VOLUNTEER FORCE TASK FORCE, *supra* note 42, at i-ii ("The Central All-Volunteer Force Task Force was asked to study the utilization of military women and prepare contingency plans for increasing the use of women to offset possible shortages of male recruits after the end of the draft. . . . Shortly after this study commenced, the Equal Rights Amendment was passed by Congress on March 22, 1972. . . . This Amendment brought the focus of the nation upon equal rights for women, and the Defense Department intensified its efforts 'to make Military and Civilian service in the Department of Defense a model of equal opportunity' During the course of the study, . . . Navy and Air Force announced plans to increase significantly the number of military women during FY 1973-1977, and the Marine Corps advised the Task Force that it planned a modest increase." (footnote omitted)); COMPTROLLER GEN. OF THE U.S., JOB OPPORTUNITIES FOR WOMEN IN THE MILITARY: PROGRESS AND PROBLEMS, at i (1976) ("The draft was to end. Fewer men were expected to join the services. Equal Rights Amendment requirements were expected. This was the milieu in 1972 when the Department of Defense started recruiting more women and using them in as many jobs as possible within combat limitations, including those previously restricted to men."); OFFICE OF THE ASSISTANT SEC'Y OF DEF. (MANPOWER, RESERVE AFFAIRS, & LOGISTICS), BACKGROUND STUDY: USE OF WOMEN IN THE MILITARY 1 (2d ed. 1978) ("[T]he use of women in the military is a question of increasing importance, for two reasons. First is the movement within the society to provide equal economic opportunity for American women. Second, and more important, use of more women can be a significant factor in making the all-volunteer force continue to work in the face of a declining youth population.").

intertwined, although the *Rostker* Court and scholars repeating *Rostker*'s account later sought to separate them.

Throughout these debates, powerful forces in government and popular culture remained determined to limit women's military service in the interest of confirming and enforcing the conviction that women's real responsibilities were domestic and private. There was a strong consensus against including women in combat. There was more dispute over whether women should register and be eligible for conscription. But many people who supported including women in registration and conscription did so on the belief that Congress and the military would organize any draft to preserve women's existing roles in the family and workplace. Even so, efforts to include women in registration and conscription failed.

A. GOVERNMENTAL AND POPULAR DEBATES ABOUT WOMEN'S LEGAL STATUS IN THE MILITARY, 1970–1980

The modern women's movement was intent on amending the Constitution to provide that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”⁴⁶ By 1970, Congress was also focused on the ERA. In the extensive congressional debates and testimony on the Amendment, all ERA opponents,⁴⁷ and virtually all ERA supporters,⁴⁸ agreed that the Amendment would

46. Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong., § 1, 86 Stat. 1523, 1523 (1972).

47. See, e.g., 118 CONG. REC. 9100 (1972) (statement of Senator Samuel Ervin, Jr.) (“Since one of the obligations that our society imposes upon men is to serve in the Armed Forces, even if one is unwilling to volunteer and to serve in combat, this amendment would require that men and women be drafted on exactly the same conditions and serve in combat units and all other units of the Armed Forces under exactly the same conditions.”); *id.* at 9317 (statement of Senator John Stennis) (“Under the resolution as it now stands no man in the United States could be drafted into the Army unless women were equally subject to the draft. . . . [I]f we adopt the resolution without amendment, . . . the U.S. Army would not be allowed to exclude women from combat or other hazardous duty on the basis of sex, since that would discriminate against men, and the present resolution requires absolute sameness of treatment regardless of sex.”).

48. See, e.g., S. REP. NO. 92-689, at 13 (1972) (“It seems likely as well that the ERA will require Congress to treat men and women equally with respect to the draft.”). William Van Alstyne was one of the very few ERA supporters who argued that the Amendment would not necessarily require sex-neutral rules governing registration, conscription, and combat. He considered “the deference the Supreme Court has placed with Congress with regard to matters of national security,” and concluded that the Court would uphold women's exclusion from “combatant training and service,” even with the ERA in the Consti-

require sex-neutral rules governing registration, conscription, and combat service.

The charge that the ERA would compel women's inclusion in registration, conscription, and combat was a leading objection, perhaps the foremost objection, to the Amendment. ERA opponents repeatedly proposed substitute amendments stating that the sex discrimination prohibition would "not impair, however, the validity of any law of the United States or any State which exempts women from compulsory military service."⁴⁹

These opponents stressed that including women, especially mothers, in registration, conscription, and combat would destroy family life by removing the person obligated to maintain it. Senator Samuel Ervin, Jr. stated bluntly that women's responsibilities were domestic and private rather than political and public. He explained that "custom and law" had always held wives and mothers responsible for making "homes" and furnishing "nurture, care, and training to their children during their early years."⁵⁰ "It is absolutely ridiculous to talk about taking a mother away from her children so that she may go out to fight the enemy and leave the father at home to nurse the children."⁵¹ Representative Emanuel Celler affirmed that women's real responsibilities were familial. "Women represent motherhood and creation," he declared. "Wars are for destruction."⁵² Representative David Dennis elaborated that American society's foundation depended on preserving women's family roles. He warned that "the drafting of American women and mothers into the military service is a thoroughly undesirable social development which would go far, indeed, to transform us into a national socialist state."⁵³

tution. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 150 (1978) (statement of William Van Alstyne, Marshall-Wythe School of Law, College of William and Mary).

49. *E.g.*, 116 CONG. REC. 29,671 (1970) (statement of Senator Samuel Ervin, Jr.).

50. S. REP. NO. 92-689, at 49 (Minority Views of Mr. Ervin).

51. 118 CONG. REC. 9102 (1972) (statement of Senator Samuel Ervin, Jr.).

52. 117 CONG. REC. 35,785 (1971) (statement of Representative Emanuel Celler).

53. *Id.* at 35,316 (statement of Representative David Dennis). Opponents of women's equality have long attempted to discredit both feminism and socialism by linking them together as movements meant to undermine women's family roles. *See, e.g.*, B.V. HUBBARD, SOCIALISM, FEMINISM, AND SUFFRAGISM, THE TERRIBLE TRIPLETS: CONNECTED BY THE SAME UMBILICAL CORD, AND FED

ERA supporters offered two sorts of responses. Some ERA supporters directly contested the premises of ERA opponents. They challenged women's circumscribed role in the military as part of their larger challenge to women's circumscribed role in the family, workplace, and society as a whole. These ERA supporters rejected the "understanding among people that women are not to serve their country, that women are to serve individuals—that is, husbands and families."⁵⁴ They stressed the benefits of military service—leadership opportunities, vocational training, educational scholarships, and job preferences for veterans—that would help women surmount the constraints they typically confronted in the workplace.⁵⁵ They insisted that women should assume equal responsibility for national defense to establish and confirm their equal citizenship. Representative Bella Abzug observed that "[i]n the Congress of the United States and in the political life of this Nation, political choices and debate often reflect a belief that men who have fought for their country have a special right to wield political power and make political decisions." Until women had equal rights and responsibilities with respect to military service, they would be "denied the status of full citizenship, and the respect that goes with that status."⁵⁶

However, many ERA supporters offered arguments much more closely aligned with the premises of ERA opponents. These ERA supporters belie standard scholarly accounts stress-

FROM THE SAME NURSING BOTTLE 286 (1915) ("Socialism, Feminism and Suffragism are triplets. . . . All three isms are intent on breaking down the Christian family as a unit, and the making of individuals of each member. All disregard the teachings of Scripture in regard to the relative duties of husband and wife."); WOMAN PATRIOT, Apr. 27, 1918, at 1 ("A National Newspaper For Home and National Defense Against Woman Suffrage, Feminism and Socialism").

54. *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92d Cong. 99 (1971) (statement of Jean Faust, Assistant on Women's Rights for Representative William F. Ryan).

55. See, e.g., *id.* at 131–32 (statement of Virginia R. Allan, Former Chairman, President's Task Force on Women's Rights and Responsibilities); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 75 (1970) (statement of Jean Witter, Chairman, Equal Rights Amendment Committee, National Organization for Women); 117 CONG. REC. 35,311 (1971) (statement of Representative Bella Abzug).

56. 117 CONG. REC. 35,311 (1971) (statement of Representative Bella Abzug).

ing the radicalism of Amendment advocates.⁵⁷ Instead, these ERA supporters appeared to be significantly attached to preserving women's social roles, within and outside the military. They either felt such commitments themselves, or were convinced that the Amendment would fail unless taken to be consistent with such commitments, or both.

These ERA supporters denied that the Amendment would cause as much change as opponents predicted. For instance, they conceded that the ERA would make women eligible for conscription, but explained that Congress and the military would structure any draft to preserve women's domestic roles. Mothers would be exempt, and this would not violate the ERA if fathers with the same family responsibilities were also exempt. The Senate Judiciary Committee promised that "the fear that mothers will be conscripted from their children into military service if the Equal Rights Amendment is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service."⁵⁸

These ERA supporters also opposed including women in combat. They argued that the Amendment would permit Congress and the military to restrict combat service to people fitted for such service, and assumed this would preclude women from actually assuming combat roles. Senator Edward Gurney stated flatly that "the amendment does not require that women become combatants in the Armed Forces although it will subject them to the draft."⁵⁹ Representative Michael Harrington explained that "the principle that members of the Armed Forces are used according to their basic ability alleviates the possibility that women will be sent into combat."⁶⁰ Representa-

57. Jane Mansbridge, for instance, has emphasized that "[b]ecause ERA activists had little of an immediate, practical nature to lose if the ERA was defeated, they had little reason to describe it in a way that would make it acceptable to middle-of-the-road legislators." JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 2 (1986). "Most proponents contended, for example, that the ERA would require the military to send women draftees into combat on the same basis as men." *Id.* at 3; see also Edith Mayo & Jerry K. Frye, *The ERA: Postmortem of a Failure in Political Communication*, in *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* 76, 84 (Joan Hoff-Wilson ed., 1986) ("Such strident feminist rhetoric was typical of the women's movement's failure to construct persuasive answers to the draft for a general, nonfeminist public.").

58. S. REP. NO. 92-689, at 13 (1972).

59. 118 CONG. REC. 9336 (1972) (statement of Senator Edward Gurney).

60. 117 CONG. REC. 35,325 (1971) (statement of Representative Michael Harrington).

tive Martha Griffiths, the ERA's chief House sponsor, confidently predicted that the Amendment would leave servicewomen in the same low-level clerical and administrative jobs women dominated in civilian life and had long been confined to in the military. "The draft itself is equal," she stated. "But once you are in the Army you are put where the Army tells you where you are going to go. The thing that will happen with women is that they will be the stenographers and telephone operators."⁶¹

The ERA passed the House on October 12, 1971,⁶² and the Senate on March 22, 1972.⁶³ But the charge that the Amendment would transform women's military status, and so transform women's domestic status, raged in state ratification debates.⁶⁴

By 1978, the ERA's ratification deadline (March 22, 1979) was approaching, and only thirty-five of the required thirty-eight states had ratified.⁶⁵ During the intense congressional debates over whether to extend the deadline, ERA opponents reiterated that the Amendment would undermine women's family roles by subjecting women to registration, conscription, and combat,⁶⁶ and identified the ERA's implications for wom-

61. *Id.* at 35,323 (statement of Representative Martha Griffiths).

62. *See id.* at 35,815.

63. *See* 118 CONG. REC. 9598 (1972).

64. An ERA opponent in the Illinois House of Representatives, for instance, contended that the United States House "Judiciary Committee said that this would mean that women and this includes mothers, would be subject to the draft and the military would be compelled to place them in combat units along side of men. . . . [T]his is the Judiciary Committee that has drafted many many Constitutional Amendments." House of Representatives, State of Illinois General Assembly 104 (Apr. 4, 1973) (on file with author) (statement of Representative Donald Deuster); *see also* Connecticut Committee to Rescind ERA, Don't Let the Equal Rights Amendment Stamp Out Womanhood, *reprinted in Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 142, 143 (1979) (statement of Thomas I. Emerson, Lines Professor of Law Emeritus, Yale Law School) ("ERA will make women subject to the draft on an equal basis with men in all our future wars. ERA will make women and mothers subject to military combat and warship duty").

65. Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia had not ratified the ERA by 1978 and never would. *See* MANSBRIDGE, *supra* note 57, at 13–14 ("All were Mormon or southern states, except Illinois, which required a three-fifths majority for ratifying constitutional amendments and which had a strongly southern culture in the third of the state surrounded by Missouri and Kentucky.")

66. *See, e.g., Equal Rights Amendment Extension: Hearings on S.J. Res.*

en's military service as "probably the most serious" obstacle to ratification.⁶⁷ ERA supporters again conceded that the Amendment would require women's inclusion in registration and conscription, but explained that Congress and the military would organize any draft to protect women's existing family roles and would exclude women from combat.⁶⁸ On October 6, 1978, Congress extended the ratification deadline until June 30, 1982.⁶⁹ But the debate over the ERA's consequences for women's military service continued within and outside Congress.⁷⁰

In the midst of this debate, President Carter, a leading ERA advocate,⁷¹ sought to implement by statute and regulation the changes in women's military role that many ERA supporters contended the Amendment would achieve. On February 8, 1980, Carter announced that he would seek congressional authorization to reinstitute registration and register women along with men,⁷² but stressed his opposition to including women in combat positions.⁷³

134 *Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, *supra* note 64, at 352, 354 (statement of Senator Orrin Hatch).

67. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, *supra* note 48, at 113 (statement of Erwin N. Griswold, former Solicitor General of the United States).

68. *See, e.g., id.* at 348-49 (statement of Frankie M. Freeman, Commissioner, U.S. Commission on Civil Rights); *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, *supra* note 64, at 281, 345-47 (statement of Senator Birch Bayh).

69. H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

70. *See Women in the Military: Hearings Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 96th Cong. 34 (1981) (statement of Representative Richard White); *id.* at 42-43 (statement of Representative Larry McDonald).

71. *See, e.g.,* Jimmy Carter, Equal Rights Amendment: Remarks on Signing H.J. Res. 638, 2 PUB. PAPERS 1800, 1800-01 (Oct. 20, 1978) ("[T]he Constitution does not require that the President sign a resolution concerning an amendment to the Constitution of the United States. But I particularly wanted to add my signature . . . to again demonstrate as strongly as I possibly can my full support for the ratification of the equal rights amendment.").

72. *See* Jimmy Carter, Selective Service Revitalization: Statement on the Registration of Americans for the Draft, 1 PUB. PAPERS 289, 289 (Feb. 8, 1980) ("I will seek from Congress funds to register American young men under existing law.—I will seek additional authority to register women for noncombat service to our Nation.").

73. *See id.* at 290 ("[W]omen are not assigned to units where engagement in close combat would be part of their duties, and I have no intention of changing that policy.").

Carter explicitly linked his proposal to support for the ERA. He identified registration and conscription eligibility as responsibilities that would confirm women's full citizenship and entitlement to equal rights. "Just as we are asking women to assume additional responsibilities," Carter explained, "it is more urgent than ever that the women in America have full and equal rights under the Constitution. Equal obligations deserve equal rights."⁷⁴

Debate over Carter's proposal dominated Congress for months, until Congress passed on June 25, 1980, and Carter signed on June 27, a statute funding registration for men only.⁷⁵ The *Rostker* Court would claim that Congress developed new reasons for limiting women's military service in these months in 1980. On the Court's account, the debate about Carter's proposal was properly considered in isolation. Any earlier discussion of women's military role was irrelevant and not to be examined because Congress in 1980 had "thoroughly reconsider[ed] the question of exempting women from [registration], and its basis for doing so."⁷⁶

This assertion was meant to facilitate the Court's decision permitting male-only registration to continue, by insisting that any constitutionally problematic modes of reasoning about women had been left in the past. *Rostker* contended that Congress's 1980 debate represented a complete break from history, in which Congress decided to exclude women from registration for fresh reasons, not grounded in constitutionally illegitimate concerns. The Court declared that Congress's 1980 "decision to exempt women from registration was not the "accidental by-product of a traditional way of thinking about females."⁷⁷

Since *Rostker*, scholars have simply repeated the Court's assertion that Congress in 1980 carefully reconsidered whether to register women without reflexively relying on traditional ideas about women's appropriate societal role.⁷⁸ Even *Rostker's*

74. *Id.* at 290–91.

75. See Act of June 27, 1980, Pub. L. No. 96-282, 94 Stat. 552, 552. For Carter's July 2, 1980 proclamation reinstating male-only registration, see Proclamation No. 4771, 3 C.F.R. 82 (1981).

76. *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981).

77. *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in judgment))).

78. See G. Sidney Buchanan, *Women in Combat: An Essay on Ultimate Rights and Responsibilities*, 28 HOUS. L. REV. 503, 514 (1991) ("In *Rostker*, the Court noted that Congress, in deciding to register only males, carefully re-

critics appear to have accepted its characterization of women's unequal treatment as located in the past, a "traditional,"⁷⁹ "outmoded"⁸⁰ practice.

In fact, the debate about Carter's proposal was not a break with the past, and fit smoothly within over a decade of debate over women's military roles. In 1980, powerful governmental and popular voices—whether for or against Carter's proposal—remained determined to limit women's military service in ways designed to maintain and enforce women's place in the family and civilian employment. Throughout this period, the notion that women, but not men, had primary responsibilities that were domestic and private was not, as a descriptive matter, out-of-date or a remnant of history. It shaped ongoing political and popular debates over women's military service.

Many congressional advocates of Carter's proposal were the same people supporting the ERA, but contending the Amendment would cause less change than ERA opponents envisioned. Like Carter, they explicitly linked Carter's proposal to support for the ERA.⁸¹ They explained, moreover, that Carter's

viewed and reaffirmed the governmental policy of excluding women from military combat. In light of that careful review and reaffirmation, it would border on the fatuous to hold that Congress does not intend for its exclusion of women from military combat to serve the government's interest in raising and supporting armies." (footnote omitted); Edward L. Froelich, *Defending the Equal Protection Jurisprudence in Lamprecht v. FCC: A Matter of Judgment*, 10 J.L. & POL. 263, 287–88 (1994) ("[W]here Congress has given due attention to the legislation a court should show deference. However, where Congress has cursorily examined and reflexively approved certain legislation, a court is not bound to defer to Congress. . . . Congress roundly and vigorously debated the matter in *Rostker*—drafting women into the armed forces."); Kelly, *supra* note 22, at 97 ("The extensive legislative history noted by the Court in *Rostker* fully supports the fact that Congress carefully considered the issues."); *id.* at 100 ("Having thoroughly dismantled the notion that Congress has reflexively or thoughtlessly chosen to exclude women from combat, the final inquiry must be made."); Earl F. Martin, *Separating United States Service Members from the Bill of Rights*, 54 SYRACUSE L. REV. 599, 640 (2004) ("Absent such explicit and thorough consideration of the issue by Congress, a civilian branch of the government specifically tasked to oversee military matters, the *Rostker* majority might possibly have brought a great deal more skepticism to the case.").

79. Diane H. Mazur, *A Blueprint for Law School Engagement with the Military*, 1 J. NAT'L SECURITY L. & POL'Y 473, 490 (2005); Vojdik, *supra* note 22, at 333.

80. Karen Lazarus Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1335 (1997).

81. See 126 CONG. REC. 13,885 (1980) (statement of Senator Carl Levin) ("[The ERA] represents a growing recognition of the role that women have and should be guaranteed. It just does not seem to me to be consistent or proper for

proposal would establish by statute and military regulation exactly what they argued the ERA would establish.

Congressional advocates of Carter's proposal stressed that Congress and the military would structure any conscription of women to preserve women's domestic roles and would continue to exclude women from combat.⁸² Senator Carl Levin explained that "[o]ur society mores" required restricting women "to non-combat roles."⁸³ And he emphasized that Congress and the military would need to arrange conscription "to avoid" the "absurdity"⁸⁴ of (in Senator John Warner's words) drafting "a young mother" and requiring her to go "off to boot camp leaving the baby with the husband."⁸⁵

Leaders of the Defense Department and Selective Service System, in turn, testified before Congress that registering women and making them eligible for conscription would promote military effectiveness and national security. But they anticipated that most servicewomen's work would mirror the jobs women dominated in the sex-stratified civilian workplace, while the military would shield men from such work. Robert Pirie, Jr., the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics, and Bernard Rostker, the Selective Service System director who would become the named defendant in *Rostker*, both told Congress that it was "in our national security interest to register women at this time."⁸⁶ Pirie testified that "the work women in the Armed Forces do today is essential to the readiness and capability of the forces."⁸⁷ In wartime, the number of women the military required "would inevitably expand" and "[h]aving our young women registered

us to talk of opportunity on the one hand and deny responsibility on the other.").

82. See *id.* at 13,877–78 (statement of Senator William Cohen); *id.* at 13,878–79 (statement of Senator Nancy Kassebaum); *id.* at 13,882–83 (statement of Senator Jacob Javits).

83. *Id.* at 13,885 (statement of Senator Carl Levin).

84. *Id.* (statement of Senator Carl Levin).

85. *Id.* (statement of Senator John Warner).

86. *Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1981 and Armed Forces Educational Assistance Act of 1980: Hearings on H.R. 6495 [H.R. 6974] and H.R. 7266 Before the H. Comm. on Armed Services, 96th Cong., pt. 5, at 155 (1980)* (statement of Robert B. Pirie, Jr., Assistant Secretary for Manpower, Reserve Affairs, and Logistics, Department of Defense); see also *id.* ("[Representative Richard] WHITE. Do you believe that, Mr. Rostker? Dr. [Bernard D.] ROSTKER[, Director, Selective Service System]. Yes, I do.").

87. *Id.* at 132 (statement of Robert B. Pirie, Jr., Assistant Secretary for Manpower, Reserve Affairs, and Logistics, Department of Defense).

in advance will put us in the position to call women if they do not volunteer in sufficient numbers.”⁸⁸ Yet Pirie also explained that “[w]omen have traditionally held the vast majority of jobs in fields such as administrative/clerical and health care/medical. An advantage of registration for women,” he reported, “is that a pool of trained personnel in these traditionally female jobs would exist in the event that sufficient volunteers were not available. It would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft only males who would not only require training in these fields but would be drafted for employment in jobs traditionally held by females.”⁸⁹

Despite such arguments, Carter’s proposal sparked substantial and effective opposition within Congress and from many of the popular groups successfully fighting ERA ratification. Like Carter’s supporters, opponents of registering women explicitly linked Carter’s proposal to the ERA. They identified Carter’s proposal as an attempt to impose ERA requirements by statute and military regulation,⁹⁰ and contended that registering women—even under Carter’s proposal—would disrupt women’s social roles, particularly in the family.

Rostker would eventually quote a Senate Armed Services Committee report from June 20, 1980 as evidence of strong congressional, military, and popular opposition to women in combat.⁹¹ But in passages of the Senate report that *Rostker* did not quote, the committee justified its opposition to registering and conscripting women by explaining that women’s ultimate responsibilities were familial and private. The committee recounted that “witnesses representing a variety of groups testi-

88. *Id.* (statement of Robert B. Pirie, Jr., Assistant Secretary for Manpower, Reserve Affairs, and Logistics, Department of Defense); see also *Registration of Women: Hearings on H.R. 6569 Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 96th Cong. 21 (1980) (“[Representative Bill] NICHOLS. . . Mr. Secretary, in your personal view do you feel there is a military need to register women? Mr. PIRIE. Yes, sir, we have women serving very effectively in military positions today. It is quite important to have a pool of applicants that is as large as possible for a variety of reasons including military effectiveness.”).

89. *Registration of Women: Hearings on H.R. 6569 Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, *supra* note 88, at 6 (statement of Robert B. Pirie, Jr., Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics).

90. See *id.* at 2–3 (statement of Elaine Eidson); *id.* at 99–102 (statement of Elaine Donnelly).

91. See *infra* text accompanying note 153.

fied . . . that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency.”⁹² The committee itself made the “specific finding[]” that “[u]nder the administration’s proposal there is no proposal for exemption of mothers of young children. The administration has given insufficient attention to necessary changes in Selective Service rules, such as those governing the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women.”⁹³ The committee concluded that “[a] decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.”⁹⁴

Concern for preserving women’s family roles pervaded congressional opposition to registering women. Senator Sam Nunn warned that Carter’s proposal would “treat the mothers of young children exactly the same as the fathers of young children,” so that in “hundreds, perhaps even thousands of cases” there would be “fathers staying home while mothers are shipped off for military service under a draft.”⁹⁵ Nunn declared it intolerable to create a system in which women could be drafted “leaving their husbands at home to take care of the children.”⁹⁶ Senator John Warner similarly stressed that Carter’s proposal would “require women to go register and become eligible for a draft irrespective of their family situation,” making no provision “for excluding a young mother.”⁹⁷ Representative Marjorie Holt opposed registering women because the “vast majority” of women did not want to serve in the military.⁹⁸ Pre-

92. S. REP. NO. 96-826, at 159 (1980).

93. *Id.* at 160–61 (capitalization omitted).

94. *Id.* at 159.

95. 126 CONG. REC. 13,894 (1980) (statement of Senator Sam Nunn).

96. *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the S. Comm. on Armed Services*, 96th Cong., pt. 3, at 1691–92 (1980) (statement of Senator Sam Nunn).

97. 126 CONG. REC. 13,885 (1980) (statement of Senator John Warner).

98. *Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1981 and Armed Forces Educational Assistance Act of 1980: Hearings on H.R. 6495 [H.R. 6974] and H.R. 7266 Before the H. Comm. on Armed Services*, *supra* note 86, at 145 (statement of Representative Marjorie Holt).

sumably, most men would also prefer to avoid conscription. But Holt contended that Congress should honor women's preferences because women "want to stay home and be wives and mothers."⁹⁹ Senator Jake Garn identified the proposal to register women as "another part of the degradation of the family, taking women out of the home."¹⁰⁰ He could not "even conceive of that in the tradition of the American family and what it has meant to society."¹⁰¹

Popular groups also testified before Congress that registration would unacceptably remove women from their place in the family as if women had no more private responsibilities than men. Kathleen Teague testified representing Phyllis Schlafly, who was spearheading the fight against ERA ratification and leading the Coalition Against Drafting Women. Teague explained that registering women was "contrary to the Judeo-Christian culture which honors and respects women in their role as wives and mothers. It is irrational because it treats as fungibles men and women, husbands and wives, and fathers and mothers, which they certainly are not."¹⁰² "There is a different role for males and females and it must start with not registering women." "Our young women," she insisted, "have the right to be feminine, to get married, to build families and to have homes."¹⁰³ Rabbi Herman Neuberger, Chairman of the Orthodox Jewish Coalition on Registration of Women for the Selective Service System, testified that including "women in a registration or a draft would deal a severe blow to the traditional concept of the American family," in which the woman was the "stabilizing element."¹⁰⁴

In sum, the continued conviction that women could not and should not fully participate in military service because their true responsibilities were private and domestic shaped debate over Carter's proposal as it shaped debate over the ERA itself.

99. *Id.* (statement of Representative Marjorie Holt).

100. 126 CONG. REC. 13,888-89 (1980) (statement of Senator Jake Garn).

101. *Id.* (statement of Senator Jake Garn).

102. *Registration of Women: Hearings on H.R. 6569 Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, *supra* note 88, at 103 (statement of Kathleen Teague, representing Phyllis Schlafly, Coalition Against Drafting Women).

103. *Id.* at 105 (statement of Kathleen Teague, representing Phyllis Schlafly, Coalition Against Drafting Women).

104. *Id.* at 77 (statement of Rabbi Herman N. Neuberger, Chairman, Orthodox Jewish Coalition on Registration of Women for the Selective Service System).

Governmental and popular forces—on both sides of the debates about Carter’s proposal and the ERA—remained intent on restricting women’s military role in order to protect and enforce women’s social roles outside the military.

B. WOMEN’S LEGAL STATUS IN THE MILITARY AND THE DEVELOPMENT OF MODERN SEX DISCRIMINATION JURISPRUDENCE

One measure of the strength of Congress’s commitment to preserving women’s domestic roles is that Congress continued to express this commitment openly despite the development of modern sex discrimination jurisprudence. By 1980, Congress’s own efforts on behalf of women’s equality outside the military context had encouraged the Supreme Court to develop a much more rigorous sex discrimination jurisprudence. This jurisprudence gave Congress good reason to think that arguments about the primacy of women’s domesticity would not help male-only registration survive a constitutional challenge in court, and that the existence of such arguments in the legislative history of Congress’s rejection of Carter’s proposal might actually make a court less likely to uphold male-only registration. Yet members of Congress continued to find arguments about domesticity so convincing that they repeatedly opposed registering women on the ground it would interfere with women’s family roles. They confronted the new sex discrimination jurisprudence, implicitly pressing the Court to narrow that jurisprudence’s reach.

For most of its history, Congress had no reason to fear that courts might contest limits on women’s military service. The Supreme Court had historically applied rational basis review to state action that explicitly treated men and women differently. This review required only that there be some “basis in reason” for the sex-based distinction.¹⁰⁵ Under rational basis review, the Supreme Court did not find any unconstitutional sex discrimination until 1971.¹⁰⁶ Suits contesting male-only registration and conscription systematically failed in the lower courts.

Some courts hardly felt compelled to identify any rationale for women’s exclusion.¹⁰⁷ Courts that did identify a reason in-

105. *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948).

106. *See Reed v. Reed*, 404 U.S. 71, 74–77 (1971).

107. *See, e.g., United States v. Reiser*, 532 F.2d 673, 673 (9th Cir. 1976) (“There is, however, a clear rational relationship between the government’s legitimate interests, as expressed in the [Selective Service] Act, and the classification by sex, and thus no violation of appellee’s constitutional rights.”);

voked *United States v. St. Clair*,¹⁰⁸ a 1968 opinion from the United States District Court for the Southern District of New York.¹⁰⁹ *St. Clair* endorsed the norms that had shaped women's legal status in the military. It concluded that male-only registration and conscription were rational because women's responsibilities were domestic and private, rather than political and public. "In providing for involuntary service for men and voluntary service for women," *St. Clair* explained, "Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."¹¹⁰

However, state action that explicitly differentiated between men and women, like male-only registration, had become constitutionally vulnerable in court by the mid-1970s. In *Frontiero v. Richardson* (1973),¹¹¹ the Supreme Court reconsidered the appropriateness of rational basis review for sex-based state action. Congress had passed the ERA in 1972 and enacted statutes prohibiting sex discrimination in civilian employment in the 1960s. The four-judge *Frontiero* plurality cited Congress's actions as sources of instruction and guidance, explaining that

United States v. Baechler, 509 F.2d 13, 14–15 (4th Cir. 1974) (per curiam) ("Considering the nature of the demands of military service, we cannot say that Congress had no rational basis for the distinction based on sex. While it is true that women may and do perform vital services in the armed forces of the United States, and their physical and mental capabilities are valued contributions to the nation in both peace and war, these characteristics and accomplishments do not create a constitutional obligation upon the Government to subject them to call equally with men."); United States v. Camara, 451 F.2d 1122, 1126 (1st Cir. 1971) ("[W]e are not yet prepared to say that the Congress lacked a sufficiently rational basis in confining the draft to males."); United States v. Fallon, 407 F.2d 621, 623 (7th Cir. 1969) ("We hold such classifications and deferments are reasonably related to the purposes of the Selective Service Act. Congress was entitled to consider factors which would both maximize the efficiency and minimize the expense of raising an army and minimize the disruption of what were considered important civilian functions."); United States v. Clinton, 310 F. Supp. 333, 336 (E.D. La. 1970) ("Congressional chivalry in drafting men only to comprise an army has a sufficiently rational basis to avoid constitutional condemnation as mere male chauvinism."); Suskin v. Nixon, 304 F. Supp. 71, 72 (N.D. Ill. 1969) ("[T]he legislative policy to exclude women . . . from compulsory military service has a rational basis which is reasonably related to the congressional power to raise and support an army.").

108. 291 F. Supp. 122 (S.D.N.Y. 1968).

109. See *United States v. Yingling*, 368 F. Supp. 379, 386 (W.D. Pa. 1973) (quoting *St. Clair*); *United States v. Cook*, 311 F. Supp. 618, 621–22 (W.D. Pa. 1970) (same).

110. *St. Clair*, 291 F. Supp. at 124–25.

111. 411 U.S. 677 (1973).

“Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”¹¹² The *Frontiero* plurality voted to apply strict scrutiny to sex-based state action, meaning that laws explicitly distinguishing between men and women would be unconstitutional unless narrowly tailored to serve a compelling state interest.¹¹³ Moreover, the *Frontiero* plurality applied strict scrutiny to a sex-based military regulation. It struck down a disparity in military benefit provisions that automatically entitled servicemen to receive dependents’ benefits for their wives, but required servicewomen to prove their husbands’ actual dependence.¹¹⁴ Strict scrutiny for sex-based state action never secured majority support. But the Supreme Court decided in *Craig v. Boren* (1976) to apply heightened scrutiny to sex-based state action, meaning that sex-based state action would be unconstitutional unless the sex-based distinction was “substantially related to achievement of” “important governmental objectives.”¹¹⁵

By 1980, the Court had repeatedly found that commitments to preserving women’s circumscribed roles in the family and workplace would not justify sex-based state action under heightened scrutiny. Indeed, the Court identified such commitments as sources of women’s inequality and part of what its sex discrimination jurisprudence was designed to disrupt. For instance, the Court explained in 1979 “that the ‘old notio[n]’ that ‘generally it is the man’s primary responsibility to provide a home and its essentials,’ can no longer justify a statute that discriminates on the basis of gender. ‘No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.’”¹¹⁶

112. *Id.* at 687–88 (plurality opinion).

113. *See id.* at 682, 688 (plurality opinion).

114. *See id.* at 678–79 (plurality opinion).

115. 429 U.S. 190, 197 (1976).

116. *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (alteration in original) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)); *see also* *Trammel v. United States*, 445 U.S. 40, 52 (1980) (“Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.” (alteration in original) (quoting *Stanton*, 421 U.S. at 14–15)); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (“[T]he gender classification . . . is

During the congressional debate over Carter's proposal, the Justice Department warned Congress that it needed to create a legislative history that could survive heightened scrutiny. Deputy Assistant Attorney General Larry Simms appeared before the Military Personnel Subcommittee of the House Armed Services Committee to testify that if Congress decided to exempt women from registration, the Justice Department anticipated litigation contesting the decision. In fact, Simms noted that the case that would become *Rostker v. Goldberg* was already underway in the lower courts.¹¹⁷ Simms further reported that any constitutional defense of male-only registration could not "call on in any way" the legislative history from earlier congressional decisions about women's military service because the earlier legislative history was "unfortunately replete" with "sexual stereotypes."¹¹⁸ Instead, Simms explained that if Congress wanted to exclude women from registration and survive a constitutional challenge it needed to create a legislative history free from the commitments to limiting women's roles and status that had characterized earlier debates on women's military service. "[S]peaking solely for the Department of Justice as litigator," he told Congress, "it should be fairly obvious to this committee that the defensibility of the all-male registration is something on which Congress perhaps should speak out clearly and formulate the kind of record, if indeed, it chooses to reject the administration's proposal, which will be helpful rather than hurtful in the litigation." Whether the Justice Department could successfully defend male-only registration was "largely a matter within the jurisdiction of this committee and Mr. Pirie and his peers at the Department of Defense."¹¹⁹ The Justice Department could "use all of the help we can get."¹²⁰

. . . . part of the 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the "center of home and family life." Legislation that rests on such presumptions, without more, cannot survive scrutiny" (quoting *Orr*, 440 U.S. at 283; *Stanton*, 421 U.S. at 10; *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975)).

117. See *Registration of Women: Hearings on H.R. 6569 Before the Subcommittee on Military Personnel of the H. Comm. on Armed Services*, *supra* note 88, at 14 (statement of Larry Simms, Deputy Assistant Attorney General, Office of Legal Counsel).

118. *Id.* at 14–15 (statement of Larry Simms, Deputy Assistant Attorney General, Office of Legal Counsel).

119. *Id.* at 15 (statement of Larry Simms, Deputy Assistant Attorney General, Office of Legal Counsel).

120. *Id.* at 25 (statement of Larry Simms, Deputy Assistant Attorney Gen-

Congressional opponents of registering women knew they needed a legislative history that could survive heightened scrutiny. But they were so committed to preserving women's roles outside the military, and so certain this was a convincing argument for maintaining male-only registration, that they repeatedly explained that women's military service needed to be limited to protect and enforce the primacy of women's private obligations. They pushed against the Court's sex discrimination jurisprudence, implicitly challenging the Court to limit its scope.

Ultimately, the legislative history of Congress's 1980 decision to reinstate male-only registration was little different from the larger ERA debate over women's military role that had been raging since 1970. The continued determination to maintain and enforce women's domestic responsibilities through barriers to women's military service was still evident. And by 1980, male-only registration had become unprecedentedly vulnerable in court.

II. *ROSTKER* AND THE RELATIONSHIP BETWEEN THE COURT AND THE WORLD OUTSIDE THE COURT

On June 25, 1981, the Supreme Court in *Rostker v. Goldberg* upheld the constitutionality of male-only registration.¹²¹ The Court was so determined to reach this judgment that it claimed that Congress had entirely new reasons for excluding women from registration in 1980, reasons not grounded in modes of thinking about women that might be problematic under modern sex discrimination jurisprudence.¹²²

The *Rostker* case began in 1971, with four men suing during the Vietnam War and the ERA debate to challenge the constitutionality of registration and conscription.¹²³ The plaintiffs started with several arguments, including that conscription constituted involuntary servitude and a taking of property without due process. By 1973, however, the lower courts had dismissed all claims except the contention that exclusively

eral, Office of Legal Counsel).

121. 453 U.S. 57, 83 (1981).

122. See *supra* text accompanying notes 76–77.

123. See *Goldberg v. Tarr*, 510 F. Supp. 292, 292–93 (E.D. Pa. 1980); *Rowland v. Tarr*, 341 F. Supp. 339, 340 (E.D. Pa. 1972), *aff'd in part, vacated in part per curiam*, 480 F.2d 545 (3d Cir. 1973).

male registration and conscription violated constitutional principles of equal protection.¹²⁴

This suit was another reminder that male-only registration and conscription represented a complicated mix of benefits and burdens for each sex. Many men received significant benefits from military service and their privileged place within it. At the same time, registration, especially if leading to conscription, also represented a significant burden that only men experienced.

The *Rostker* suit proceeded slowly,¹²⁵ but on July 18, 1980 a three-judge federal district court struck down male-only registration.¹²⁶ The Supreme Court stayed enforcement of that judgment on July 19,¹²⁷ and decided to hear the case on December 1.¹²⁸

The Supreme Court's *Rostker* opinion, written by then-Justice William Rehnquist,¹²⁹ is a vivid example of the influence that extrajudicial forces can exert on the Court's constitutional jurisprudence. *Rostker* explicitly took congressional, executive, military, and popular opposition to women in combat as sufficient cause to uphold the constitutionality of male-only registration.

Rostker, moreover, offers a window into how extrajudicial influence on judicial constitutional interpretation can function in a specific case. It suggests that the observation that extrajudicial developments can shape the Court's understanding of constitutional requirements should not be taken to imply that the Court is passive or confronts uniform political and public opinion. The *Rostker* Court did not simply respond to extrajudicial debates about women's appropriate military role. Indeed, the Court did not simply defer to political and professional military expertise. While the Court did discuss such expertise,¹³⁰ *Rostker's* position upholding male-only registration was in considerable tension with the military's stated interests. President Carter—Commander in Chief,¹³¹ Naval Academy graduate, and

124. See *Rowland*, 480 F.2d at 546–47.

125. See *Goldberg*, 510 F. Supp. at 292–94 (recounting suit's procedural history from 1971 to 1980).

126. See *Goldberg v. Rostker*, 509 F. Supp. 586, 605 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

127. See *Rostker v. Goldberg*, 448 U.S. 1306, 1311 (1980) (Brennan, Circuit Justice).

128. See *Rostker v. Goldberg*, 449 U.S. 1009, 1009 (1980).

129. See 453 U.S. at 59.

130. See *id.* at 64–67.

131. See U.S. CONST. art. II, § 2, cl. 1.

former naval submarine officer¹³²—had supported registering women.¹³³ Leading Defense Department and Selective Service System officials had testified to Congress that implementing Carter's proposal would promote military effectiveness and national security.¹³⁴

Instead of simply responding to extrajudicial events or deferring to military judgment, *Rostker's* constitutional interpretation actively intervened and enmeshed itself into contemporary extrajudicial debates over women's military status—debates that contained important divisions. *Rostker* drew on substantial extrajudicial agreement that women should be excluded from combat, and staked a position on an issue of significant extrajudicial disagreement: whether the combat exclusion justified male-only registration and conscription eligibility.

The *Rostker* opinion was not organized around the doctrinal test for heightened scrutiny, although it stated this standard applied.¹³⁵ Instead, *Rostker* defended Congress's 1980 decision to fund male-only registration in three steps.

First, the Court explained that Congress had excluded women from registration because Congress intended to limit any future drafts to men.¹³⁶ The link between registration and conscription was clear; the purpose of registration is to prepare for possible future conscription. But the Court's argument still left the question of why a male-only draft would be constitutional.

The Court's second step was to argue that Congress intended to limit any future drafts to men because federal statutes and military regulations limited combat service to men.¹³⁷ The link between conscription and combat was significantly less clear than the link between registration and conscription. Even during World War II and the Vietnam War, many drafted men never served in combat; the majority of the military consisted of noncombat personnel.¹³⁸ The military, moreover, had

132. See PETER G. BOURNE, *JIMMY CARTER: A COMPREHENSIVE BIOGRAPHY FROM PLAINS TO POSTPRESIDENCY* 54, 64–66 (1997).

133. See *supra* text accompanying notes 72, 74.

134. See *supra* text accompanying notes 86–88.

135. See 453 U.S. at 69–70.

136. See *id.* at 75–77.

137. See *id.* at 76–77.

138. See, e.g., MICHEAL CLODFELTER, *VIETNAM IN MILITARY STATISTICS: A HISTORY OF THE INDOCHINA WARS, 1772–1991*, at 238 (1995) (noting that eighty-eight percent of the American troops in Indochina in 1968 “were support or administrative personnel” and sixty-one percent of the Americans in

historically emphasized that women in noncombat roles could free men to fight.¹³⁹

Indeed, the relationship between conscription and combat was a matter of serious dispute in Congress, the White House, state legislatures, and the streets when the Court decided *Rostker*. Many ERA supporters conceded that ratification would require women to be included in drafts. But they contended, perhaps partially to increase the Amendment's appeal, that women would not serve in combat.¹⁴⁰ Carter and advocates of his 1980 proposal had attempted to implement this arrangement by statute and military regulation. They sought to make women eligible for conscription, and argued this was consistent with excluding women from combat.¹⁴¹ The three *Rostker* dissenters—Justices Byron White, Thurgood Marshall, and William Brennan—also stressed the difference between conscription and combat. They concluded that the government had not demonstrated that excluding women from registration and conscription eligibility enhances military effectiveness. Instead, the dissenters contended, congressional testimony indicated that registering women and making them eligible for conscription would improve military flexibility and preparedness, even if no women were drafted because of abundant female volunteers or only a limited number of women were drafted for exclusively noncombat roles.¹⁴²

But Rehnquist's opinion for the *Rostker* Court reflected greater affinity for the claims of the political and popular forces opposed to the ERA and to expanding women's military roles. In fact, Rehnquist himself nicely illustrates how extrajudicial debates can enter the Court through the appointments process.¹⁴³ As an Assistant Attorney General in 1970, Rehn-

World War II were "noncombat troops").

139. See, e.g., Be a Marine . . . *Free a Marine to Fight* (1943) (U.S. Marine Corps Women's Reserve recruiting poster, on file with author); Enlist in the WAVES Release a Man to Fight at Sea (1943) (Navy recruiting poster, on file with author).

140. See *supra* text accompanying notes 58–61, 68.

141. See *supra* text accompanying notes 72–73, 82–89.

142. See 453 U.S. at 83–86 (White, J., dissenting); *id.* at 92–113 (Marshall, J., dissenting).

143. For some of the literature examining how the appointments process can influence the Court's constitutional jurisprudence, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("Jurists known to be sharply at odds with the basic outlook of the president or a majority of senators are not nominated by the president and confirmed by the Senate. Thus the views of a majority of the justices of the Supreme Court are never out of line for very long

quist warned that the ERA could “turn ‘holy wedlock’ into ‘holy deadlock.’”¹⁴⁴ “The overall implication of the equal rights amendment,” he explained, “is nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable.”¹⁴⁵ On the Court, Rehnquist vigorously criticized modern sex discrimination jurisprudence. He dissented from the *Frontiero* plurality,¹⁴⁶ and the *Craig* majority,¹⁴⁷ both of which the three *Rostker* dissenters had supported.¹⁴⁸ Unsurprisingly, Rehnquist did not manage to stop the development of modern sex discrimination jurisprudence. The forces of change and the appeal of the general principle of sex equality were strong enough that even the ERA’s congressional opponents felt compelled to include modified sex discrimination prohibitions in their proposed substitute amendments.¹⁴⁹ But in *Rostker*—which concerned women’s military role, a subject dividing the nation and contributing to the ERA’s defeat—Rehnquist led the Court to stake a position aligned with ERA opponents on a disputed point in political and popular debate.¹⁵⁰ Like ERA opponents, *Rostker* insisted on

with the views prevailing among the lawmaking majorities of the country.”); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 27 (1966) (“Since over the whole history of the Court the President has had the opportunity of appointing a new Justice on the average of once every twenty-two months, it seems unlikely that the Court could long hold out against entrenched majority sentiment.”). Richard Funston found that “the Court has been more than three times as likely to declare recently enacted federal legislation unconstitutional” “during periods of electoral and partisan realignment” when “the Court, as a result of its life tenure, is most likely to be out of line with the new, dominant law-making majority.” “As time passes,” however, “the new majority is enabled to appoint its own adherents to the Supreme bench, and the Court increasingly returns to harmony with the new lawmaking majority.” Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 805, 807 (1975).

144. Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, to Leonard Garment, Special Consultant to the President 6 (May 4, 1970) (on file with author).

145. *Id.* at 9.

146. See *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting).

147. See *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

148. See *id.* at 191; *Frontiero*, 411 U.S. at 678.

149. See *supra* text accompanying note 49.

150. Social scientists have examined correlations between extrajudicial forces and the Court’s constitutional jurisprudence. Thomas Marshall found that since the mid-1930s “[m]ost modern Supreme Court rulings reflect public opinion, and overall, the modern Court has been roughly as majoritarian as other American policy makers.” THOMAS R. MARSHALL, PUBLIC OPINION AND

the direct connection between conscription eligibility and combat eligibility.

Yet even assuming one accepted the connection between conscription and combat, that still left the question of why Congress and the military could constitutionally limit combat positions to men. On this, the third and ultimate issue, *Rostker* had only one thing to say. The Court's reasoning was remarkably bare. The Court simply relied on the significant political and popular consensus for excluding women from combat—a position that united many ERA supporters and opponents, joined Carter and his critics, and went unchallenged in the *Rostker* dissents.¹⁵¹ Here, the Court recognized and built upon substantial extrajudicial convergence rather than taking sides on a point of divergence. The Court noted that the President intended “to continue the current military policy precluding women from combat” and that strong congressional, popular, and military sentiment supported excluding women from combat.¹⁵² *Rostker* quoted a passage from the June 20, 1980 report of the Senate Armed Services Committee, stating that:

“The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy.”¹⁵³

This passage, and the rest of *Rostker*, did not explore the reasons behind the support for excluding women from combat. Nevertheless, the Court took the extrajudicial opposition to women in combat as sufficient cause to uphold male-only registration, stating that “[t]he fact that Congress and the Executive have decided that women should not serve in combat fully justi-

THE SUPREME COURT, at ix (1989). David Barnum's examination of “data on public opinion and Supreme Court decision making” concluded that “the post-New Deal Supreme Court” has been “surprisingly consistent with majoritarian principles.” David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985). William Mishler and Reginald Sheehan found “that for most of the period since 1956, the Court has been highly responsive to majority opinion,” with decisions that “have conformed closely to the aggregate policy opinions of the American public.” William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993).

151. See 453 U.S. 57, 83 (1981) (White, J., dissenting); *id.* at 93 (Marshall, J., dissenting).

152. *Id.* at 77 (majority opinion).

153. *Id.* (quoting S. REP. NO. 96-826, at 157 (1980)).

fies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.”¹⁵⁴ On the same logic, presumably, banning women entirely from military service would also be constitutional if the President, Congress, military leaders, and a majority of the public did not want women to serve, even voluntarily and in noncombat roles. *Rostker*’s conclusion about the constitutional requirements of equal protection was thus deeply responsive to, and actively engaged with, extrajudicial debates.

III. WOMEN’S LEGAL STATUS IN THE MILITARY SINCE *ROSTKER*

Since *Rostker*, few lawsuits have challenged restrictions on women’s military service,¹⁵⁵ and no challenges have reached the Supreme Court. Two reasons probably explain the paucity of litigation.

First, there have long been close connections between the women’s movement and pacifism, and some portion of the women’s movement—a natural source of litigation on issues implicating sex equality—is not interested in expanding women’s military role. These feminists do not defend sex-based restrictions on women’s military service, but they argue that the women’s movement should prioritize strategies to avoid military conflict, keep as many people as possible out of military service, and reduce the military’s importance in the nation’s life.¹⁵⁶

154. *Id.* at 79.

155. For three rare examples, see *United States v. Schmucker*, 815 F.2d 413, 419–20 (6th Cir. 1987) (relying on *Rostker* to uphold constitutionality of requiring male conscientious objectors to register while exempting “women and males with severe mental deficiencies”); *Schwartz v. Brodsky*, 265 F. Supp. 2d 130, 131–35 (D. Mass. 2003) (relying on *Rostker* to uphold male-only registration); *Lewis v. U.S. Army*, 697 F. Supp. 1385, 1386, 1392–93 (E.D. Pa. 1988) (relying on *Rostker* to uphold Army policy permitting men with General Educational Development (GED) certificates to enlist but requiring women to have high school diplomas).

156. See Stephanie A. Levin, *Women and Violence: Reflections on Ending the Combat Exclusion*, 26 NEW ENG. L. REV. 805, 821 (1992) (“[W]e must go beyond notions of equality which end in the equal right to inflict violence, and search for alternative conceptions of citizenship which do not have violence at their core.”); Sara Ruddick, *Pacifying the Forces: Drafting Women in the Interests of Peace*, 8 SIGNS 471, 473 (1983) (“[C]onscripting women would further the feminist effort to eliminate the restrictions on power and mastery that now afflict us. But such a solution, adding as it does the wrong of conscription to the evils of militarism, only compounds the difficulties of reconciling feminist with antimilitarist aims.”); Ann Scales, *Militarism, Male Dominance and Law:*

Second, people who are interested in expanding women's military service apparently concluded after *Rostker* that litigation was an unpromising route to reform. *Rostker* suggested that the Supreme Court would be unlikely to transform women's military role. Moreover, the judiciary's hierarchical organization strongly discourages lower courts from undermining *Rostker*. The few lower courts to consider challenges to restrictions on women's military service since *Rostker* quickly rejected the claims, relying on the *Rostker* precedent.¹⁵⁷ As recently as 2003, the United States District Court for the District of Massachusetts cited *Rostker* to uphold male-only registration.¹⁵⁸ The plaintiffs in *Schwartz v. Brodsky*—four men required to register and one woman excluded from registration—appealed on the ground that the extrajudicial changes in women's military status since *Rostker* had undermined the *Rostker* precedent.¹⁵⁹ But at the urging of leading feminist groups, the *Schwartz* plaintiffs decided to dismiss their appeal because they did not want to risk that the appellate court might also be unwilling to undermine a Supreme Court holding, no matter how extrajudicial changes had weakened it.¹⁶⁰

Yet despite the virtual absence of litigation—and the resultant decline in academic attention¹⁶¹—women's legal status in the military has undergone tremendous change since *Rostker*. As the failure of the *Schwartz* suit suggests, courts have not

Feminist Jurisprudence as Oxymoron?, 12 HARV. WOMEN'S L.J. 25, 26 (1989) ("We can't overcome gender oppression without demilitarizing ourselves and our world."); Jennifer Tiffany, *The Equal Opportunity Trap*, in LOADED QUESTIONS: WOMEN IN THE MILITARY 36, 36 (W. Chapkis ed., 1981) ("Seeking the right and opportunity to participate on equal terms in structures that so undermine the welfare of women as the military, and so bolster the exploitation of women, simply won't pass as a feminist priority.").

157. See *supra* note 155.

158. See *Schwartz*, 265 F. Supp. 2d at 133–34.

159. See *id.* at 131, 132 & n.4.

160. See Telephone Interview with Harvey A. Schwartz, Rodgers, Powers & Schwartz PC (Dec. 11, 2006) (on file with author). Harvey Schwartz, an employment and civil rights lawyer, represented the *Schwartz* plaintiffs. He is the father of one plaintiff, Samuel Schwartz, and the stepfather of another, Nicole Foley. The family began to think about suing after a dinnertime conversation about why Samuel had to register but not Nicole. See *id.* Harvey Schwartz reports that "[d]ismissing this case continues to be a major disappointment for me. If I had it to do over again, I would have gone forward with the appeal." E-mail from Harvey A. Schwartz, Rodgers, Powers & Schwartz PC, to Jill Hasday, Professor, University of Minnesota Law School (Dec. 11, 2006) (on file with author).

161. See *supra* text accompanying notes 11–13.

driven this change. Instead, extrajudicial forces have acted notwithstanding *Rostker's* protection of the status quo.

The extrajudicial transformation in women's military status since *Rostker* has focused, moreover, on women's combat service. In the debates over the ERA and Carter's proposal, the prospect of women in combat was always considered less popular and more revolutionary than registering and conscripting women. Many people saw combat as inherently inconsistent with women's roles, but supported including women in registration and conscription eligibility on the belief that Congress and the military would structure any draft to preserve women's existing positions in the family and sex-stratified civilian workplace.¹⁶² In addition, combat service is arguably more immediately important than registration or conscription eligibility in an era with frequent military conflicts but no draft. Since *Rostker*, however, congressional, executive, military, and popular support for women's military service, including in combat, has dramatically increased. Federal law no longer contains statutory combat exclusions, the military has opened many, although not all, combat positions to women, and the public has become steadily more enthusiastic about women in the military, including in combat.

Rostker concluded that women's exclusion from registration, conscription, and combat was consistent with equal protection, generating no pressure to expand women's military role. Commentators frequently stress and admire the Court's ability to settle constitutional disputes.¹⁶³ Yet *Rostker's* judgment that women's rights to equality were not in jeopardy did not mean the end of discussion and dispute about that question. The claim that restrictions on women's military role threatened sex equality moved to other parts of the government for redress, and has enjoyed notable success there. Congress, the executive, and the military have continued to debate how sex equality should be upheld, and to generate evolving answers, while the Court's position has remained unchanged. These extrajudicial actors have been driven by their commitment to sex equality—paired with their recognition of the vo-

162. See *supra* Part I.A.

163. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 457, 471–72, 482 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377, 1380 (1997); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1634 (2005) (book review).

lunteer military's pragmatic need for female talent—to dramatically, if incrementally, expand women's military role, including in combat. As this record illustrates, the Court is not the only developer and enforcer of equality norms, or even the most important source of those norms in some situations.

Indeed, the extrajudicial changes in women's military role increasingly raise questions about the status of *Rostker* itself. The filing of *Schwartz* is unsurprising and additional lawsuits challenging sex-based restrictions on military service are likely because the extrajudicial transformation of women's military status has undercut the factual premises and cultural assumptions behind *Rostker*'s interpretation of constitutional equal protection. This transformation makes clear that *Rostker* is inconsistent with the rest of the Supreme Court's sex discrimination jurisprudence. In fact, Congress, the executive, and the military are very aware that the extrajudicial changes since *Rostker* in women's military status may undermine *Rostker* and support a Court judgment striking down male-only registration, conscription eligibility, and combat positions. They have continued to expand women's military role anyway, cognizant that their developing extrajudicial understanding of how women's military service should be structured to reflect women's equality could one day be judicially codified in a decision demanding still more transformation of women's military status.

A. CONGRESSIONAL, EXECUTIVE, MILITARY, AND POPULAR CHANGE SINCE *ROSTKER*

After *Rostker*, Congress, the executive, the military, and the public continued to consider whether women's military role should expand in the interest of sex equality. Courts created no pressure for change, but nonjudicial actors within and outside the government kept the issue alive. The Defense Advisory Committee on Women in the Services (DACOWITS), a civilian advisory group within the Defense Department, played a particularly important role.

DACOWITS has attracted little scholarly attention,¹⁶⁴ but for decades the group has interviewed servicewomen, questioned military leaders, and visited military bases in order to develop an evolving understanding of how to structure military service to reflect and promote women's equality. DACOWITS

164. For an exception describing some DACOWITS work through the 1980s, see Mary Fainsod Katzenstein, *Feminism Within American Institutions: Unobtrusive Mobilization in the 1980s*, 16 SIGNS 27, 47–53 (1990).

has also diligently worked, with significant success, to convince the military, the executive, Congress, and the public to adopt and enforce this evolving understanding of sex equality norms. As one DACOWITS report noted, “[t]he two most distinctive characteristics of the DACOWITS throughout its history of contributions to the Department of Defense have been *insight* and *tenacity*.”¹⁶⁵ Phyllis Schlafly, leader of the campaign against ERA ratification and staunch DACOWITS opponent, called DACOWITS members “the most effective special-interest lobbyists ever to function in Washington.”¹⁶⁶

As early as 1975, DACOWITS concluded that statutory combat exclusions threatened both sex equality and the volunteer military’s personnel goals.¹⁶⁷ Over the next half decade, DACOWITS advised the Defense Department and military to “attach the highest priority to efforts to repeal” the exclusions, explaining that they “constitute major roadblocks to the full utilization of and equal opportunities for women in the Services.”¹⁶⁸ DACOWITS Chair Sally Richardson also lobbied Congress, stressing “the opportunities that have been closed to women because of” the exclusions and “the difficulty” the exclusions “created for the services in managing its women personnel.”¹⁶⁹

The 1970s effort to remove the statutory combat exclusions was unsuccessful, but DACOWITS did not drop its commitment to securing repeal.¹⁷⁰ The group vigorously pressed the issue

165. DACOWITS DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES, HISTORY AND ACCOMPLISHMENTS 21 (1997).

166. Phyllis Schlafly, *Feminist Lobbyists Get Free Pass*, CHATTANOOGA TIMES FREE PRESS, Mar. 8, 2002, at B9.

167. See Recommendations Requests for Information Commendations: DACOWITS Fall Meeting 1, 3 (Nov. 14–18, 1976) (on file with author); *Women in the Military: Hearings Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, supra note 70, at 192–93 (statement of Sally K. Richardson, Chairperson, Defense Advisory Committee on Women in the Services).

168. *Women in the Military: Hearings Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, supra note 70, at 180 (Recommendation #1, Fall Meeting 1979, attachment to the statement of Ms. Sally K. Richardson, Chairperson, DACOWITS).

169. *Id.* at 192–93 (statement of Sally K. Richardson, Chairperson, Defense Advisory Committee on Women in the Services).

170. See, e.g., Defense Advisory Committee on Women in the Services (DACOWITS), Recommendations, Requests for Information, and Continuing Concerns Made at the 1989 Fall Conference 58 (1989) (on file with author) [hereinafter DACOWITS 1989 Fall Conference]; Defense Advisory Committee on Women in the Services (DACOWITS), Recommendations, Requests for Infor-

again when it sensed a ripe moment. First, DACOWITS recommended in 1989 that the Army, which was not subject to statutory combat exclusions,¹⁷¹ “conduct a 4-year test program under which women in the Army will be allowed to enter all military occupational specialties (including combat and combat support).”¹⁷² Then in 1991, after servicewomen’s demonstrated success in the Persian Gulf War, DACOWITS seized the opportunity and began a full-time campaign against the statutory combat exclusions. The group used its spring 1991 meeting with Defense Department and military leaders to explain why repealing the exclusions would recognize and promote servicewomen’s equality, while simultaneously giving the military “[f]lexibility . . . to fully utilize all qualified personnel.” DACOWITS advised that eliminating the combat exclusion statutes would make “[a]bility rather than gender . . . the basis for assignment,” enhance the “[a]cceptance of Servicewomen as full partners,” and expand “[o]pportunities . . . for Servicewomen to compete fairly for assignments and promotion.”¹⁷³

DACOWITS members spent the next months urging Congress to repeal the combat exclusion statutes and making the case for repeal to the public.¹⁷⁴ DACOWITS Chair Becky Cos-

mation, Continuing Concerns, and a Statement of Appreciation Made at the 1990 Spring Conference 435 (1990) (on file with author) [hereinafter DACOWITS 1990 Spring Conference]; Defense Advisory Committee on Women in the Services (DACOWITS), Recommendations, Requests for Information, Continuing Concerns, and a Statement of Appreciation Made at the 1990 Fall Conference 303 (1990) (on file with author) [hereinafter DACOWITS 1990 Fall Conference].

171. See *supra* note 38.

172. DACOWITS 1989 Fall Conference, *supra* note 170, at 3; see also DACOWITS 1990 Spring Conference, *supra* note 170, at 434 (repeating recommendation); DACOWITS 1990 Fall Conference, *supra* note 170, at 306 (same); Defense Advisory Committee on Women in the Services (DACOWITS), Recommendations, Requests for Information, Continuing Concerns, and a Statement of Appreciation 187 (1991) (on file with author) [hereinafter DACOWITS 1991 Spring Conference] (same). On January 23, 1990, Representative Patricia Schroeder introduced legislation that would have required the Army to conduct the test DACOWITS recommended. See 136 CONG. REC. 6 (1990) (statement of Representative Patricia Schroeder).

173. DACOWITS 1991 Spring Conference, *supra* note 172, at 167; see also Final Draft DACOWITS 1991 Fall Conference Miami Beach, Florida 140 (1991) (on file with author) (repeating recommendation).

174. For example, one DACOWITS member advocated repeal of the statutory combat exclusions in a university alumni magazine. See Thomas H. Stafford Jr., *Women in Combat?*, NCSU, Nov. 1991, at 44, 44 (“Consideration for combat should be based on individual ability. Women who have the physical, mental and emotional attributes for combat should not be excluded on gender alone.”).

tantino, testifying in June 1991 before the Senate Armed Services Committee, stressed that statutory combat exclusions limited women's opportunities, and that servicewomen sought and deserved "[e]qual responsibility, equal opportunity, and equal commitment," "to be full-fledged defenders of our country and our military."¹⁷⁵ By then, Congress had become more receptive to the idea that it should eliminate statutory combat exclusions as part of its commitment to sex equality.

In December 1991, Congress repealed the statutory prohibitions, dating from 1948, on assigning women in the Air Force, Navy, and Marines to combat aircraft.¹⁷⁶ This meant there was no longer any statutory combat exclusion for the Air Force. The 1991 statute also modified the remaining statutory combat exclusion, which covered the Navy and Marines.¹⁷⁷ In addition, the statute created a "Commission on the Assignment of Women in the Armed Forces" to "assess the laws and policies restricting the assignment of female service members."¹⁷⁸

Congressional supporters of the 1991 statute emphasized that the law would establish and confirm that the commitment to sex equality was a basic organizing principle of the American polity, and one that Congress was determined to defend. Senator Edward Kennedy, an author of the 1991 law, explained that the bill was attempting to "eliminate gender as a classification and commit this Nation to ability as the criterion for classification." "[W]e, as legislators and policymakers," he stated, "ought to be able to make a judgment and a decision about what we believe."¹⁷⁹ "Barriers based on sex discrimination are coming

175. *Department of Defense Authorization for Appropriations for Fiscal Years 1992 and 1993: Hearings on S. 1507 Before the S. Comm. on Armed Services*, 102d Cong., pt. 6, at 861 (1991) (statement of Becky Costantino, Chair, Defense Advisory Committee on Women in the Services).

176. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), (b)(1), 105 Stat. 1290, 1365 (1991).

177. After the 1991 statute, the governing provision prohibited the Navy from assigning women to duty on vessels engaged in combat missions, but made an exception for women serving "as aviation officers as part of an air wing or other air element assigned to such a vessel." *Id.* § 531(b)(2). The Navy could permanently assign any Navy woman to "hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions" and could temporarily assign any Navy woman to other Navy vessels not "engaged in combat missions." Department of Defense Appropriation Authorization Act, 1979, Pub. L. No. 95-485, § 808, 92 Stat. 1611, 1623 (1978).

178. National Defense Authorization Act for Fiscal Years 1992 and 1993 §§ 541(a), 542(a).

179. 137 CONG. REC. 20,729 (1991) (statement of Senator Edward Kennedy).

down in every part of our society,” and “[t]he Armed Forces should be no exception.”¹⁸⁰ Senator Brockman Adams stressed that “[w]hat is at stake is a fundamental issue of equality.”¹⁸¹ “Nowhere else in our society,” he contended, “do we condone the exclusion of women simply on the basis of gender.”¹⁸² “Equal opportunity,” Senator Patrick Leahy confirmed, “has no gender.”¹⁸³

Even opponents of narrowing the statutory combat exclusions in 1991 agreed that Congress should express and confirm the nation’s core commitment to sex equality. The Senate Armed Services Committee supported establishing a commission to study the restrictions on women’s military service, but recommended against any immediate effort to reduce statutory combat exclusions. In reporting its position, the committee emphasized that “[a]s a matter of basic principle, the committee believes that equal opportunity has no gender.”¹⁸⁴ Committee member John Glenn stressed that “[o]ppportunity in the United States of America should have no gender,”¹⁸⁵ and explained that the committee had “set out on a course to objectively determine how equal opportunity for all women in the military should be improved.”¹⁸⁶

During the congressional debates over the 1991 statute, President George H.W. Bush’s Defense Department “welcome[d] th[e] legislation” without indicating whether the military would open combat aircraft to women.¹⁸⁷ After the 1991 law passed, Defense Secretary Richard Cheney announced that he would wait for the recommendations of the Commission on the Assignment of Women in the Armed Forces before deciding whether to alter military policies.¹⁸⁸

180. *Id.* at 20,713 (statement of Senator Edward Kennedy).

181. *Id.* at 20,733 (statement of Senator Brockman Adams).

182. *Id.* at 20,732 (statement of Senator Brockman Adams).

183. *Id.* at 20,729 (statement of Senator Patrick Leahy).

184. S. REP. NO. 102-113, at 216-17 (1991).

185. *Department of Defense Authorization for Appropriations for Fiscal Years 1992 and 1993: Hearings on S. 1507 Before the S. Comm. on Armed Services, supra* note 175, at 797 (statement of Senator John Glenn).

186. 137 CONG. REC. 20,717 (1991) (statement of Senator John Glenn).

187. Eric Schmitt, *Head of Army Sees Chance of Female Fliers in Combat*, N.Y. TIMES, June 2, 1991, § 1, at 32 (quoting Pentagon spokesman Pete Williams); *see also* George Bush, The President’s News Conference, 2 PUB. PAPERS 1013, 1016 (Aug. 2, 1991) (“I think there are some darn good women pilots out there But I want to see—I want to hear from the Secretary of Defense, the members of the Joint Chiefs on all of these things.”).

188. *See* THE PRESIDENTIAL COMM’N ON THE ASSIGNMENT OF WOMEN IN

The commission—which reported on November 15, 1992, after Bush lost his reelection bid to Bill Clinton—engaged in its own debate about how women’s military role should be structured to reflect sex equality. Some commissioners and witnesses made claims that resonated with the opposition to the ERA and Carter’s proposal, warning that “assigning women to combat would be a fundamental departure from sound American and military values” because it would disrupt “civilized order in sexual and family relationships.”¹⁸⁹ However, other commissioners and witnesses argued that Congress and the military should grant women significantly greater military opportunities, including in combat, in order to advance sex equality and serve the manpower (or womanpower) needs of an all-volunteer military. Some stated that women “should be treated as individuals,” and explained “that placing the best qualified person in a specialty requires servicemembers” to “be judged as individuals” “and not as men or women.”¹⁹⁰ Some contended “that, as long as American women must accept broad societal responsibilities, they have the right to be represented in all aspects of the military, including ground combat.”¹⁹¹

Les Aspin, Clinton’s Defense Secretary, sided with these latter voices without going as far as some. Aspin came to the Clinton Administration from Congress. He voted for the ERA in 1971,¹⁹² and voted to extend the ERA’s ratification deadline in 1978.¹⁹³ As chairman of the House Armed Services Committee in 1992, Aspin criticized combat exclusions for barring women from “the essence of” military service, “[t]he key to advancement,” and “lots of promotion possibilities.”¹⁹⁴ As he explained, “the whole promotion system; the prestige in the service is oriented toward one of the combat elements.”¹⁹⁵ Aspin also suggested to the military leaders appearing before him that combat exclusions were linked to women’s unequal citizenship and

THE ARMED FORCES, REPORT TO THE PRESIDENT, at iii (1992).

189. *Id.* at 60 (alternative views of Samuel G. Cockerham, Elaine Donnelly, Sarah F. White, Kate Walsh O’Beirne, Ronald D. Ray).

190. *Id.* at 22.

191. *Id.* at 23.

192. *See* 117 CONG. REC. 35,815 (1971).

193. *See* 124 CONG. REC. 26,264 (1978).

194. *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 31 (1992) (statement of Representative Les Aspin).

195. *Id.* (statement of Representative Les Aspin).

to wider patterns of sex discrimination in the military. He asked whether combat exclusions made women “second-class citizens,” fostering an attitude in the military that “it is fair game to treat them with discrimination.”¹⁹⁶ “[I]f it is an official policy of each of the services to discriminate, then what you have is officially endorsed discrimination at one level, which then goes over into unofficially endorsed discrimination at other levels.”¹⁹⁷

In April 1993, Defense Secretary Aspin issued a memorandum establishing a new “Policy On The Assignment Of Women In The Armed Forces” that implemented many of the changes DACOWITS had been urging since passage of the 1991 law.¹⁹⁸ This policy took advantage of the 1991 elimination of the statutory provisions barring women from combat aircraft to provide that all the armed services would “permit women to compete for assignments in aircraft, including aircraft engaged in combat missions.”¹⁹⁹ The policy also directed the Navy to “open as many additional ships to women as is practicable within current law” and “develop a legislative proposal” to repeal the remaining statutory combat exclusion. The Army and Marines were instructed to “study opportunities for women to serve in additional assignments, including, but not limited to, field artillery and air defense artillery.” The Defense Department was ordered to establish an implementation committee “to ensure that the policy on the assignment of women is applied consistently across the services,” and “review and make recommendations” about the continued appropriateness of the Defense Department’s “Risk Rule.”²⁰⁰ This Risk Rule, which Defense Secretary Frank Carlucci had announced in February 1988, permitted the “closure of noncombatant positions or units” to women “if their risks of exposure to direct combat, hostile fire, or capture are equal to or greater than the risks for land, air, or sea combat units with which they are associated in a theater of operations.”²⁰¹

196. *Id.* at 77 (statement of Representative Les Aspin).

197. *Id.* (statement of Representative Les Aspin).

198. *See* DACOWITS Fall Conference October 18–21, 1992 Hosted by U.S. Army 44–45 (1992) (on file with author).

199. Memorandum from Les Aspin, Sec’y of Def., to the Sec’y of the Army; Sec’y of the Navy; Sec’y of the Air Force; Chairman, Joint Chiefs of Staff; Assistant Sec’y of Def. (Force Mgmt. & Pers.); Assistant Sec’y of Def. (Reserve Affairs) 1 (Apr. 28, 1993) (on file with author).

200. *Id.* at 2.

201. Memorandum from Frank Carlucci, Sec’y of Def., to Sec’ys of the Mili-

Aspin's April 1993 memorandum did not represent a complete commitment to eliminating all laws and regulations that excluded women from military positions. It stated that military policy would continue to exclude women from "units engaged in direct combat on the ground, assignments where physical requirements are prohibitive and assignments where the costs of appropriate berthing and privacy arrangements are prohibitive."²⁰² The services could also "propose additional exceptions, together with the justification for such exceptions, as they deem appropriate."²⁰³ But the April 1993 memorandum did represent an unprecedented military commitment to expanding women's opportunities.

The Defense Department and Navy (with DACOWITS' support)²⁰⁴ proceeded to lobby Congress to remove the remaining statutory combat exclusion. Vice Admiral Ronald Zlatoper, the Deputy Chief of Naval Operations for Manpower, Personnel and Training, and the Chief of Naval Personnel, stressed the claims "of young women and sailors and officers who want to serve their country as professional equals with men," and observed that maintaining a statutory combat exclusion "would serve no purpose other than keeping the Navy from putting the best qualified men and women into the right jobs."²⁰⁵

Congress responded to this initiative in November 1993 by repealing the remaining statutory combat exclusion.²⁰⁶ The new law gave the military discretion to assign servicewomen to any position, although it required the Defense Secretary to provide the congressional armed services committees with thirty days of notice before opening a new combat position to women.²⁰⁷ If the Defense Secretary wanted to assign women "to units and positions whose mission requires routine engagement

tary Dep'ts 1 (Feb. 2, 1988) (on file with author).

202. Aspin, *supra* note 199, at 2.

203. *Id.*

204. For an article by DACOWITS' chair in 1993, see Ellen Press Murdoch, *Equal Combat Roles Put Muscle in Defense*, CHI. TRIB., May 30, 1993, § 6, at 11 ("Military women want to be accepted as full participants in our country's defense.").

205. *Women in Combat: Hearing Before the Subcomm. on Military Forces and Personnel of the H. Comm. on Armed Services*, 103d Cong. 50 (1994) (statement of Vice Admiral Ronald J. Zlatoper, Deputy Chief of Naval Operations, Manpower, Personnel and Training, Chief of Naval Personnel, Department of the Navy).

206. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993).

207. See *id.* § 542(a).

in direct combat on the ground," Congress required ninety days of notice.²⁰⁸

Since enactment of the 1993 statute, military regulations have steadily opened more combat positions to women. In a January 13, 1994 memorandum, Aspin announced that the implementation committee established under his earlier memorandum had concluded that the Defense Department's Risk Rule was "no longer appropriate."²⁰⁹ Aspin rescinded the Risk Rule as of October 1, 1994, and put forth a new "direct ground combat assignment rule" to control military policy starting October 1.²¹⁰ This rule provides that "[s]ervice members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground."²¹¹ The January 13, 1994 memorandum defines "[d]irect ground combat" as "engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect."²¹²

This January 13, 1994 memorandum was designed to recognize and promote commitments to sex equality, and enhance women's status in the military. Aspin told the military services to "use this guidance to expand opportunities for women" and stated that "[n]o units or positions previously open to women [would] be closed under these instructions."²¹³ At the same time, the memorandum's approach was incremental, shrinking rather than eliminating sex-based differences in treatment. In addition to affirming women's exclusion from direct ground

208. *Id.* § 542(b). The 1993 statute also instructed the Defense Secretary to apply the same occupational performance standards to men and women, *see id.* § 543(a)–(b), and provide Congress with sixty days of notice before changing the occupational performance standards for a military field in a way expected to increase or decrease by at least ten percent the number of women entering or being assigned to the field, *see id.* § 543(c).

209. Memorandum from Les Aspin, Sec'y of Def., to the Sec'y of the Army; Sec'y of the Navy; Sec'y of the Air Force; Chairman, Joint Chiefs of Staff; Assistant Sec'y of Def. (Pers. & Readiness); Assistant Sec'y of Def. (Reserve Affairs) 1 (Jan. 13, 1994) (on file with author).

210. *Id.*

211. *Id.*

212. *Id.* at 1–2.

213. *Id.* at 2.

combat, the memorandum also informed the services that they could exclude women, subject to Defense Department approval, "where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive," "where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women," "where units are engaged in long range reconnaissance operations and Special Operations Forces missions," and/or "where job related physical requirements would necessarily exclude the vast majority of women Service members." The military services were also permitted to "propose additional exceptions" to the Defense Department.²¹⁴

On January 21, 1994, Secretary Aspin relayed the contents of his April 1993 and January 13, 1994 memoranda to the congressional armed services committees and reported on the changes the memoranda had already prompted. He noted that every service had opened "all combat aircraft types" to women. In addition, even before the 1993 repeal of the last statutory combat exclusion, the Navy had opened eighteen additional noncombatant ships to women, making approximately one thousand more sea billets open to women. In light of the 1993 repeal, the Navy was "preparing plans" to "allow women to serve aboard combatant vessels."²¹⁵

In the months and years to follow, Defense Department letters to the congressional armed services committees reported the progressive expansion of military positions open to women, citing both commitments to women's equality and the pragmatic military benefits of women's increased participation. In February 1994, for instance, Defense Secretary William Perry reported that the Navy would allow "women, both enlisted and officer personnel, to be assigned permanently to surface combatant ships, all combat aircraft squadrons, all afloat staff, and units of the Naval Construction Force." He explained that this was "a very important step to integrate and utilize women better in the Navy, as well as to broaden and strengthen significantly their career opportunities. This expansion of assignment opportunities acknowledges the future diversity of the work force and at the same time enables the Navy to assign the best

214. *Id.*

215. Letter from Les Aspin, Sec'y of Def., to Ronald V. Dellums, Chairman, House Comm. on Armed Servs. 1-2 (Jan. 21, 1994) (on file with author); Letter from Les Aspin, Sec'y of Def., to Sam Nunn, Chairman, Senate Comm. on Armed Servs. 1-2 (Jan. 21, 1994) (on file with author) (same).

individual to each job.”²¹⁶ In July 1994, Perry reported that when the new direct ground combat assignment rule announced in Aspin’s January 13, 1994 memorandum became effective on October 1, 1994 approximately eighty-one thousand additional positions would be opened to women, meaning that a total of ninety-two percent of the career fields and more than eighty percent of the military positions in the Defense Department would be open to women.²¹⁷ Perry explained that the Defense Department “implemented these policy changes to increase the pool of qualified individuals for each military job,

216. Letter from William J. Perry, Sec’y of Def., to Ronald V. Dellums, Chairman, House Comm. on Armed Servs. 1 (Feb. 4, 1994) (on file with author); Letter from William J. Perry, Sec’y of Def., to Sam Nunn, Chairman, Senate Comm. on Armed Servs. 1 (Feb. 4, 1994) (on file with author) (same). In May 1999, Under Secretary of Defense for Personnel and Readiness Rudy deLeon reported that the Navy would open Mine Countermeasure and Mine Coastal Hunter ships to female officers, although such ships would remain closed to enlisted women because of “prohibitive modification cost.” Letter from Rudy deLeon, Under Sec’y of Def. for Pers. & Readiness, to Floyd Spence, Chairman, House Comm. on Armed Servs. 1 (May 6, 1999) (on file with author); Letter from Rudy deLeon, Under Sec’y of Def. for Pers. & Readiness, to John Warner, Chairman, Senate Comm. on Armed Servs. 1 (May 6, 1999) (on file with author) (same). In July 1999, Acting Assistant Secretary of Defense for Force Management Policy Francis Rush, Jr. reported that the Navy would also open Mine Countermeasure and Mine Coastal Hunter ships to enlisted women because “[t]he Navy recently reevaluated the cost based on experiences gained from embarking women in combatant ships” and “[i]t has now been determined that the initial modifications needed to reconfigure female enlisted berthing would be negligible.” Letter from Francis M. Rush, Jr., Acting Assistant Sec’y of Def. for Force Mgmt. Policy, to Floyd Spence, Chairman, House Comm. on Armed Servs. 1 (July 22, 1999) (on file with author); Letter from Francis M. Rush, Jr., Acting Assistant Sec’y of Def. for Force Mgmt. Policy, to John Warner, Chairman, Senate Comm. on Armed Servs. 1 (July 22, 1999) (on file with author) (same). In May 2005, Defense Secretary Donald Rumsfeld reported that the Navy would open Patrol Coastal ships to female officers. *See* Letter from Donald Rumsfeld, Sec’y of Def., to Duncan Hunter, Chairman, House Comm. on Armed Servs. 1 (May 2, 2005) (on file with author); Letter from Donald Rumsfeld, Sec’y of Def., to John Warner, Chairman, Senate Comm. on Armed Servs. 1 (May 2, 2005) (on file with author) (same).

217. *See* Letter from William J. Perry, Sec’y of Def., to Ronald V. Dellums, Chairman, House Comm. on Armed Servs. 1 (July 28, 1994) (on file with author). The Army would “open all units and positions except Armor, Infantry, and ground Special Operations Forces units below the brigade level and any closely associated support units such as Combat Engineer Companies and Air Defense Artillery batteries.” *Id.* The Marines would “open 33 additional Military Occupational Specialties and nine types of units previously closed to women,” so that “[o]nly the Marine Corps Infantry Regiment and those closely associated support units and positions remain closed.” *Id.* at 1–2. In the Air Force, “[o]nly Air Force Pararescue, Combat Controllers and those units and positions routinely associated with direct ground combat” would remain closed to women. *Id.* at 2.

regardless of gender, to allow the Department to meet the future needs of our country.”²¹⁸

Congress remains interested in monitoring the combat positions that the military opens to women or keeps closed. A 2002 statute required the Defense Secretary to submit to Congress, for each fiscal year from 2002 to 2006, “a report on the status of female members of the Armed Forces,” including information on “[t]he positions, weapon systems, and fields of skills” closed to women, and the reason for each exclusion.²¹⁹

The 2006 report identified nineteen Army positions (involving infantry, armor, special forces, and ranger service) closed to women because they involve direct ground combat as their primary mission, and eight Army positions (involving field artillery) closed because they involve collocation with direct ground combat units.²²⁰ The Air Force reported thirteen positions closed because they involve collocation with direct ground combat units.²²¹ The Navy reported seven positions (involving Special Warfare and Special Operations) closed because they involve direct ground combat as their primary mission, thirty-five positions closed because they involve collocation with direct ground combat units, and two areas of service (Submarines and Patrol Coastal ships) closed on the ground that the costs of appropriate berthing and privacy arrangements are prohibitive.²²² The Marines reported twenty-five positions closed because they involve direct ground combat as their primary mission.²²³ No service reported closing any positions to women because of job related physical requirements.

The United States Government Accountability Office calculates the current combat exclusions in different terms. It reports that “females are excluded from 178 enlisted occupational specialties (5 percent of all enlisted occupational specialties), mostly in infantry, gun crew, and seamanship; electronic equipment repairers; and electrical/mechanical equipment re-

218. *Id.* at 1.

219. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 562(a), (b)(1), 116 Stat. 2458, 2554–55 (2002).

220. See OFFICE OF PERS. & READINESS, MILITARY PERS. POLICY, DEP’T OF DEF., ANNUAL REPORT ON STATUS OF FEMALE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES FY 2002–06, at 2.

221. See *id.* at 3.

222. See *id.* at 4–5.

223. See *id.* at 6.

pairers occupational areas.” Women “are excluded from 17 officer specialties (less than 1 percent of all officer specialties).”²²⁴

In the ongoing Iraq War, the military is using servicewomen to the fullest extent possible under current military regulations, and may be testing regulatory boundaries.²²⁵ One hundred American servicewomen have died in the Iraq War as of October 4, 2008.²²⁶ Yet Congress, the executive, and the military have continued to express enthusiastic support for women’s military role, including in combat. Officials have emphasized how essential women’s military service, including combat service, is to the armed forces. General George Casey, Jr., Commander of Multi-National Forces-Iraq in 2005, testified before the House Armed Services Committee about his commitment to maintaining “the policies and programs” allowing servicewomen to assume a wide-ranging military role, including in combat. He reported that servicewomen “perform magnificently every day, and we couldn’t do without them in the positions that they are in.”²²⁷ Ronald James told the Senate Armed Ser-

224. U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: REPORTING ADDITIONAL SERVICEMEMBER DEMOGRAPHICS COULD ENHANCE CONGRESSIONAL OVERSIGHT 45 (2005).

225. See 152 CONG. REC. S8542 (daily ed. Aug. 1, 2006) (statement of Senator Robert Menendez) (“The Navy and the Air Force have begun to allow female soldiers to fly fighters and bombers. The Army has expanded the role of women in ground-combat operations. . . . This would have been unheard of a decade ago, but it is happening right now.”); 151 CONG. REC. E1492 (daily ed. July 14, 2005) (statement of Representative Jim Cooper) (“I rise today to recognize and congratulate U.S. Army Sgt. Leigh Ann Hester, a recent recipient of the Silver Star Medal—the Army’s third highest award for valor in combat. . . . According to an Army account, ‘[Sgt.] Hester led her team through the ‘kill zone’ and into a flanking position, where she assaulted a trench line with grenades and M203 grenade-launcher rounds.’ Sgt. Hester killed at least three insurgents . . .”); MARGARET C. HARRELL ET AL., RAND NAT’L DEF. RESEARCH INST., ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 32 (2007) (“[T]here are circumstances in which support units with women are in a relationship with maneuver units that is only very slightly different from being assigned, and . . . in some circumstances, they have a closer relationship with the maneuver unit than with the unit in their assigned chain of command.”); JAMES E. WISE JR. & SCOTT BARON, WOMEN AT WAR: IRAQ, AFGHANISTAN, AND OTHER CONFLICTS, at ix (2006) (“Servicewomen are frequently engaged in fire-fights with enemy insurgents while guarding convoys, traveling in hostile territory, or performing military police duties and other vital support functions.”).

226. See Statistical Info. Analysis Div., Dep’t of Def., Operation Iraqi Freedom Military Deaths March 19, 2003 Through October 4, 2008, at 1 (on file with author).

227. *Progress of the Iraqi Security Forces: Hearing Before the H. Comm. on Armed Services*, 109th Cong. 53 (2007) (statement of General George W. Casey, Jr., Commander, Multi-National Forces-Iraq, U.S. Army).

vices Committee when nominated in 2006 to be Assistant Secretary of the Army for Manpower and Reserve Affairs “that women have been and will continue to be an integral part of the Army team, performing exceptionally well in all specialties and positions open to them.”²²⁸ Many officials have also linked women’s expanded military role to national commitments to sex equality. For example, Representative Susan Davis in 2005 endorsed the claims of servicewomen who stressed “that women have the right, as well as the responsibility, to serve.”²²⁹ Davis elaborated, quoting a female Marine veteran: “Women’s struggle for a place in the military has been about seeking the full rights and responsibilities of citizenship. The struggle is about women being judged by the same standards as men in any job for which they can qualify. It has always been about being able to pursue a career based on individual qualifications rather than unrelated stereotypes.”²³⁰

Survey data suggests that popular support for women’s military service, including in combat, has also increased since *Rostker*. In 1979 and 1980—the years surrounding the debate over Carter’s proposal—surveys found that approximately half the population supported registering women and subjecting them to conscription, and approximately one-fifth to one-quarter of the population supported making women eligible for combat positions.²³¹ Opposition to drafting women may have

228. *Nominations Before the Senate Armed Services Committee, Second Session, 109th Congress: Hearings Before the S. Comm. on Armed Services*, 109th Cong. 487 (2007) (statement of Ronald J. James, to be Assistant Secretary of the Army for Manpower and Reserve Affairs).

229. *Progress of the Iraqi Security Forces: Hearing Before the H. Comm. on Armed Services*, *supra* note 227, at 54 (statement of Representative Susan Davis).

230. 151 CONG. REC. H4015 (daily ed. May 25, 2005) (statement of Representative Susan Davis) (quoting Sergeant Cynthia Hanna, Marine veteran).

231. In a Gallup survey conducted between March 2 and 5, 1979, fifty percent favored registering women and forty-three percent stated that women should be conscripted if a draft became necessary. Of the forty-three percent who favored drafting women, nineteen percent stated that women should be eligible for combat roles and twenty-two percent stated that women should be ineligible. See GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1979*, at 150–53 (1980). On February 1 to 4, 1980, fifty-six percent favored registering women and fifty-one percent stated that women should be conscripted if a draft became necessary. Of the fifty-one percent who favored drafting women, twenty-one percent stated that women should be eligible for combat roles and twenty-eight percent stated that women should be ineligible. See GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1980*, at 54–56, 58 (1981). On July 11 to 14, 1980, forty-nine percent favored registering women and forty-nine percent stated that women should be conscripted if a draft became neces-

increased slightly in *Rostker*'s immediate wake.²³² But in 1990, 1991, and 1992—before, during, and after the Gulf War that helped spur the laws eliminating statutory combat exclusions—surveys found dramatically increased levels of public support for women in combat, with that position almost always attracting over half the population and sometimes significantly more than that. A New York Times/CBS News poll surveying 1557 adults nationwide between January 13 and 15, 1990 found that seventy-two percent stated that “women members of the armed forces should be allowed to serve in combat units if they want to.”²³³ In a Gallup poll conducted between August 30 and September 2, 1990, sixty percent stated that “women in the U.S. military” should “serve in actual combat roles if it becomes necessary in the current situation in the Mideast.”²³⁴ A Gallup poll conducted between February 14 and 17, 1991 found that thirty-eight percent stated that they “favor[ed] changing U.S. policy in order to allow women to serve in combat roles.”²³⁵ A Newsweek/Gallup poll surveying 610 adults on July 25 and 26, 1991 found that fifty-three percent stated that servicewomen should receive combat assignments if they want them and an additional twenty-six percent stated that servicewomen should receive combat assignments on the same terms as men.²³⁶ Res-

sary. Of the forty-nine percent who favored drafting women, twenty-two percent stated that women should be eligible for combat roles and twenty-five percent stated that women should be ineligible. *See id.* at 146–49. Between January 31 and February 4, 1980, the ABC News-Harris Survey polled a nationwide cross section of 1198 likely voters. Fifty-five percent favored registering women and making them eligible for conscription. Twenty-nine percent favored assigning servicewomen to combat units. *See* Louis Harris, *Americans Favor Military Registration of Young People*, ABC NEWS-HARRIS SURV., Mar. 7, 1980, at 1, 2–3.

232. A Gallup survey conducted between July 31 and August 3, 1981 asked respondents whether they “approve[d] or disapprove[d] of the Supreme Court ruling that women cannot be drafted.” Of course, this question did not accurately describe the *Rostker* holding. *Rostker* did not prevent Congress from drafting women; it held that Congress was constitutionally free to choose male-only registration and conscription instead. Nonetheless, fifty-nine percent of respondents reported that they approved of the “ruling that women cannot be drafted.” GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1981*, at 181–82 (1982) (emphasis omitted).

233. Elaine Sciolino, *Battle Lines Are Shifting on Women in War*, N.Y. TIMES, Jan. 25, 1990, at A1, D23.

234. GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1990*, at 114, 117 (1991) (emphasis omitted).

235. GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1991*, at 59–60 (1992) (emphasis omitted).

236. *See Opinion Watch: On the Front Lines?*, NEWSWEEK, Aug. 5, 1991, at

pondents were also asked whether allowing women to serve in combat roles would benefit or burden the military. Sixty-three percent thought the military would benefit from allowing women to serve as jet fighter pilots, fifty-nine percent thought the military would benefit from allowing women to serve on Navy warships, and forty-one percent thought the military would benefit from allowing women to serve as infantry soldiers.²³⁷ Fifty percent supported including women in conscription if a draft became necessary.²³⁸ A Gallup survey conducted on November 10 and 11, 1992 found that fifty-five percent favored “[a]llowing women in the military into combat jobs.”²³⁹ A 1992 Roper Organization survey of fifteen hundred representative adults found that fifty-three percent favored allowing women to serve on combat aircraft, fifty-one percent favored allowing women to serve on combat ships, and forty-five percent favored allowing women to serve in direct ground combat positions. Fifty-two percent favored making women eligible for conscription.²⁴⁰

More recent surveys have found similarly widespread, if not greater, support for women’s military service, including in combat. A CNN/USA Today/Gallup poll conducted between June 5 and 7, 1998 found that fifty-four percent supported including women in conscription if a draft became necessary.²⁴¹ A CNN/USA Today/Gallup poll conducted between December 14 and 16, 2001 found that seventy-seven percent favored women “[f]lying combat aircraft,” seventy-three percent favored women “[s]erving on submarines,” sixty-three percent favored women “[s]erving as Special Forces that conduct operations behind enemy lines,” and fifty-two percent favored women “[s]erving as ground combat troops.” Forty-six percent favored including women in conscription if a draft became necessary.²⁴²

Popular support for women’s military service, including in combat, has remained strong during the Iraq War. A CNN/USA

27, 27.

237. *Id.*

238. *Id.*

239. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1992, at 198 (1993) (emphasis omitted).

240. See THE PRESIDENTIAL COMM’N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, *supra* note 188, at D-1.

241. See GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1998, at 179, 183 (1999).

242. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 2002, at 3 (2003).

Today/Gallup poll conducted between May 20 and 22, 2005 found that, even amidst a bloody and extended conflict, forty-four percent of the 1,006 surveyed adults favored women “serving as ground troops who are doing most of the fighting.”²⁴³

In sum, the evidence indicates a marked positive shift in congressional, executive, military, and popular support for women’s military service, including in combat. Despite *Rostker*’s judgment that restrictions on women’s military service did not threaten women’s equal rights, extrajudicial forces—driven by the combination of their commitment to sex equality

243. Darren K. Carlson, *Do Americans Give Women a Fighting Chance?: Service Other than Active Combat OK with Americans*, in THE GALLUP POLL: PUBLIC OPINION 2005, at 217, 217–18 (Alec M. Gallup & Frank Newport eds., 2007). James Webb’s career also suggests the popular opinion shift since *Rostker*. In 1979, Webb felt comfortable publishing an article opposing women’s participation in combat and criticizing Congress’s decision to admit women to the military academies. See James Webb, *Women Can’t Fight*, WASHINGTONIAN, Nov. 1979, at 144, 146 (“There is a place for women in our military, but not in combat. And their presence at institutions dedicated to the preparation of men for combat command is poisoning that preparation.”). Webb’s article was not universally popular, but did not prevent Webb from becoming Secretary of the Navy from 1987 to 1988. See *Nominations Before the Senate Armed Services Committee, First Session, 100th Congress: Hearings Before the S. Comm. on Armed Services*, 100th Cong. 49–93 (1988); John H. Cushman Jr., *Navy Chief Quits, Assailing Carlucci over Budget Cuts*, N.Y. TIMES, Feb. 23, 1988, at A1. When Webb campaigned in 2006 to become a United States Senator from Virginia, however, his 1979 article became a significant campaign issue, with Webb’s opponent, George Allen, mailing fliers to voters warning that: “If James Webb had his way, . . . we’d send women back to a time when they weren’t respected, and weren’t treated fairly — and we certainly wouldn’t have women studying at the military academies.” Michael D. Shear, *Hip-High in Mud, Allen, Webb Show No Signs of Letting up*, WASH. POST, Sept. 27, 2006, at B6. In response, Webb distanced himself from his own publication, either because he no longer believed what he had written, or because he realized that opposing the expansion of women’s military role was now outside the mainstream of popular opinion and hence a political liability, or both. In September 2006, Webb declared he was “fully comfortable with the roles of women in the military today.” *Meet the Press* (NBC television broadcast Sept. 17, 2006) (transcript at 12, on file with author) (statement of James Webb).

Interestingly, Allen had fought the admission of women to the Virginia Military Institute (VMI), a state military college. While Governor of Virginia in 1995, he criticized “the federal government,” which was litigating to win women’s admission to VMI, for “its efforts to ruin VMI for whatever social cause.” Allen explained that “if VMI admitted women, it wouldn’t be the VMI that we’ve known for 154 years. You just don’t treat women the way you treat fellow cadets. If you did, it would be ungentlemanly, it’d be improper.” *Live with TAE: George Allen*, AM. ENTERPRISE, Mar./Apr. 1995, at 23, 24. During the 2006 Senate campaign, Allen also distanced himself from his earlier position, stating that he had been “wrong” to think women’s admission would ruin VMI. *Meet the Press*, *supra*, at 14 (statement of Senator George Allen). Webb won the election.

and their recognition of the volunteer military's personnel needs—have dramatically expanded women's military role, including in combat.

B. *ROSTKER* IN LIGHT OF THE EXTRAJUDICIAL CHANGES IN WOMEN'S MILITARY STATUS

The record of women's legal status in the military since *Rostker* illustrates how the constitutional interpretation in a Supreme Court decision can become much less compelling and convincing over time, without any constitutional amendment or reversal in the Court's jurisprudence. The Court has not overruled or questioned *Rostker*, and lower courts have not challenged the decision. In addition, none of the extrajudicial changes in women's military role formally contravene *Rostker*, which imposed no prohibitions on Congress, the executive, or the military. But the extrajudicial transformation in women's military status has nonetheless seriously undermined *Rostker*'s foundation because *Rostker*'s reasoning, premises, and expectations do not match how the nation has evolved.²⁴⁴ The congressional, executive, and military officials who undertook this transformation, moreover, realized that their actions threatened *Rostker*. These extrajudicial actors have enforced their own judgments about sex equality, recognizing that their judgments may be codified in a judicial decision that demands still further expansion of women's military role in the form of sex-neutral rules governing registration, conscription, and combat.

Extrajudicial developments have undercut *Rostker*'s factual premises. *Rostker* relied on women's absence from combat service, and on political and popular opposition to women's combat service. Today, it is much harder to assert that there is strong governmental and popular opposition to women serving in combat. Public support for women's military service, including in combat, has steadily increased. Congress has eliminated statutory combat exclusions, and military regulations have

244. *Rostker* is not unique in grounding its constitutional interpretation on factual and cultural premises that can become less plausible over time. To some degree, the Court may inevitably base its interpretation of constitutional equal protection on its understanding of "the facts of life." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 427 (1960). Sometimes the Court's understanding of the world stands the test of time, and sometimes it does not. For a notorious example, compare *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), with *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

opened many combat roles to women, including almost all military positions except those officially identified as primarily involving direct ground combat. Even with women's official exclusion from direct ground combat, moreover, the military is structured so that some women will be predictably involved in direct ground combat.²⁴⁵

Extrajudicial change has also undermined *Rostker's* cultural assumptions. *Rostker* accepted political and popular opposition to women's combat service as too commonsensical to be explained. In fact, this opposition was intent on preserving constraints on women's public roles out of the belief that women's real responsibilities were domestic. Today, *Rostker's* ingrained cultural assumptions do not resonate with the assurance of common sense. Growing segments of the government and public appear to have abandoned the notion that women have special familial responsibilities incompatible with military service, especially in combat. Indeed, such notions are now widely understood to be one of the cultural premises undermining sex equality. Congress cited its determination to recognize women's equal rights in eliminating statutory combat exclusions, and the military has expressed similar commitments to sex equality in dramatically expanding women's combat service.²⁴⁶

The extrajudicial changes in women's military status have undercut *Rostker's* central factual and cultural assumptions. These extrajudicial developments make clear that *Rostker* is inconsistent with the rest of the Court's sex discrimination jurisprudence, even if the Court may be reluctant to acknowledge the inconsistency and require sex-neutral rules for military service before legislation and military regulations impose them.

The Court's sex discrimination jurisprudence holds that the state cannot exclude all women from a position open to men on the ground that many or most women may be unable or unwilling to satisfy that position's requirements. In other words, the state cannot treat women who are similar to men in interests and abilities as if they are different just because they are women. For instance, *United States v. Virginia*²⁴⁷ held that the Virginia Military Institute (VMI), a state military college, could not exclude all women even if most women were uninterested in, or unable to complete, VMI's program. Instead, VMI had to assess each individual applicant's qualifications. "State actors

245. See *supra* note 225.

246. See *supra* Part III.A.

247. 518 U.S. 515 (1996).

controlling gates to opportunity,” the Court explained, “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”²⁴⁸ “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”²⁴⁹ In this case, women have now served in a wide range of combat positions with a success that would have been unimaginable to most Americans in the 1970s and early 1980s, and it is apparent that some women could fill all military roles.

The Court’s sex discrimination jurisprudence also holds that the state cannot use sex-based distinctions to expand differences between men and women by enhancing men’s status and undermining women’s. The Court has explained that its sex discrimination jurisprudence is designed to end women’s “legal, social, and economic inferiority” and give women “full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”²⁵⁰ Military service has long established and confirmed men’s full citizenship, while political and popular commitments to limiting women’s military role—including Congress’s 1980 decision to exclude women from registration—have been closely intertwined with the notion that women’s private duties preclude their equal participation in public life. The Court’s sex discrimination jurisprudence rejects sex-based state action that undercuts women’s equal citizenship.

In sum, the transformation in women’s military role has undermined *Rostker*’s continued plausibility as constitutional interpretation. The congressional, executive, and military officials who pursued this transformation, moreover, realized they might be stripping *Rostker*’s foundation, and nonetheless continued to expand women’s military role, including in combat. Congressional supporters of eliminating statutory combat exclusions were acutely aware that their conduct might undercut *Rostker*. Responding to their critics’ warnings,²⁵¹ Senators Wil-

248. *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

249. *Id.* at 550.

250. *Id.* at 534, 532. For more discussion of this aspect of the Court’s sex discrimination jurisprudence, see Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”: A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 771–73 (2002).

251. Senators John Glenn and Sam Nunn opposed narrowing the statutory

liam Roth and Edward Kennedy, authors of the 1991 law narrowing statutory combat exclusions, repeatedly addressed the argument that the law would “result in women being required to register for the draft and women being subject to the draft.”²⁵² Yet Congress proceeded anyway to reduce and then remove all statutory combat exclusions. Congress and the executive have simply asked the Defense Department to monitor whether extrajudicial changes in women’s military status are weakening *Rostker*’s foundation.²⁵³

combat exclusions in 1991 on the ground that repealing “current combat exclusion laws” might negatively impact “the constitutionality of the male only registration and service requirements of the Military Selective Service Act.” 137 CONG. REC. 20,715 (1991) (statement of Senator John Glenn); *see also id.* at 20,728 (statement of Senator Sam Nunn) (similar). Senator John McCain explained that *Rostker* “clearly stated that the reason the Supreme Court of the United States upheld the law that required males to register at age 18, and did not require females, was because of the combat exclusionary laws that had already been put on the books.” He warned that narrowing the statutory combat exclusions would mean that “we may well have to register women for the draft when they turn age 18.” *Id.* at 20,718 (statement of Senator John McCain). After Congress enacted the 1991 statute, Representative Robert Dornan stressed that “there is no way the Supreme Court or any court in the land is going to say once women are in combat, they are going to be exempt from the draft.” *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services, supra* note 194, at 110 (statement of Representative Robert Dornan). Representative Jon Kyl advocated the 1992 recommendation of the Commission on the Assignment of Women in the Armed Forces that Congress enact, for the first time, a statutory prohibition barring women from ground combat. *See Women in Combat: Hearing Before the Subcomm. on Military Forces and Personnel of the H. Comm. on Armed Services, supra* note 205, at 42–44 (statement of Representative Jon Kyl). The Commission had argued that such a prohibition would preserve “the justification used by the Supreme Court to uphold the constitutionality of the all-male draft.” THE PRESIDENTIAL COMM’N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, *supra* note 188, at 26. Kyl agreed that Congress needed “to ensure that a legal distinction exists between the role of men and women, thus to justify a policy of non-conscription of women.” *Women in Combat: Hearing Before the Subcomm. on Military Forces and Personnel of the H. Comm. on Armed Services, supra* note 205, at 43 (statement of Representative Jon Kyl).

252. 137 CONG. REC. 20,722 (1991) (statement of Senator William Roth); *see also id.* at 20,733 (statement of Senator William Roth); *id.* at 20,714; 20,721; 20,733 (statement of Senator Edward Kennedy).

253. The 1993 statute that eliminated the last statutory combat exclusion required the Defense Secretary to provide Congress with ninety days of notice before assigning women “to units and positions whose mission requires routine engagement in direct combat on the ground.” The statute specified that the Defense Secretary’s report notifying Congress had to include “a detailed analysis of [the] legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act to males only.” National Defense Authorization Act for Fiscal Year 1994, Pub. L. No.

IV. WOMEN'S LEGAL STATUS IN THE MILITARY AND EXTRAJUDICIAL CONSTITUTIONAL CHANGE

Extrajudicial developments have had a devastating impact on *Rostker*'s viability. But the most pressing issue this record raises is how to understand the transformation in women's military role that has taken place outside the courts since *Rostker*.

One immediate question is whether to understand this transformation as constitutional change. There is a developing legal literature on extrajudicial constitutionalism. But this literature has focused on the existence or exercise of the courts' power to strike down or restrict government action, and on how extrajudicial institutions can, should, or do resist exertions of that power. Scholars have opposed the courts' power to find laws unconstitutional through judicial review.²⁵⁴ They have challenged Court rulings limiting Congress's authority to enact legislation under Section Five of the Fourteenth Amendment.²⁵⁵ They have advanced the "departmentalist" view that

103-160, § 542(b), 107 Stat. 1547, 1660 (1993). In May 1994, President Bill Clinton directed the Defense Secretary to "continue to review the arguments for and against continuing to exclude women from registration now that they can be assigned to combat roles other than ground combat." Letter from Bill Clinton, President, to Thomas S. Foley, Speaker, House of Representatives (May 18, 1994), *reprinted in* 140 CONG. REC. 15,545 (1994); Letter from Bill Clinton, President, to Albert Gore, Jr., President, Senate (May 18, 1994), *reprinted in* 140 CONG. REC. 15,547 (1994) (same). The Defense Department's November 1994 report concluded "that the restriction of females from assignments below the brigade level whose primary mission is to engage in direct combat on the ground, provides justification for exempting women from registration as set forth in the decision of the U.S. Supreme Court in *Rostker v. Goldberg*." However, the report noted that "[b]ecause of th[e] change in the makeup of the Armed Forces"—specifically "the significant increase" in military dependence on women "due to their increased combat and combat support roles"—"much of the congressional debate which, in the court's opinion, provided adequate congressional scrutiny of the issue 15 years ago, would be inappropriate today." Dep't of Def., Peacetime Draft Registration and the Selective Service System (SSS) 2 (Nov. 16, 1994) (on file with author). The National Defense Authorization Act for Fiscal Year 2006, in turn, altered the congressional notification requirements from the 1993 statute. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541(a)(1), 119 Stat. 3136, 3251-52 (2006). But the Defense Secretary's report providing Congress with notice of a decision to change the military's "ground combat exclusion policy" is still required to include "a detailed analysis of [the] legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act (50 App. U.S.C. 451 et seq.) to males only." *Id.*

254. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 52 (1999); JEREMY WALDRON, LAW AND DISAGREEMENT 15 (1999).

255. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical*

the President and Congress have the right to disregard the Supreme Court's constitutional interpretation,²⁵⁶ or even its resolution of specific cases,²⁵⁷ in order to proceed contrary to Court instruction. They have made the "popular constitutionalist" case that the public has the power to overturn the Court's constitutional interpretation.²⁵⁸

Rostker upheld and placed no constraints upon government action. Yet the striking extrajudicial transformation in women's military status is at odds with *Rostker's* reasoning, premises, and expectations. This transformation highlights a question on which the literature about extrajudicial constitutional change has not adequately focused: what counts as constitutional change outside the courts? The record of women's military status illustrates how the answer to that question depends on the purposes for which the question is being asked.

The transformation in women's military role since *Rostker* clearly does not count as constitutional change if the question is meant to determine whether courts would have required this transformation if Congress, the executive, and the military had not acted. *Rostker* placed no pressure on Congress, the executive, or the military to alter women's military role. The opinion upheld male-only registration, endorsed male-only conscription and combat, and appeared to permit any form of sex-based distinction in military service, including women's complete exclusion. If extrajudicial actors had not spent the years since *Rostker* transforming women's military status, moreover, *Rostker's* foundation would be no weaker today than when announced.

The transformation in women's military role since *Rostker* also does not count as constitutional change if the question is meant to determine whether Congress, the executive, and the military stated after *Rostker* that they were constitutionally obligated to make the changes in women's military status that they enacted. These extrajudicial actors have not contended that they were required to act. This is unsurprising. It is not clear how often Congress, the executive, or the military ever

Leave Act, 112 YALE L.J. 1943, 1952–80 (2003).

256. See, e.g., John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 371 (1988); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270–71 (1996).

257. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221–22 (1994).

258. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 253 (2004).

reason in terms of an affirmative constitutional obligation upon them. Indeed, the notion that specific actions are required to remedy specific constitutional violations—common when a court must decide the specific case before it—might be in some tension with the incremental process, marked by compromise, that Congress, the executive, and the military often employ, and that they used to expand servicewomen's role.

However, the transformation in women's military role since *Rostker* does count as constitutional change if one is trying to understand the basic normative commitments that shape the meaning of constitutional equal protection as it evolves. This transformation has made modes of structuring women's military service that were once widely accepted as right, reasonable, and equitable, now appear wrong and invidious. In the governmental and popular debates over women's military role that raged in the 1970s and early 1980s, even many people determined to establish sex equality in constitutional and statutory law believed that Congress and the military should organize women's military service to protect the primacy of women's domestic obligations and should exclude women from combat positions. *Rostker's* interpretation of equal protection reflected that contemporaneous understanding of sex equality, and the courts' jurisprudence on women's military service has remained static since. From the standpoint of constitutional principle, this view of constitutional equal protection may have been wrong from the moment of its conception because it treated women as less than full citizens, and denied women equal access to the benefits and burdens of military service simply because of sex. But as a functional matter, what constitutional equal protection means in practice at any given point in history tends to reflect and respond to widespread, evolving understandings of the requirements and implications of equality. From the early 1990s to the present, Congress, the executive, the military, and the public have increasingly come to believe that the conception of women's military role dominant as recently as the early 1980s is inconsistent with their commitments to sex equality, and they have expanded women's military service, including in combat. Over time, this shift in perspective is likely to lead people to make different claims for change and to shape judgments about how the Constitution's open-textured language of equal protection applies to specific questions about women's legal status in the military. More aspects of women's military status are likely to be scrutinized for

their consistency with constitutional norms of equal protection, challenged as unconstitutional, and changed in the interest of sex equality.

Courts are one place this shift in perspective might register. But at least in the short term, they are probably not the most important place. Extrajudicial changes in women's military role have undermined *Rostker's* foundation. Where *Rostker* assumed that women's exclusion from combat was too commonsensical to require explanation, male-only combat positions now need justification and appear constitutionally vulnerable because women's combat service is widely accepted as reasonable. However, courts typically have not been prominent agents of change in the military context, where the judiciary's symbolic authority is relatively low. For example, courts have not led efforts to equalize military opportunities, for African-Americans,²⁵⁹ gay people,²⁶⁰ religious minorities,²⁶¹ or women.

259. Six years before *Brown v. Board of Education*, 347 U.S. 483 (1954), President Harry Truman's executive order "declared [it] to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." Exec. Order No. 9981, 3 C.F.R. 722, 722 (1943-1948). By October 1953, ninety-five percent of black Army soldiers were in integrated units, largely because of Army field commanders' actions during the Korean War. See RICHARD M. DALFUME, DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953, at 218-19 (1969). The author of the first book on military integration later reported that Supreme Court Justices read his manuscript before issuing *Brown*. See *id.* at 4 & n.4.

260. The "Don't Ask/Don't Tell" policy that the Clinton Administration, Congress, and the military negotiated in 1993 currently governs the military service of gay people. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993) (codified at 10 U.S.C. § 654 (2006)). This policy does not accord gay people equal rights, and thus represented a significant compromise for Clinton, who had initially planned to sign "an Executive order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces." William J. Clinton, Memorandum on Ending Discrimination in the Armed Forces, 1 PUB. PAPERS 23, 23 (Jan. 29, 1993). Nonetheless, Clinton understood Don't Ask/Don't Tell to be "a substantial advance over" previous military policy permitting questions "about sexual orientation in the enlistment procedure." William J. Clinton, Remarks Announcing the New Policy on Homosexuals in the Military, 1 PUB. PAPERS 1109, 1111 (July 19, 1993). The policy change was not made under judicial pressure; courts had consistently upheld military policies discriminating against gay servicemembers. See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61, 464-65 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984).

261. In 1987, Congress recognized the right of uniformed military personnel to wear an item of religious apparel that does not interfere with military duties, and is neat and conservative. See National Defense Authorization Act

Constitutional rights in this arena have frequently been underenforced judicially, relying instead on political enforcement for their vindication.²⁶²

The shift in perspective is likely to be most important, at least in the near term, in shaping the constitutional arguments that can be made to Congress, the executive, and the military. For instance, a court would probably be unwilling to find a male-only combat position inconsistent with equal protection, at least in the short term. This judicial nonintervention leaves extrajudicial actors with more freedom and less clarity than they would have if operating under judicial constraint. But even without judicial action, the extrajudicial shift in perspective on women's military service has altered the constitutional landscape that Congress, the executive, and the military confront, empowering certain constitutional arguments, rendering certain questions about constitutionality more reasonable, and making some paths more difficult and others easier to pursue. The argument that a male-only combat position should be opened to women to help vindicate constitutional principles of equal protection has become a perfectly cogent, even powerful claim to advance before Congress, the executive, and the military. In contrast, for example, it has become much more difficult to argue that removing women entirely from combat service would be consistent with constitutional equal protection, making Congress, the executive, and the military less likely to initiate action in that direction and less likely to succeed if they do.

Extrajudicial actors, rather than courts, may answer the many questions that women's military status raises from the perspective of the constitutional law of sex equality. Over the next decade or so—as changes in women's military role continue to destabilize understandings of what, if any, limits on women's military service are consistent with constitutional norms of sex equality—numerous issues are likely to become

for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508(a)(2), 101 Stat. 1019, 1086–87 (1987) (codified at 10 U.S.C. § 774 (2006)). This law reversed a Supreme Court decision upholding an air force prohibition on wearing a yarmulke while in uniform. *See Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

262. *Cf.* LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 6 (2004) (discussing judicial underenforcement of “[t]he right to minimum welfare and the obligation to reform structurally entrenched social bias”); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 30–44 (1994) (discussing judicial underenforcement of a Fourteenth Amendment right to government protection from private violence).

more prominent, revealing some of the practical consequences of the extrajudicial transformation in women's military role.

Women's Exclusion from Registration and Conscription Eligibility. For instance, Congress, the executive, and the military may have to reconsider whether male-only registration and conscription eligibility are consistent with constitutional norms of sex equality. Men seeking to share the burdens of military service and women seeking recognition of their equal citizenship are sure to challenge male-only registration and conscription vigorously if Congress ever seeks to reimpose a draft. Even in the absence of conscription, the filing of *Schwartz* indicates some persistent interest from both men and women in contesting male-only registration. Without judicial action or constitutional amendment, which are both unlikely, extrajudicial decisionmakers cannot be forced to act, and they may prefer to avoid the issue of male-only registration and conscription while no draft is in place. But as Congress, the executive, the military, and the public increasingly recognize women's military service, including in combat, as a natural consequence of women's equality, women's exclusion from registration and the draft—and men's responsibility for bearing this entire burden—becomes harder for extrajudicial decisionmakers to defend and sustain as consistent with constitutional equal protection.

Male-Only Combat Positions. Congress, the executive, and the military will have to decide whether male-only combat positions are consistent with constitutional equal protection. Servicewomen seeking greater opportunities for leadership and advancement, and their supporters within and outside government, are sure to press the issue. Again, extrajudicial decisionmakers cannot be forced to open all combat positions to women without judicial intervention, which is unlikely. Male-only combat positions may persist, at least in the near future, because some members of Congress, the executive, the military, and the public remain resistant to placing women in positions whose officially designated primary mission is to engage in direct ground combat. But the growing political and popular recognition that women's combat service—including service in what is functionally direct ground combat—is a legitimate expression and reflection of women's equality makes women's exclusion from some combat positions more difficult for Congress, the executive, and the military to justify and maintain as consistent with constitutional norms of sex equality.

The Rationality of Which Military Positions Are Open to Women and Which Closed. If Congress, the executive, and the military determine, at least for the short term, that male-only military positions can be consistent with constitutional norms of sex equality, they will have to decide whether the reasons behind specific exclusions need more systematic scrutiny. The judiciary currently does not review the rationality of why certain military positions are open to women and other positions closed, and it is unlikely to do so in the near future. A judicial ruling that military policies are unconstitutionally irrational is improbable. Moreover, courts have held that servicemembers are not protected under Title VII of the 1964 Civil Rights Act,²⁶³ which requires an employer's demonstration of business necessity before permitting a single-sex job.²⁶⁴ In fact, military service is almost the only arena of American life that remains outside Title VII's commitment to enforce principles of equal protection in employment. The functional absence of even rationality review over military decisions to close positions to women means that servicewomen are deprived of the basic guarantees of reasoned decisionmaking based on legitimate criteria that both women and men enjoy in the civilian employment arena, rendering servicewomen's military opportunities more vulnerable and their ability to plan their military careers more tenuous.

The extrajudicial shift in normative perspective on women's military service, the growing practical recognition that women are capable of successful military service in roles unimaginable to most Americans in the 1970s and early 1980s, and the virtual absence of judicial review, combine to make a strong case that Congress, the executive, and the military should assume a heightened responsibility to review and oversee military decisions about which positions are closed to women to ensure their rationality, freedom from bias, and consistency with constitutional norms of sex equality. For instance, Congress could enact a statute specifying criteria and procedures for the military to use in deciding which positions should be closed to women, and providing for greater congressional oversight of these military decisions in ways that explicitly incorporate commitments to constitutional norms of sex equality

263. See, e.g., *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997); *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978).

264. See 42 U.S.C. § 2000e-2(e) (2000).

and concerns about bias. The executive could impose similar requirements and oversight procedures in reviewing military decisions. In turn, the military itself could adopt internal procedures that provide for more study, deliberation, and explanation before making a decision to exclude women from a military position, and that explicitly take concerns about sex equality and bias into account. For example, the military presently excludes women from submarines on the ground that creating appropriate berthing and privacy arrangements would be too expensive.²⁶⁵ Expense is a rationally relevant criteria to consider in deciding whether to open a position to women, but the extrajudicial shift in perspective on women's military service strengthens the argument that the military, together with Congress and the executive, should engage in more deliberation about and provide more explanation of how much expense should be deemed to prohibit change that would otherwise be undertaken to serve constitutional principles of equal protection. The shift also pushes these extrajudicial actors to decide and explain whether cost-based rationales for exclusion should distinguish between existing and new equipment, so that the military would design new submarines to accommodate both sexes even if it did not retrofit submarines already built for all-male crews.

In the near term at least, the argument that Congress, the executive, and the military should institute such changes in review and oversight in the interest of constitutional norms of sex equality may be even stronger and more compelling than the arguments for integrating all male-only combat positions and ending women's exclusion from registration and draft eligibility. The changes in review and oversight would simply seek to ensure women's rational access to service and to institutionalize the commitments to constitutional norms of sex equality that Congress, the executive, and the military have already repeatedly expressed and demonstrated in transforming women's military role.

Facially Sex-Neutral Obstacles to Women's Equal Status in the Military. To date, discussion of women's military status has centered on sex-based rules like women's exclusion from registration, conscription eligibility, and some combat positions. That is unsurprising because these exclusions are important and increasingly anomalous as courts and legislatures have fo-

265. See *supra* text accompanying note 222.

cused on explicitly sex-based rules, eliminating almost all state action that openly treats men and women differently. The Supreme Court automatically applies heightened scrutiny to state action that explicitly distinguishes based on sex.²⁶⁶ But it subjects facially sex-neutral state action to heightened scrutiny only if the plaintiff can meet the exceedingly difficult burden of demonstrating that the action was adopted with the equivalent of malice, “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” women or men.²⁶⁷ The Court has explained that addressing the threats that facially neutral state action can pose to equality is beyond the judiciary’s capacity because it would require too much change.²⁶⁸

However, there is little reason to believe that eliminating only open and obvious sex-based distinctions would be sufficient to give women equal opportunities, responsibilities, and status in the military. For example, military assignment policies for noncombat positions officially open to both sexes are currently structured in ways that reflect and reinforce sex stratification in the civilian workplace. The Armed Services Vocational Aptitude Battery (ASVAB) test, which the military uses to assign enlisted personnel, measures existing practical knowledge rather than just aptitude. One of the eight ASVAB test areas measures “knowledge of automotive maintenance and repair, and wood and metal shop practices.” Another test area measures “knowledge of electrical current, circuits, devices, and electronic systems.”²⁶⁹ Upon enlistment, men are more likely than women to be knowledgeable about automotive repair, electrical work, and other skilled trades, and so the military is more likely to assign men to positions involving and developing those skills—positions leading to relatively lucrative civilian

266. See *supra* text accompanying note 115.

267. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

268. The Court has stated that subjecting facially neutral state action with a disproportionately adverse impact on African-Americans to strict scrutiny “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes.” If such changes were to be made, the Court reasoned, they should be undertaken by “legislative prescription.” *Washington v. Davis*, 426 U.S. 229, 248 (1976). *Feeney* similarly noted that “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Feeney*, 442 U.S. at 272.

269. ASVAB CAREER EXPLORATION PROGRAM, COUNSELOR MANUAL, at iv, 4; see also ASVAB: THE ARMED SERVICES VOCATIONAL APTITUDE BATTERY 3–7 (2006).

jobs.²⁷⁰ When the Government Accountability Office reviewed the military's demographics in 2005, servicewomen constituted fifteen percent of the active Armed Forces. Yet women accounted for just six percent of enlisted electrical/mechanical equipment repairers and seven percent of enlisted craftworkers, compared to thirty-four percent of enlisted health care specialists and thirty-one percent of the enlisted personnel in functional support and administration, which includes such stereotypical female tasks as secretarial work.²⁷¹

The explicitly sex-based distinctions in military service currently attract the most interest and concern. But over time, the extrajudicial shift in perspective on women's military service is likely to push nonjudicial decisionmakers to consider whether there are facially sex-neutral military policies, such as the structure of the ASVAB test, that they should revise to advance constitutional norms of sex equality. Here again, this extrajudicial shift, combined with the absence of judicial review, make a strong case for heightened congressional, executive, and military oversight over facially neutral military policies that disproportionately hamper servicewomen's opportunities, depriving women of options within the military and of training that is valuable in the civilian workplace.

Congress, the executive, and the military do not share the Court's institutional limitations and need not adopt the narrow focus that the Court has pursued in light of its capacities. These extrajudicial actors can continue to develop and enforce their own evolving understanding of how military service should be structured to be most consistent with constitutional norms of sex equality.

270. One government study reviewed the high school transcripts of 21,607 nationally representative graduates from 1990. See SCOTT H. OPPLER ET AL., AM. INSTS. FOR RESEARCH & JOHN R. WELSH, DEF. MANPOWER DATA CTR., ITEM EVALUATION FOR THE ARMED SERVICES VOCATIONAL APTITUDE BATTERY (ASVAB) SCIENCE AND TECHNICAL TEST SPECIFICATIONS: FINAL REPORT 5, 7 (1997). Only 1.73% of the women had taken an auto/machine shop class, compared to 18.78% of the men. Only 0.78% of the women had taken an electricity/electronics class, compared to 9.75% of the men. See *id.* at 7 tbl.5; see also *id.* at 17, 20 ("Males receive higher scores than Females on the [ASVAB's science and technical test areas] . . . Controlling for exposure to content accounts for a non-trivial portion (21% to 64%) of the Male-Female differences in test scores.").

271. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 224, at 44 tbls.18 & 19.