Dependency as a Keyword of the American Draft System and Persistence of Male-Only Registration

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How has male-only draft registration been ideologically justified in the United States? Feminist International Relations and Security Studies scholars would, correctly, point to the strong association between masculinity and militarism in explaining the preservation of male-only registration. I argue, however, that feminist political-sociological scholarship on the centrality of the male breadwinner/female caregiver distinction to numerous federal programs sheds light on ideological justification for women's exclusion from draft registration. Much like other federal programs, concerns with women's dependency and men's economic independence shaped the Selective Service System in 1917. Fear of unraveling the family's sexual division of labor persisted when Congress renewed all-male draft registration in 1980, a position to which the Supreme Court deferred in 1981. I conclude by arguing that the draft's problematic nature would endure if women were required to register with Selective Service and that the new arrangement would likely reproduce multiple inequalities.

Keywords: *draft; gender; family; Congress; Supreme Court; Federalism*

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The United States Selective Service System, the federal draft system founded in 1917, is often seen by American policymakers and the public at large as an archaic institution, which politicians would never dare revive following the bitter experiences of the Vietnam War draft. Yet, all men living on American soil are still required by law to register with the Selective Service System when they reach the age of eighteen, and are penalized if they fail to register. In its current standby position, the system hangs like a federal ghost, quietly registering men in case a draft will one day be called. In its phantom form, it remains an institution that differentiates the citizenship roles of men and women. This article traces the ideological justification enabling all-male registration, despite other considerable changes in men's and women's citizenship and despite repeated efforts to integrate women into the All Volunteer Force (AVF) since the 1970s.

Feminist International Relations and Security Studies scholars would be quick – and correct – to note an enduring association between militarism and masculinity. In that sense, there is no great surprise that Selective Service has remained an exclusively male institution. However, as a feminist political sociologist, I argue that to understand fully how it has persisted as an exclusively male institution, and in order to understand some of the problems that would persist even if women were required to register, it is instructive to view Selective Service as a federal administration akin to the other federal administrations founded during the Progressive Era and the New Deal. Similar to such programs as Aid to Dependent Children, the draft was initially structured as a decentralized federal bureaucracy that would implement policies locally. Local draft boards were to determine which men were acting as breadwinning heads of families. Men with economic dependents, including a wife and/or children, would be deferred from the draft. This policy was variously applied until the draft ended in 1973.

Selective Service therefore did not solely emphasize men's military heroism. It also emphasized their duties to their economic dependents. This corresponded to policymakers'

emphasis on women's roles as dependent caregivers. The male breadwinner/female caregiver distinction implicitly underpinned the Congressional decision in 1980 to revive male-only draft registration, and the Supreme Court's subsequent support of Congress's decision. By examining the founding principles of the Selective Service System during WWI, and late twentieth-century controversies surrounding integrating women into the registration process, this essay underscores how ideas about men and women's "traditional" family roles informed how men were selected for service, and how these conceptions of appropriate family life continued to lurk beneath the 1980 decision to maintain male-only registration.[1]

To appreciate fully the layers of masculine and feminine citizenship reproduced by Selective Service, the first section of this essay places feminist IR and Critical Security Studies in dialogue with feminist political-sociological accounts of the American welfare state. Such an approach entails shifting the conventional disciplinary division of labor. Rather than treating military institutions as somehow distinct or exceptional, and rather than leaving analysis of military manpower planning to the subfields of International Relations or Security Studies, I treat the Selective Service System as a typical federal administration in terms of its approach to the American family. Selective Service by valorizing men as independent breadwinning heads of families and women as dependent caregivers, has functioned as a federal family policy. Local boards sorted draft registrants to determine who was a legitimate breadwinner worthy of draft deferment. When combined with the insights offered by Feminist IR and Security Studies, the dual emphasis of men as citizen-soldiers and men as breadwinners explains how policymakers have continued to justify male-only registration.

In the next section, I offer a brief history of the establishment and operation of the Selective Service System during the First World War. Policymakers and members of Congress had sought to create a conscription system that would select men for service who

had few family obligations, and would defer male breadwinners to the extent possible.[2] I note three distinct phases in the draft process: 1) *Registration* with the Selective Service System; 2) *Classification* by local board members, who determined which men were selected for service and who would be deferred; and 3) Being *drafted* into the armed forces.

In the following section, I describe how Congress decided in 1980 to maintain male-only registration. At that time, many members of Congress were concerned about the possible effect of women's registration on the family's sexual division of labor. They therefore created the erroneous impression that women's registration would lead directly to the conscription of women and to their removal from their families. Members of Congress thereby turned to women's combat exclusion as a legally defensible means of defending male-only registration. Congress's decision to maintain male-only draft registration thus rested on two justifications. The first was resistance to unraveling "traditional" family roles; and the second was the view that men were most suitable for combat service.

I then review the legal challenges to all-male registration that followed Congress's 1980 decision to allocate funds only for men's draft registration. These challenges ended with the Supreme Court's decision to uphold the constitutionality of male-only registration. The Court agreed with Congress's argument that the purpose of draft registration was to organize registrants for combat service. Because women were barred from combat service, the Court also accepted the argument that the registration of women would hamper personnel planning and hence military flexibility. The Court thereby perpetuated male-only draft registration by accepting distinctions between men and women's roles as soldiers in the military that rested, below the surface, on distinctions that Congress had made between men and women's roles within the family. The Court's deference to Congress on military matters and its narrow construction of draft registration's purpose helped perpetuate an institution which has historically seen men as soldiers and breadwinners, and women as caregivers.

I conclude the article with some pragmatic and normative considerations that arise from the Pentagon's announcement in March 2013 that some 230,000 combat positions would be opened to women in the All Volunteer Force.[3] Because women's exclusion from combat service had provided the legal basis for barring women from registering with the Selective Service System, the Pentagon's decision has prompted some to speculate that women will eventually be required to register with Selective Service.[4] Armed with a detailed understanding of how the draft was designed to operate, I point to how both its non-universal, selective nature and its use of autonomous local boards make it highly unlikely that women's integration into draft registration will bring about a significantly more egalitarian process. As in the past, the draft would still likely be a source of institutional racism in conjunction with reproduction of the male breadwinner/female caregiver distinction. Even though the Selective Service System might seem like an organization of little contemporary relevance, men's continued registration and women's potential integration make awareness of the draft system's processes and rules all the more important.

Dependency as a Keyword of the Selective Service System

The few political scientists who have studied the institutionalization of the twentieth-century draft system have largely taken for granted that it was designed as, and has remained, an all-male institution. They focus instead on how the creation of the Selective Service System in 1917 combined political principles, such as civic republicanism and federalism, with pragmatic, strategic, and political considerations.[5] Several historians have noted that when Selective Service was implemented locally during WWI, it reinforced gender and racial inequalities and discriminated against African Americans and poor white men.[6] These historians' insights, however, have not been integrated into most political-science scholarship, which continues to ignore the gendered origins and implementation of the Selective Service System.

By contrast, scholars working in feminist International Relations and Security Studies have done much to problematize the taken-for-granted link between masculinity and militarism. These growing and internally diverse fields have shown the multiple ways in which hegemonic masculinity is articulated within military organizations, the geographic and social networks that informally link various groups of women to military organizations, and the role masculinity plays at the highest echelons of security establishments and within national citizenship regimes.

As Laura Sjoberg and Sandra Via have stressed, there is no single feminist approach to the study of gender, war, and militarism. [7] Some scholars emphasize the co-articulation between militarism, masculinity, and nationalism.[8] Cynthia Enloe, for example, explicitly sees militarism as tied to patriarchy, [9] and has reported on the wide nets of women's sexual subordination in militarized zones.[10] Militarism continues to be associated with sexual violence against women.[11] While less common, some men's dominance over other men is also expressed through sexual violence within the armed forces.[12]

Joshua S. Goldstein seeks to explain the remarkably pervasive link between masculinity and war trans-historically and cross-culturally.[13] Other scholars focus on American international relations and the discursive strategies of the security establishment, and note how heterosexual men are constructed as responsible for the protection of women and children, which ties the patriarchal family order to the international security order.[14] Conscription systems have long connected between men's duty to protect and men's overall privileged positions as citizens both inside and outside the armed forces.[15] The privileging of heterosexual males as the ultimate protectors excludes not only women, but also marginalizes other categories of men,[16] sexualities,[17] and queer citizens.[18]

Students of the gender dynamics within armed forces contend that militaries remain intensely masculine institutions. The integration of women into contemporary armed forces has not shifted the balance of equality between men and women. Instead,

there is often a re-articulation of gender inequality. Orna Sasson-Levy and Sarit Amram-Katz, for instance, report that after several categories of officer positions were opened to women in the Israel Defense Forces, Israeli women officers were still seen as less effective because they were held to a male standard of what constitutes good military leadership.[19] Women conscripts in the Israeli armed forces are often placed in feminized jobs, serve as low-status secretaries, reenforcing a highly stereotyped sexual division of labor within the Israeli military.[20] Focusing on rebel armies in Sierra Leone, Myriam Denov and Christine Gervais show how girls were forcefully abducted into revolutionary forces, and then made to act simultaneously as combatants, wives, and slave laborers.[21] Some surprising changes, however, are being observed. Sandra Via notes that with increased integration of women into the All Volunteer Force, the national armed forces of the United States are becoming feminized, unlike the growing network of masculine private-security forces.[22] Nonetheless, women within the AVF, especially those who have been deployed to Iraq and Afghanistan, continue to report high rates of sexual harassment and violence.[23] The armed forces also continue to promote troop morale by inculcating the loyalty of military spouses, a policy which Denise M. Horn argues exacerbates a gendered "homefront/warfront" dichotomy.[24]

Some changes and contradictions are apparent not only in the professional armed forces, but also in contemporary conscription systems. Maya Eichler has documented how military masculinity in contemporary Russia is undergoing crisis.[25] Conscript service is no longer viewed as inherently heroic and honorable, and servicemen are viewed through multiple frames, some of which do not flatter them as willing, muscular warriors. Still, even though the valorization of men's conscript service might be on the decline, conscription – where it still exists – remains a nearly exclusively male institution.[26]

From the vantage point of feminist political sociology, a strength of feminist IR and Security Studies is that these fields emphasize not only that gender inequality profoundly shapes security regimes and vice versa, but that security institutions and

discourses are embedded in everyday social relations. All the above-noted scholars refuse to view security institutions and discourses as autonomous from the inequalities structuring social and political life.[27] Building on this perspective, I argue as a political sociologist that the "social" and the "political" can be further thickened to show how regimes of gender and sexual inequality are produced and reproduced within, and by, military institutions. I suggest doing so by treating national armies as *national institutions* and by paying close attention to their similarities to other government bureaucracies in terms of discourses, ideological assumptions, and organizational processes. Feminist welfare-state scholarship can help explain how how concerns over women's dependency were integrated into the American draft system. Selective Service has emphasized not solely men's military might, but also men's economic duties to their dependents.

However, feminists in the disciplines of political science, history, and sociology who have studied the institutionalization of American federal programs have almost entirely stayed away from analysis of military institutions as federal institutions.[28] It is here that feminist IR and security studies scholars, who connect militarism to everyday social and political life, offer valuable insights to feminist scholars who, focusing on welfare policy and the American state, note how federal programs in the United States have reproduced a male breadwinner and a female caregiver model of social citizenship. These distinctions between male and female forms of citizenship can be traced to Civil War pensions[29] and, also, to Progressive Era innovations[30] and institutional refinements during the New Deal.[31]

As opposed to the "masculine" track of social welfare, epitomized by such programs as unemployment insurance, women in the feminized track of social welfare were problematically constructed either as dependent on male breadwinners or as dependent on the state. Programs for poor mothers were distinguished from the masculine track of employment relief, which eventually became institutionalized as Social Security.[32] Several

masculinized programs emphasizing men's breadwinning were transformed into federal programs[33] and were valorized as a right. The programs withstood the moral opprobrium and political vulnerability associated with programs that targeted "dependent" women who receive "welfare."[34]

As the following sections will show, the breadwinner/caregiver distinction and the "commonsense" understandings of women's dependency and of the appropriate sexual division of labor within the family played crucial roles in the organization of the American draft system since its inception. The draft system was concerned with the proper distribution of manpower between the armed forces, industry, agriculture, and American families. A system of deferments was constructed so that men in certain occupations and men who were breadwinning heads of families would receive deferments from the draft.[35] Extending Nancy Fraser and Linda Gordon's insight that dependency is a keyword of the American welfare state,[36] I will show that dependency has also been a keyword of the American security state. Although obfuscated during the Congressional deliberations leading to maintenance of male-only registration in 1980, dependency has persisted as a keyword of the Selective Service System; and the importance of this keyword was reinforced by the Supreme Court in 1981, when the Court deferred to Congress on military matters.

While certain scholars, such as Iris Marion Young, have noted the discursive link between the military as masculine protector and the patriarchal family order,[37] I will show how the patriarchal family order first justified *excluding* certain men from the American draft system. In the conscription system established during the First World War, widespread deferments for men with dependents meant that the American draft system was also a federal family policy, one that was careful not to transform men into citizen-soldiers so long as they were fulfilling their duties as economically independent husbands and fathers. This assumption regarding the appropriate sexual division of labor, and its

twin view that women ought to remain at home as caregivers, later shaped the decision in the 1980s to continue to exclude women from draft registration, even though the AVF was already recruiting women as professional soldiers, and even though today women constitute some 14% of all active-duty personnel.[38]

Caregiving, Breadwinning, and WWI Origins of the Selective Service System

As of WWI, most countries implemented some sort of conscription system. Many had followed the French or Prussian model and created a permanent and fairly universal form of military service, in which all men were required to fulfill a given number of years of full-time mandatory military training and service, followed by years of reserve service, when men in the reserves could be called up for occasional training, and could be mobilized at times of emergency.[39] The United States, however, followed the British model, which relied on local militia organizations, and did not institute a system of permanent and universal service.[40]

During the American Civil War, both the Confederate South and the Union North had introduced mandatory conscription. The Confederate Army introduced the most centralized and universal system of conscription in American history,[41] whereas the Union Army relied on locally conscripted militia organizations.[42] Conscription proved immensely unpopular in both the North and South,[43] and after the Civil War, few American politicians were willing to contemplate organizing a national system of mandatory military service.[44]

By the first years of the First World War, however, mandatory and nationalized conscription systems had become a global norm. Within the United States, several personages, such as former President Theodore Roosevelt, encouraged President Woodrow Wilson to organize a Prussian-style conscription system.[45] In July of 1915, after the sinking of the *Lusitania*, Wilson recognized that he needed to reassess the country's existing military organization and its nearly exclusive reliance on local militias. Over the next two years, he became increasingly convinced that a selective wartime draft would be

the most efficient means of organizing a mass army.[46] There would be no attempt at organizing universal service. Instead, a mechanism would be established to select certain men for service.

On March 28, 1917, Wilson authorized the War Secretary, Newton D. Baker, and the Judge Advocate General, Enoch H. Crowder, to elaborate a proposal for a conscription system. Crowder, who would later be appointed as the Provost Marshal General,[47] played a key role in the formulation of that proposal for the President.[48] A few days later, the United States declared war on Germany. The President immediately submitted a bill to Congress, in which he asked it to end the government's reliance on the militia system, and to form a national army through a selective national draft. Debate over the selective draft plan opened in both houses of Congress on April 21, 1917. The Administration's plan quickly gained momentum. After a few compromise amendments, Congress approved the bill on April 28, 1917.[49]

The bill required that all men within a given age range register at their local draft board. Local draft-board members were to note details about the registrants, such as their marital status, occupation, and physical health. Then, after receiving quotas issued by the Selective Service System's National Headquarters, the local boards would select some men for the draft and defer others. The system conformed to the federalist principle of a national administration combined with extensive local autonomy. Local draft boards were to follow loosely defined federal rules and would wield considerable discretionary power in the determination of registrants' draft status.

The bill specified some outright exemptions to the draft – for example, officers of the executive, legislative and judicial branches.[50] Conscientious objectors belonging to "well-recognized sects" were to be assigned to noncombatant service. Deferments (in contrast to exemptions) were to be given to men employed in certain industrial

occupations, along with some agricultural laborers. The morally or physically "deficient" could also be deferred, along with men with financial dependents.[51]

The United States' late entry into WWI provided Americans time to study allies' conscription policies, the innovations that governments tried, and the unexpected challenges that arose. The British and Canadian experiences, in particular, influenced American policymakers. The British government, for example, at first had implemented a voluntary system, and then found that more married men and fathers enlisted than did bachelors. Eventually, the government required mandatory service of all single men, and later extended conscription to men with families, too.[52] The Canadians had found that supporting soldiers' families could be very costly for a nation at war.[53]

Observing the experiences of allied countries who shared with the United States antipathy to universal conscription, and with memories of the Civil War experience still haunting American policymakers, the President and Congress established a draft system that avoided universal conscription partly out of fear of widespread resistence, and partly out of worries about the impact of conscription on American family life and wartime production.[54] In addition, the government attempted to respect federalist principles (by creating a nationally supervised system that was locally administered) and, also, to minimize the costs of supporting soldiers' families. The amalgam of these political principles and practical concerns yielded a conscription system in which local draft-board members determined, on a case-by-case basis, who would be drafted and who be deferred.

In November 1917, the Selective Service System introduced a classification protocol for determining who was most needed for the military, and who should be deferred.[55] Local draft boards were to classify each male registrant. The lower a man's classification, the lower the likelihood that he would be drafted. For example, Class I(a) – the highest classification, which was for the men most likely to be drafted – was to be assigned to a "Single registrant with no dependents." Class I(b) was for a registrant who

had dependents, but who "failed" to support them. Lower down the list, Class IV(a) was for a "Married registrant whose wife or children are mainly dependent on his labor for support."[56] This classification system has continued, in modified form, to this day.

In effect, the Selective Service System had divided manpower planning and mobilization into three distinct stages: registration, classification, and the draft. Men were legally required to register with their local boards. Then, they were classified by local draft boards, which were given wide discretion in considering manpower needs in industry, agriculture, the family, and the armed forces. The classification determined the likelihood of being drafted.

The U.S. government could have implemented a more universal system of social supports, which would have enabled a more universal conscription system. The Canadian and British governments eventually adopted this approach during WWI.[57] Instead, the U.S. Selective Service System, as evident from its title, selected some men for service and deffered others either for work in industry or agriculture, or to stay at home as primary breadwinners. This meant that the draft would not radically challenge the existing distribution of men's and women's familial roles. Local draft boards were to prioritize the drafting of single men, men without children, and men who had been deemed to be failing as breadwinning heads of families. The maintenance of the sexual division of labor within American families was a central concern for the Selective Service System from its inception.

By the end of WWI, 36.5% of registrants had been deferred for dependency reasons.[58] African American men had been more likely to receive I(a) classifications and received proportionally fewer deferments. According to estimates by the Provost Marshal General, 50.65% of African American registrants were placed in Class I, compared to 32.53% of white registrants.[59]

Although dependency-based deferments diminished during WWII, when American armed forces were more heavily involved in combat,[60] the effect of the draft on American families remained a concern through the Vietnam War draft. In 1940, registrants who were judged to be supporting families could still be assigned a "Class III" deferment status[61] and, therefore, would be drafted only after men in Classes I and II. Class III dependency deferments also existed during the Vietnam War draft. Marriage deferments, however, were made more stringent in 1965, and the more generous fatherhood deferments were curbed in 1970. According to today's Military Selective Service Act, if a draft were to be called, local draft boards cannot consider either marriage or fatherhood alone as sufficient grounds for draft deferments, but can legally offer deferments to men who can demonstrate that their conscription would result in financial hardship for their dependents.[62]

"Strains on Family Life" and Congressional Maintenance of Male-Only Registration

In 1973, the draft was cancelled, although registration continued until 1975. The American armed forces became a voluntary professional force and integrated more women as professional servicewomen. Controversy over renewing registration erupted in early 1979, when leaders of the armed forces stated that they were not recruiting enough professional soldiers to meet personnel needs, despite a campaign that focused on recruiting more women. Newspapers reported that in January 1979, Army Secretary Clifford L. Alexander Jr. had proposed in a speech that the draft be revived, and that he used gender-neutral language when referring to the need for a peacetime registration of "young people."[63]

Controversy intensified when General Bernard W. Rogers, the Army Chief of Staff, expressed to the Senate Armed Services Subcommittee on Manpower his view that Congress needed to legislate a new, limited draft.[64] Speculation grew that perhaps a new draft would not be male-only. Several members of Congress proposed legislation to

remove the Selective Service System from its "deep standby" status.[65] The debates in both the Senate and the House of Representatives were chaotic, with legislators making cross-cutting arguments about the need for registration, the need for a draft, and the need for women's registration. Some members of Congress objected to renewing registration; some favored renewal of registration but opposed activating a draft; yet others favored renewal of registration, but opposed registering women.[66]

In testimonies before the Senate Armed Services Committee in mid-March 1979, the service chiefs differed in their opinions about the registration of women in a possible future draft, but none of the chiefs categorically objected to registering women. Rogers said that women should register, "in order for us to have an inventory of what the available strength is within the military qualified pool in this country."[67] General Lew Allen, the Air Force Chief of Staff, advanced a more tepid position. Although he did not think that registering women was essential in terms of meeting personnel needs, he added, "if there were feelings of equal treatment that would make the act of registration more acceptable, if it were done the same for men and women, then I would have no objection to the registration of women."[68] Admiral Thomas Hayward, the Chief of Naval Operations, presented the most negative opinion:

> In my judgment, the requirement for large numbers of women for mobilization purposes, hence registration, is not there. If it were intended to accelerate our ability to mobilize, I could not support a requirement for registration of women nearly to the degree that I could male registration. It seems to me the issue really is a political decision more than a military requirement decision.[69]

By contrast, General Louis Wilson, the Commandant of the Marine Corps, espoused the most positive view regarding women's registration: "I believe [women] should be registered. I think from a pure equitable point of view, women in the Marine Corps are doing very

well. We are very pleased with them and they meet many of our manpower requirements."[70]

Although the Personnel Subcommittee of the House Armed Services Committee voted to recommend a male-only draft in May 1979, the House ignored its recommendations and, in September 1979, rejected a bill for any registration renewal. Instead, the House called upon the President to conduct a study of the existing personnel situation, the wisdom of reviving registration, and the benefits and costs of registering women.[71] Meanwhile, the House continued to conduct hearings on the possible registration of women.[72] Soviet invastion of Afghanistan in December 1979 added further urgency to the draft controversy.

On February 12, 1980, President Carter transmitted his study and also proposed a bill to Congress. Carter recommended renewing registration and amending the Military Selective Service Act (MSSA) to include women. The proposed bill removed the words "male" and "men" from the existing MSSA, and replaced them with "person" and "persons."[73] The accompanying report explained that the Administration's proposal was propelled not by personnel needs, but by reasons of equity:

> Since women have proven that they can serve successfully in the Armed Forces in peace they should be asked also to serve in the Armed Forces during a national emergency or war to the extent that they can make a contribution… The equity argument does not require that men and women be inducted in equal numbers. The numbers for each would have to reflect the jobs available for each to fill.[74]

The Carter Administration saw no need to draft women, nor did the administration intend to lift restrictions on women serving in combat situations. The Administration argued that the number of draft-eligible men would be sufficient for manpower

needs. The argument for registering women rested on the tepid claim that equal obligations should be placed upon men's and women's shoulders.

Articulation of the Administrative Inconvenience Argument Following Craig v. Boren

Three weeks after President Carter submitted his bill to Congress, the Military Personnel Subcommittee of the House Armed Services Committee heard testimony on the issues of renewing registration and integrating women.[75] Policymakers at the highest level, including Bernard Rostker, the recently appointed Director of the Selective Service System, and Robert B. Pirie, the Assistant Secretary of Defense for Manpower, spoke in favor of women's registration. Pirie explained that the military foresaw the need for 80,000 additional servicewomen. If that number could not be met through voluntarism, then registering and drafting women would be wise.[76]

The subcommittee also heard from Larry Simms, the Deputy Assistant Attorney General. Simms presented an opinion on the constitutionality of male-only registration that had been written by John M. Harmon, the Assistant Attorney General, Office of Legal Counsel of the Department of Justice. Harmon's opinion left a strong impression on the subcommittee and shaped its later lines of questioning.

Harmon summarized recent changes to constitutional law that had raised sex as a suspect category, and opined that the Supreme Court would likely test the constitutionality of a sex-based classification within the Military Selective Service Act. According to the 1976 judicial doctrine of intermediate scrutiny (formulated in the Court's decision in *Craig v. Boren*), sex discrimination violates the Fifth and Fourteenth Amendments.[77] For a sex-based classification by the government to overcome a constitutional challenge, the classification must 1) serve important governmental objectives, and 2) be substantially related to achievement of those objectives.[78]

Harmon also offered a strategy for arguing for the constitutionality of an all-male draft that, because of its later impact, is worth citing at length:

> Analytically, we believe the linchpin of a successful argument supporting the constitutionality of an all-male registration under a stricter standard is the proposition that Congress may, as a matter of substantive constitutional law, prohibit the service of females in actual combat based on either generalization regarding their physical characteristics or on psychological factors […] [W]e believe the Court would find that whatever incidental "burden" or stigma might be placed on females by virtue of the Selective Service Act itself would largely be neutralized by the ability of females to volunteer for service in the armed forces and justified by any substantial efficiency gained through that Act in producing persons for combat duty [. . .]
>
> If a male subject to registration (and induction) under the Selective Service Act could convince a court that the Government could, with relative ease, fashion the registration/conscription process in such a way as to conscript separately for combat and noncombat positions, the rationale for the constitutionality of the Act might as a factual matter be reduced to one of administrative convenience. *Thus*, *under the higher standard of scrutiny articulated in Boren, it would be necessary for the Government to produce contemporaneous evidence establishing substantial and unavoidable costs, financial and otherwise, in the administration of such a registration/conscription system in order to uphold the Act.*[79]

Harmon in effect proposed a multi-pronged approach, which would be applied in the legal battles to come. He suggested, first, that existing rules barring women from combat roles could be legally maintained. Given that the legal restriction had existed since 1948,[80] and that women could always join the All Volunteer Force, the Government could argue that the registration of women would lead to wasteful administrative costs. It would be a waste

of time and money to register so many women for so few military positions, and, furthermore, it would burdensome to create a two-tiered registration system for men and women. Through such reasoning, Harmon thought, the Government could possibly convince the Court of the constitutionality of the all-male draft. As we shall see, this was precisely the argument the Government would later marshall when defending male-only registration in *Rostker v. Goldberg*.

Immediately following distribution of Harmon's opinion, the subcommittee heard the testimony of the Director of the Selective Service System. Rostker explained that the American Selective Service System had always sought to register as many people as possible. Therefore, "[T]he administration, consistent with the philosophy of Selective Service, has asked the Congress for authority to create the largest pool possible, to spread the chances of conscription over the largest numbers of people, in order that we may meet our manpower requirements in a fair and equitable manner."[81] With that goal in mind, Rostker considered it wise to expand the supply of potential draftees by including women registrants, regardless of combat restrictions. The influence of Harmon's opinion was evident in the questions that followed. Members of the subcommittee began looking for evidence of administrative inconvenience if registration were to be extended to women. Members of the subcommittee, citing Rostker's and Pirie's estimates that 80,000 more women were needed for the armed forces, expressed doubts that a massive and expensive mechanism for registering millions of women was needed to recruit a mere 80,000 women who would be needed only in the scenario that there were insufficient numbers of women volunteers.[82]

Congress Approves Male-Only Registration

After two days of testimony, the House Military Personnel Subcommittee voted against President Carter's proposal to integrate women into registration on March 6, 1980. The

subcommittee voted 8-1 to reject integrating women into registration and emphasized the wasted tax dollars that would go towards registering women given both the combat restrictions placed on women, and the likely recruitment of a sufficient number of women through voluntary enlistment.[83] The members of the subcommittee had found in Harmon's legal opinion a route for avoiding possible constitutional challenges to their decision: they would emphasize the administrative irrationality of registering women given the combat-exclusion rule. In April, the House voted to pass a bill to appropriate funds for the organization of male-only registration.

The President's proposal to integrate women into registration also failed in the Senate. In the first week of May, the Senate Appropriations Subcommittee approved the appropriation of funds to the Selective Service System to revive registration, but only for male registration.[84] The bill then went to the full Senate for a vote.

The issue of women's registration surfaced again when Senator Nancy Kassebaum of Kansas proposed amending the registration bill to include women. A lively debate ensued, largely echoing the arguments that had already been hashed out in the House and in previous Senate committee and floor debates. Those who supported integrating women emphasized that women were already serving in large and increasing numbers in the professional armed forces, and argued for the importance of equity between men and women. These Senators, however, did not support drafting women. Nor did they support lifting the combat restrictions.[85]

Republican Senator John W. Warner of Virginia, a member of the Senate Armed Services Committee, and Secretary of the Navy from 1972 to 1974, reminded the Senate of the conclusion reached by the Subcommittee on Manpower and Personnel to reject incorporating women into registration. The subcommittee's report had argued that given the existing combat restrictions, there was no need to register women. While women's registration could be justified on the grounds of equity, that was a second-order issue

compared to the defense needs of the armed forces. Additionally, the subcommittee was concerned about the "societal" implications of registering women:

> 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.[86]

The subcommittee had concluded that given the Supreme Court's deference to Congress on matters of national defense, a male-only registration was constitutionally defensible. Additionally, "Under 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."[87]

The Senate rejected Kassebaum's motion 51 to 40. A few days later, the full Senate voted to fund the Selective Service System and to proceed with male-only registration.[88] On July 21, 1980, President Carter ordered that registration begin for men born in 1960.[89]

Another Senate debate about the Selective Service System and conscientious-objector status had preceded discussion of the Kassebaum proposal. However, there was a telling disjuncture between the Senators' demonstrated awareness of the intricacies of the draft machinery when it came to the topic of conscientious objection, and their refusal to recognize the same machinery when it came to registering women. Senator Sam Nunn, Democrat from Georgia, had pointedly argued against registering women. He claimed that if women were to be registered, and

> if we went to a draft with young children at home, I suppose under many cases we could very well have the fathers not receive draft notices under a lottery system . . . . [W]e would be in a position of having fathers staying home, in many cases hundreds, perhaps even thousands of cases, fathers staying home while mothers are shipped off for military service under a draft.[90]

In the previous discussions about conscientious objection, Nunn had repeatedly remarked that there was no point in writing into the current bill an allowance for registrants to declare conscientious-objector status upon registration, as that was more appropriate for legislation concerning the classification and deferment processes.[91] When it came to conscientious objection, Nunn understood very well the distinction between registration, classification, and activating a draft. He persuaded his colleagues in the Senate not to make the registration bill too specific with regards to the classification process and draft status of conscientious objectors because men, after they register with Selective Service, are later subject to a classification process by autonomous local boards. Yet, with regards to women's registration, Nunn and other Senators who opposed women's registration drew a causal arrow straight from registration to the draft, as if everyone who registered would serve in the armed forces. Ominously warning that fathers would stay home while mothers would be shipped off for military service, Senators who opposed the registration of women painted a fictitious picture of how the draft worked and ignored the fact that even if women were required to register, there would have to be further deliberation during the classification process, including deliberations about family-based deferments.

Additionally, men who had been recognized by local boards to be legitimate conscientious objectors have been required since 1917 to serve in non-combatant roles in the armed forces.[92] Clearly, the armed forces were capable of drafting registrants who would be streamed towards exclusively non-combatant roles. Nonetheless, the possibility

of registering women for noncombat positions was successfully framed as too burdensome an administrative challenge for the Selective Service System to manage.

The Supreme Court's Deference to Congress and Maintenance of the Sexual Division of Labor

After Congress's approval of male-only registration, three male plaintiffs filed suit in Pennsylvania and claimed that all-male draft registration was unconstitutional on the grounds of sex discrimination.[93] The District Court for the Eastern District of Pennsylvania concurred. The judges, applying the test of intermediate scrutiny and asking if there was a substantial relationship between the exclusion of women and the raising of effective military forces, ruled that male-only registration was unconstitutional and that there needed to be a stay on the male-only registration already in process. The Government had argued (1) that at a time of mobilization, personnel would be needed who could be easily deployed into combat service, and (2) that because women were barred from combat positions, registration of women would decrease flexibility.

The District Court, however, determined that the Government's assessment of the effect of women's registration and induction did not withstand intermediate scrutiny and bitingly assessed that "It is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants available for induction."[94] The Court, furthermore, noted that several heads of the Services, the President, the Director of the Selective Service System, the Assistant Secretary of Defense, and members of the Department of Defense had stated before Congress that registering women would increase military flexibility. Women, it had been argued, were already trained in relevant professions, such as nursing, and therefore could be inducted immediately to fill similar positions in the armed forces. This would release more men for the lengthy process of combat training. The District Court concluded that

because registering and inducting women would increase military flexibility, there was not sufficiently good reason to maintain male-only registration, and male-only registration could not proceed as planned.

The District Court reached its decision just three days before the new draft registration was scheduled to begin. Believing that the Supreme Court might overturn the decision, Justice William J. Brennan, Jr. agreed to issue a stay of execution one day after the District Court's ruling. This enabled male-only registration to proceed for the time being.[95] Then, on appeal by Selective Service System Director Rostker, the Supreme Court reviewed the District Circuit's opinion in March 1981. Although Rostker had earlier testified before Congress in support of registering women, male-only draft registration by this point was set to begin, and Rostker hoped to move ahead with registration as planned.

The Supreme Court overturned the District Court's ruling in June 1981. Justice William H. Rehnquist delivered the 6-3 majority opinion. The Court was persuaded that Congress had not arbitrarily distinguished between men and women as an accidental by-product of traditional distinctions between the sexes, and that male-only registration could pass intermediate scrutiny. The majority opinion also stated that Congress receives special deference on military matters, which signaled that the Court would tread lightly with regards to the Congressional decision to maintain a male-only draft. The Court would neither inquire too deeply into the purposes of registration, nor examine in detail Congress's view of men and women's appropriate family and societal roles. The majority opinion accepted the Congressional view that the purpose of registering was to furnish combat soldiers:

> Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that, "[i]f mobilization were to be ordered in a wartime

> scenario, the primary manpower need would be for combat replacements." […] The purpose of registration, therefore, was to prepare for a draft of combat troops.[96]

Because Congress had determined that registration was necessary for the purposes of supplying more combat soldiers, and because women were barred from combat service, the Court accepted that the gender classification specifying male-only registration passed the test of intermediate scrutiny. The Court also noted that if there was to be a need for women soldiers, this need could be met by voluntarism. Finally, the Court determined that forcing women to register when they could not serve in front-line combat positions would be "positively detrimental to the important goal of military flexibility."[97] Harmon's opinion had proved to be extraordinarily prescient in discerning a route for male-only registration to withstand intermediate scrutiny.

Justice Byron White dissented and was joined by Justice William Brennan, Jr.. Justice Thurgood Marshall wrote his own separate dissent. Their views relied on evidence from the Congressional hearings that 80,000 non-combat positions could be filled by women, and the dissenting justices noted that few positions in the military were combat positions. Marshall's dissent was particularly on point: "The Court essentially reduces the question of the constitutionality of male-only *registration* to the validity of a hypothetical program for *conscripting* only men […] [T]he majority simply assumes that registration prepares for a draft in which every draftee must be available for assignment to combat."[98]

Although the Court in *Rostker v. Goldberg* treated its deference to Congress on military matters as if it were a consecrated principle, feminist legal scholar Diane H. Mazur argues that this area of deference to Congress had been articulated as a principle merely seven years earlier, in *Parker v. Levy* (1974).[99] In that case, the Court had determined that two articles of the Uniform Code of Military Justice were not unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The decision affirmed the

robustness of a separate military legal system. However, an unanticipated consequence was the crystallization of the judicial view, further buttressed by *Rostker v. Goldberg*, that the military stands as a separate institution outside the scrutiny of civilian courts. In Mazur's view, the Court transformed the recognition of two systems of justice (military and civilian) into a doctrine that the military stands as a separate society with its own rules and values that are impervious to constitutional scrutiny.[100] Just as federalist principles have been treated as first-order constitutional principles at the expense of "second-order" laws attempting to enhance gender equality within the family,[101] so has the Court's deference to Congress on matters of military defense prevented the Court from considering outmoded ideas about the sexual division of labor in federal military institutions.

Congress had feared the "societal" impact of registering women and had turned to women's combat-exclusion rule to make an administrative inconvenience argument. After *Parker v. Levy*, the Supreme Court would not dig too deeply into Congress's reasoning – a decision that would enable the perpetuation of a bifurcation of men and women's citizenship through the Selective Service System.

In 1992, a Presidential Commission on the Assignment of Women in the Armed Forces did not overturn the status quo and maintained that registration should continue to include men only.[102] The same was true of a Secretary of Defense 1994 report that also clarified that women could not be assigned to units whose "primary mission" was to engage in direct combat.[103] According to current law, the classification system would operate if a draft were to be called. Most men living on American soil, including non-citizens, must continue to register with the Selective Service System when they reach the age of eighteen. The Military Selective Service Act still offers deferments to registrants who can prove that their conscription would bring financial hardship to their family members.[104]

Conclusion

Historian Linda Kerber argues that since the eighteenth century, American law has required married women to fulfill obligations to their husbands in lieu of obligations to the government.[105] On the surface, women's exclusion from Selective Service registration appears to be premised on the historical exclusion of women from combat service, especially if one were to only look at the legal reasoning presented in the Supreme Court's decision in *Rostker v. Goldberg*. However, a deeper look into the Congressional reasons for barring women from registration shows that an older understanding of men's and women's obligations persists today. Since the founding of Selective Service in 1917 as a federal program premised on the male breadwinner/female caregiver distinction, and through Congress's rejection of women's registration in 1980, women's familial roles have continued to be viewed as hallowed enough to justify women's exclusion from registration.

As of 1976, however, those arguing for the constitutionality of all-male registration could not openly invoke antiquated ideas about women's family roles. The decision in *Craig v. Boren* warned against statutes based on "increasingly outdated misconceptions concerning the role of females in the home."[106] Despite ongoing Congressional concerns over how registration could uproot women from their place in the home, maintenance of all-male registration was enabled by arguments regarding the administrative inconvenience of registering women due to the combat exclusion rule. *Parker v. Levy* then provided the Supreme Court with additional grounds for leaving Congress's view of the family unexamined.

In March 2013, the Pentagon announced that it was lifting restrictions barring professional servicewomen from frontline combat service. This policy presumably will lead to challenges to the legal reasoning that has enabled male-only registration. Still, several problems could persist even if women were integrated into the draft system.

Women's century-long exclusion from draft registration has rested on a two-pronged view of the average female's appropriate role as citizen. The first prong has viewed women as unsuitable for martial citizenship, especially as combat soldiers. The second prong has viewed women as particularly suitable for caregiving and household labor. Perhaps women's integration into draft registration will discourage the first view.[107] However, it would not necessarily diminish the prevelance of the second view. This is due both to Selective Service's non-universal nature, and to its administration through autonomous local boards. Without major reforms, Selective Service could reproduce racially inflected coverture-like ideas about men and women's appropriate roles within the household. Historically, local boards have functioned as a source of institutional racism and have contributed to the reproduction of the sexual division of labor. If women were integrated into the draft, and if a draft were to be activated, it would be naïve to expect that local draft-board members will cease to draw from ideologically loaded ideas about what constitutes a "real" family, who is a "real" male or female,[108] and who is a "real" breadwinner or caregiver. Introducing more women, African Americans, or LGBTQ citizens as local board members might alleviate such tendencies, yet this would likely fail to be a panacea.

It is conceivable, of course, that national classification and deferment rules would be reformed. However, if this were to happen, problems would persist at the level of local boards' decision-making autonomy. For example, caregiving could be incorporated into national rules as grounds for deferment. If so, local boards would still need to determine whether two parents could both be given dependency (breadwinning) deferments, or both be given caregiving deferments. Difficult decisions would persist. For example, who would be more important to the family, the caregiver or the breadwinner? Even if the national government were to rule that one is more important than the other, given patterns of male

and female employment today, and given transformations in men and women's household labor, how could one prove who is the clear breadwinner and who is the caregiver?

Few American scholars, policymakers, citizens, and residents are aware of the implications of maintaining draft registration. Perhaps this is due to the draft's current hiatus status. However, while several countries with stronger universal conscription traditions have cancelled conscription altogether (for example, France), young men's registration with the Selective Service System persists. Although the possibility of a renewed draft seems well nigh impossible, Selective Service is not an institution of the past, but continues to lurk in the shadows of men and women's citizenship today.[109] Selective Service has always drawn from powerful assumptions about appropriate work and family life in determining which citizens are more important for civilian life, versus those who should risk life and limb for the state. Given the continuation of draft registration, and the possible upcoming incorporation of women into draft registration, it is time for scholars and the public at large to consider the purpose of draft registration, its selective and local structure, and whether the Selective Service System should exist altogether.

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[61] Selective Service Regulations vol. 3, § 15, para. 328, as prescribed by Executive Order No. 8545, 5 *Federal Register* 3779 (Sept. 23, 1940).

[62] See Military Selective Service Act, 50 U.S.C. § 453 (1948).

[63] "Army Secretary Urges Revival of Draft Registration," *Washington Post*, January 12, 1979.

[64] Drew Middleton, "Military Draft: An Issue That Doesn't Fade," *New York Times*, May 2, 1979.

[65] See, e.g., A Bill to Require the Reinstitution of Procedures for the Registration of Certain Persons under the Military Selective Service Act, and for Other Purposes, S. 109, 96th Cong. (1979); A Bill to Provide for Military Registration and Mobilization Assessment, and for other Purposes, S.226, 96th Cong. (1979).

[66] See, e.g., *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226, Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate*, 96th Cong., First Session (1979).

[67] *Ibid.*, 11.

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] Marjorie Hunter, "House Bars Registration for Draft; Manpower Study Is Sought Instead," *New York Times*, September 13, 1979.

[72] E.g. *Women in the Military: Hearings on H. R., Before the Subcommittee on Military Personnel of the House Committee on Armed Services*, 96th Congress (1979).

[73] House Committee on Armed Services, Presidential Recommendations for Selective Service Reform: A Report to Congress Prepared Pursuant, Pub. L. 96–107, 96th Cong.(1980).

[74] *Ibid.*, 27–28.

[75] *Registration of Women: Hearings on H.R. 6569, Before the Subcommittee on Military Personnel of the*

House Committee on Armed Services, 96th Cong.(1980).

[76] *Ibid.*, 6–7.

[77] U.S. Const. amendment XIV specifies that, "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." The Due Process Clause of U.S. Const. amendment V. places the same constraint upon the federal government.

[78] See *Craig v. Boren*.

[79] *Registration of Women*, 13 (emphasis added).

[80] See Judith Wagner Decew "The Combat Exclusion and the Role of Women in the Military," *Hypatia* 10 (1995): 56-73.

[81] *Ibid.*,17.

[82] E.g.: "Mr. Hillis [Representative from Indiana]: So you are going to register 4 million women to perhaps – hopefully we wouldn't want to have to draft anyone, but to meet our needs perhaps to raise womanpower needs of 80,000?
Mr. Pirie [Assistant Secretary of Defense for Manpower]: That is correct.
Mr. Hillis: That is a very, very small fraction of a percentage; is it not? Don't you think 80,000 could be met by volunteers?" *Ibid.*, 22.

[83] *Ibid.*,125–31.

[84] "Draft Registration Wins Key Vote in Senate Unit," *Wall Street Journal*, May 7, 1980.

[85] See126 Cong. Rec. S13, 880–13,881 (daily ed. Jun. 10, 1980).

[86] *Ibid.,* 13,880.

[87] *Ibid.,*13,881.

[88] H.J. Res. 521, Pub.L. No. 9282, 94 Stat. 552 (1980).

[89] Proclamation No. 4771, 3 C.F.R. 82 (1980).

[90] 126 Cong. Rec. S13, 894 (daily ed. Jun. 10, 1980). The lottery was re-introduced in 1969 by President Richard M. Nixon when he amended the Military Selective Service Act of

1967. *See* Selective Service Amendment Act of 1969, Pub. L. No. 91–124, 83 Stat. 220 (1969). The lottery, however, did not cancel the classification and deferment system.

[91] *Ibid.*, 13867–13868.

[92] Selective Service Act of 1917, Pub.L. No. 65–12, 40 Stat. 76 (1917); Selective Training and Service Act of 1940, Pub.L. No. 76–783, 54 Stat. 885 (1940); Selective Service Act of 1948, Pub.L. No. 80–759, 62 Stat. 604 (1948); Universal Military Training and Service Act of 1951, Pub.L. No. 82–51, 65 Stat. 75 (1951); Military Selective Service Act of 1967, Pub.L. No. 90–40, 81 Stat. 100 (1967); Military Selective Service Act, 50 U.S.C.

[93] The suit had originally started in 1971 by a group of male plaintiffs who had argued that the draft was unconstitutional on multiple grounds. See *Rostker v. Goldberg,* at note 1, for a brief review, and Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), 221-302, for a fuller account.

[94]*Goldberg v. Rostker,* 509 F. Supp. 586 (1980).

[95] See Kerber, *No Constitutional Right,* 294.

[96] See *Rostker v. Goldberg*, 76.

[97] *Ibid.,* 82.

[98] *Ibid.,* 96–97. Emphasis in original.

[99] 417 U.S. 733 (1974

[100] Diane H. Mazur, "A Blueprint for Law School Engagement with the Military," *Journal of National Security Law and Policy* 1 (2005): 473-525. See also Sara MacDwyer, "Rostker v. Goldberg: The Uneven Development of the Equal Protection Doctrine in Military Affairs," *Golden Gate University Law Review* 12 (1982): 661-690.

[101] See Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 948-1046.

[102] See David F. Burrelli, "Women in Combat: Issues for Congress," *Congressional Research Service Report for Congress* (2012); Office of the Under Secretary of Defense, Personnel and

Readiness, *Report to Congress on the Reviews of Laws, Policies and Regulations Restricting the Service of Female Members in the U.S. Armed Forces* (2012).

[103] *Ibid.*

[104] See Military Selective Service Act, 50 U.S.C.

[105] See Kerber, *No Constitutional Right.*

[106] See *Craig v. Boren,* 199.

[107] Although as noted earlier, research shows that militaries remain highly masculine and hetero-normative institutions despite integration of women and sexual minorities.

[108] Current law requires individuals "born male" and who undergo a sex change to register; individuals "born female" and who have transitioned to male are not required to register.

[109] One should keep in mind that implementation of a federal draft system during the first years of WWI also seemed inconceivable before its creation in 1917. See Chambers, *Raise an Army.*