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FIGHTING IN COURT:
WOMEN, WAR, AND THE LAW IN TWENTIETH-CENTURY AMERICA

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SERENA COVKIN

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For Mom and Dad,

who have given me everything and more.

And for Adam,

who makes everything better.

TABLE OF CONTENTS

LIST OF IMAGES

ABBREVIATIONS

AVF	All-Volunteer Force
ERA	Equal Rights Amendment
MSSA	Military Selective Service Act
NAWSA	National American Woman Suffrage Association
NCFM	National Coalition for Men
NOW	National Organization for Women
PPFA	Planned Parenthood Federation of America
PPLC	Planned Parenthood League of Connecticut
UCMJ	Uniform Code of Military Justice

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I owe a tremendous debt of gratitude, first and foremost, to my dissertation committee co-chairs: Amy Dru Stanley and Kathleen Belew. As is true of so many of us, I came to Chicago for the chance to work with Amy—and, even still, her steady guidance and support have exceeded all my expectations. Amy has read my every piece of writing at least twice, sometimes more, and always with a supremely keen eye. Every edit she's suggested has been the right one. She gets straight to the heart of an argument—and sharpens it and makes it stronger. She has also found and recommended me for opportunities I would've never thought were within my reach (and then helped me make the most of them), looked out for my needs and backed up my decisions big and small, and made sure that I had the time and space to complete this project. Thank you, Amy, for believing I was a legal historian long before I did—and for helping me become one.

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Kunze, Naama Maor, Emily Masghati, Gregory Montoya-Mora, Allison Robinson, Andrew Seber, and Robert Suits. Thank you, in particular, to Nathalie Barton, for answering my many questions about social history methods and citations; to Nick Foster, for sharing examples of his own superb work at several key moments (and for impressing upon me that 1973 was the most consequential year in American history); and to Alex Hofmann, for offering much-needed assistance with important department applications and decisions. I'm thankful every day for the fact that Alyssa Smith was once assigned to be my graduate student mentor, and for every library study session, coffee date, and hours- and days-long text thread we've enjoyed together since. Evelyn Kessler, Corbin Page, and I have exchanged dozens of chapter drafts—and truly innumerable individual sentences—particularly over the past year and a half. They've taught me how to interpret and write more persuasively about legal sources, pushed me to refine my claims and make them bolder, and made everything about finishing up a dissertation far more bearable (and even fun).

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ABSTRACT

This dissertation is a history of women, war, and the law in twentieth-century America. In particular, it focuses on four landmark decisions of the U.S. Supreme Court: *United States v. Schwimmer* (1929); *Reid v. Covert*, first adjudicated in 1956 and then adjudicated again (and reversed) in 1957; *Griswold v. Connecticut* (1965); and *Rostker v. Goldberg* (1981). These cases have never before been examined side-by-side, because they traverse multiple domains of constitutional law and multiple, overlapping domains of immigration law, military law, and criminal law as well. This dissertation, however, argues that the Court's decisions in *Schwimmer*, *Reid*, *Griswold*, and *Goldberg* all hinged on the same, basic question: namely, in what ways and by what means were women obliged—and *not* obliged—to serve their country in time of war? What's more, the dissertation argues that the four decisions answered this question in wildly different—and sometimes diametrically opposed—ways, necessarily complicating our understanding of how American women (and American men, for that matter) worked to lay claim to the rights and obligations of twentieth-century citizenship.

The dissertation begins in the aftermath of the First World War, when the U.S. was abruptly thrust into a new position of international authority—and subsequently became entangled in an almost-endless number of military conflicts around the globe. Beginning in this same period, American women also became increasingly, more intimately involved in both the U.S. military and broader projects of state violence—and a long-assumed distinction between prototypically male citizen-soldiers, on the one hand, and quintessentially female civilians, on the other, fell steadily apart. This dissertation analyzes and interrogates these large-scale (and primarily extra-legal) developments and unearths connections—between America's military

fortunes and the closer-to-home battles fought at the U.S. Supreme Court—that many other legal historians have failed to recognize and draw out. At the same time, the dissertation makes clear that constitutional doctrine followed no clear-cut, linear progression: across these four cases, the Court intervened to demarcate women's *distance* from war just as often as it recognized—or imagined—women's proximity to the same. There was no easy path to sex equality, charted out through armed conflict or otherwise, and sometimes no path to equality at all. Instead, in *Schwimmer*, *Reid*, *Griswold*, and *Goldberg*, the Court trafficked in contradictions, indulged in legal fictions, and gave rise to unintended consequences that we're still living with today.

Chapter 1 focuses on several resident alien women who were denied naturalization—all for refusing to bear arms in defense of the United States—in the decades between the First and Second World Wars. Chapter 2 focuses on two service wives—both of whom, while stationed overseas in the early postwar period, killed their military-officer husbands—and then fought to be tried by civilian juries (rather than by military courts-martial) for their crimes. Chapter 3 examines the Cold War origins of the constitutional right to privacy. Chapter 4 examines the contested constitutionality of the all-male military draft, from the Vietnam War era through the early 1980s.

INTRODUCTION

This dissertation began with a cartoon.

I was at the New Haven Museum, where I'd never been before, rifling through its many, many boxes of Planned Parenthood League of Connecticut materials. I knew that in the fall of 1961, the PPLC had set up a birth control clinic in New Haven, in violation of the state's then-almost-100-year-old statutes which together made it a criminal offense to use—and to assist anyone who used—any kind of contraception.[1] Just days after the clinic opened, the PPLC's Executive Director, Estelle Griswold, and its Medical Director, Dr. C. Lee Buxton, had each been arrested, found guilty, and fined $100.[2] But they'd promptly appealed—and appealed again and again—arguing (in part) that the state's birth control ban infringed upon their own and their patients' constitutional right to privacy.[3] By 1965, their case, *Griswold v. Connecticut*, had made its way to the United States Supreme Court—and they'd emerged victorious. The Court had reversed the convictions, struck down the Connecticut laws, and affirmed—for the first time—that a constitutional right to privacy did indeed exist.[4]

It was a peculiar right to privacy, though. Justice William O. Douglas, who had written the *Griswold* majority opinion, had had to go looking for it. He'd not found it in the plain text of

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[1] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).
[2] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). See also David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan Publishing Company, 1994), 206-207.
[3] See, for example, Brief for the Appellants at 12-13, 21-23, 61-69, 79-89, 96, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0100564638/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=f67a94f2&pg=1 (accessed October 2, 2023). See also Garrow, *Liberty and Sexuality*, 210-211.
[4] *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965).

the Bill of Rights, but in the "penumbras" of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, which gave "life and substance" to their "specific guarantees."[5] Even more important, he'd not made it universally accessible. Griswold and Buxton, as Douglas's opinion emphasized, had been arrested after they "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception."[6] And it was married persons, specifically, whose rights he'd then pushed to protect.

"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Douglas asked. "The very idea," he answered, "is repulsive to the notions of privacy surrounding the marriage relationship."[7] And in this way—by conjuring up this harrowing possibility only to immediately dismiss it—Justice Douglas had made marital privacy into the law of the land.

Now, more than fifty years later, I was in New Haven—back at the scene of the no-longer-a-crime—trying to figure out how: how the PPLC's agents and attorneys had alighted upon a privacy strategy, how they'd gradually refined it over time, how they'd gleaned that it just might *work*. I started in the 1960s, and in the case files. But it was a miscellaneous Public Relations folder—and, within it, a Spring 1955 "Special Legislative Edition" of the PPLC newsletter—which had the cartoon.

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[5] *Griswold v. Connecticut*, 381 U.S. 479, 481-485 (1965).
[6] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).
[7] *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965).

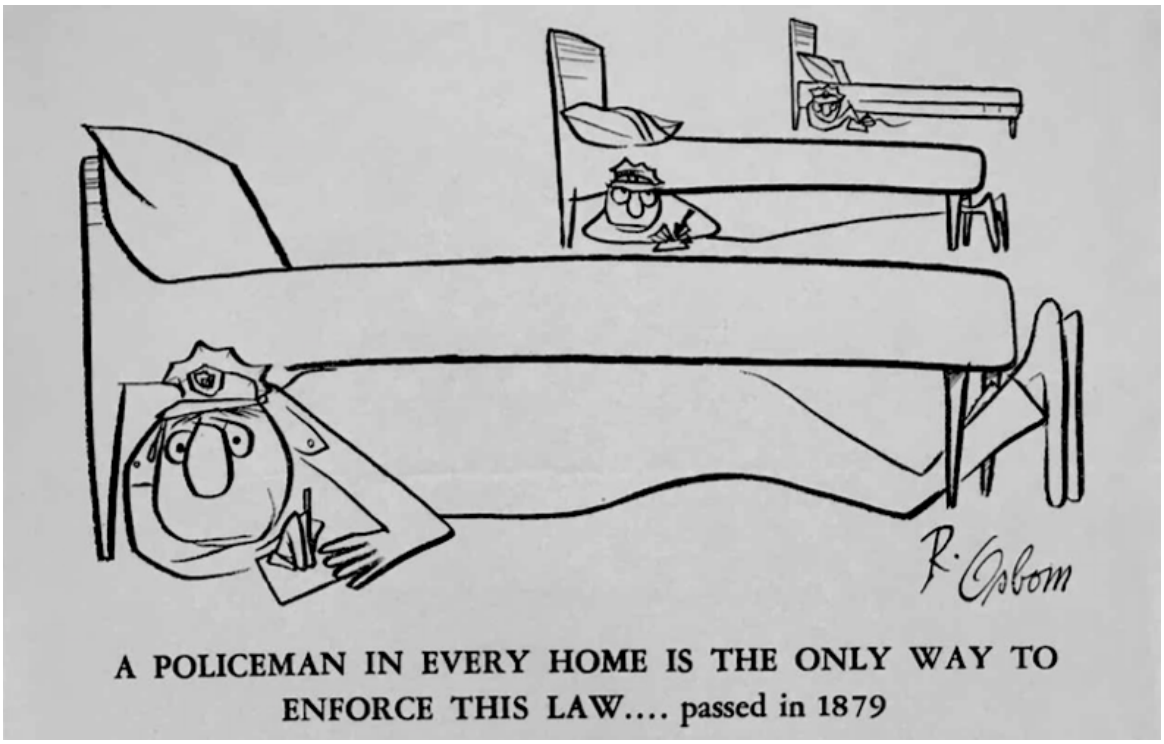

Image 1. A cartoon circulated by the Planned Parenthood League of Connecticut. Reproduced with permission from the *New Haven Museum*.[8]

Somehow, there it was: Justice Douglas's nightmare. Three police officers—one apprehensive, one annoyed, one, in the very back, looking angry—ready and waiting under three narrow beds. Their eyes and ears, and notebooks and pens, the "only way" to make the birth control ban a reality.

The PPLC, I discovered, had sent the cartoon to its "full mailing list" sometime in the first few months of 1955, when it announced that, on April 20, the Connecticut House of Representatives would be holding an open hearing on two related legislative proposals—both of which, if enacted, would repeal the anti-contraception statutes "passed in 1879." The bulletin

[8] "Special Legislative Edition," *Connecticut Parenthood* (Spring 1955): 1, Box 25, Folder L, Planned Parenthood of Conn. (New Haven), Records 1879- (MSS B62), Whitney Library, New Haven Museum, New Haven, CT [hereafter cited as PPLC Records].

urged the "MEN and WOMEN of CONNECTICUT" to attend the hearing—to add their voices to the chorus of support—and to help their home state leave the nineteenth century behind. If they did not, the cartoon drove home—if they helped to perpetuate and, ultimately, to "enforce" the birth control ban instead—then Connecticut's future would inevitably become even more draconian than its past.[9]

I knew, of course, that the legislative proposals had failed—the birth control ban stayed on the books until the Supreme Court decided *Griswold* a full ten years later—but the cartoon set me on a whole new trajectory. Evidently, Justice Douglas hadn't dreamed up officers of the law "search[ing] the sacred precincts of marital bedrooms" all on his own. Neither had the PPLC. Both parties had reached for the same dystopian vision, I came to realize, because it was one that millions of Americans—grown accustomed to Cold War-era warnings about communist threats to the family—had then shared.

I dove back into the documents and started piecing together an argument. The PPLC's triumph in *Griswold*, I learned, had followed more than a decade of canny politicking. Its birth control clinic, its legislative campaigns, its promotional materials: they had all focused on married couples (and married couples alone) and had worked to make family planning seem vital not only for specific households but also for a healthy, democratic society. The PPLC had consistently held up the Soviet Union—where, it claimed, totalitarian state officials made family decisions instead of fathers and mothers—as its particular enemy. It had likewise warned that that same totalitarianism could spread—everywhere, if global overpopulation continued apace—and much closer to home, too, if the Connecticut birth control ban were ever truly put into

[9] "Special Legislative Edition," *Connecticut Parenthood* (Spring 1955): 1, Box 25, Folder L, PPLC Records.

practice. In sum, the PPLC's members and representatives had made themselves into veritable Cold Warriors—and they'd eked out a profoundly contingent, but no less decisive, constitutional victory in the process.

From there, I began to envision a dissertation, looking backwards and forwards in time. *Griswold* couldn't have been the first time that litigants successfully harnessed a whole set of wartime principles and preoccupations for the cause of women's rights—and it couldn't have been the last. I was certain I could find more examples of the same.

What I found instead, it turned out, was considerably more complicated.

❖

This dissertation is a history of women, war, and the law in twentieth-century America. It focuses, in particular, on four landmark decisions of the U.S. Supreme Court: *United States v. Schwimmer* (1929); *Reid v. Covert*, first adjudicated in 1956 and then adjudicated again (and reversed) in 1957; *Griswold v. Connecticut* (1965); and *Rostker v. Goldberg* (1981).[10]

These cases have never before been examined side-by-side. At first blush, they have little to do with one another. They share no single jurisprudential foundation, no one doctrinal area of concern. They traverse multiple domains of constitutional law—revolving around conflicting interpretations of the First, Fourth, Fifth, and Fourteenth Amendments, among others—and multiple, overlapping domains of immigration law, military law, and criminal law as well. This dissertation, however, identifies and amplifies the thread that binds them together. The Supreme

[10] *United States v. Schwimmer*, 279 U.S. 644 (1929); *Reid v. Covert*, 351 U.S. 1 (1957); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rostker v. Goldberg*, 453 U.S. 57 (1981). When *Reid* was first adjudicated in 1956, it was given two case numbers—*Kinsella v. Krueger*, 351 U.S. 470 (1956) and *Reid v. Covert*, 351 U.S. 487 (1956)—which were argued and decided in tandem; both decisions were reversed in 1957.

Court's decisions in *United States v. Schwimmer*, *Reid v. Covert*, *Griswold v. Connecticut*, and *Rostker v. Goldberg,* it argues, all hinged on the very same, very basic question: namely, in what ways and by what means were American women obliged—and *not* obliged—to serve their country in time of war?

But that's not all. The dissertation also argues that what makes these four cases especially worthy of study—and worthy of juxtaposition—is not only that they asked the same question, but that they came to such wildly different answers.

It would be easy to imagine a tidier pattern, in which the Court's decisions all reflected one particular understanding—and a particularly twentieth-century understanding—of women's evident and ever-increasing involvement in armed conflict. That's not to say, of course, that American women haven't *always* participated in American wars. From the very beginning, they did: if not as enlisted soldiers, necessarily (barring a tiny number of exceptional cases), then as nurses and as spies, as doting campfollowers and as clamorous petitioners, and as "republican mothers" asked first to surrender their husbands to the firing line and then to teach their sons to follow suit.[11] Nonetheless, throughout much of the eighteenth and nineteenth centuries,

[11] See, for example, Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980); Betty Sowers Alt and Bonnie Domrose Stone, *Campfollowing: A History of the Military Wife* (Westport: Praeger, 1991); Barbara Clark Smith, "Food Rioters and the American Revolution," *The William and Mary Quarterly* 51, no. 1 (January 1994): 3-38; Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998); and Stephanie McCurry, *Women's War: Fighting and Surviving the American Civil War* (Cambridge: Belknap Press of the Harvard University Press, 2019). Throughout the eighteenth and nineteenth centuries, the women who formally enlisted in the U.S. military did so while posing as men. See, for example, Alfred F. Young, *Masquerade: The Life and Times of Deborah Sampson, Continental Soldier* (New York: Alfred A. Knopf, 2004); and Larry G. Eggleston, *Women in the Civil War: Extraordinary Stories of Soldiers, Spies, Nurses, Doctors, Crusaders, and Others* (Jefferson, NC: McFarland, 2003).

lawmakers, judges, and legal theorists largely pretended otherwise. As these men steadily codified the rules of engagement and fixed the boundaries of "civilized warfare," they made women into the paradigmatic noncombatants.[12] It was a revised formulation of a venerable notion, but it freshly justified women's exclusion from the polity, legitimated the very notion of sex difference, and cordoned off the limits of acceptable military violence all in one fell swoop.[13]

Slowly but surely, however, these sharp divisions began to disintegrate. The extraordinary death toll of the American Civil War, for example, all but ensured that no family emerged unscathed; the end of slavery also upended the racial and gender hierarchies—and the many, individual households—which had sustained it; and the resulting, violent encounters between Union soldiers and Confederate ladies, in particular, made it impossible to proceed as if only men engaged in military conflict.[14] America's entry into the First World War, in 1917, all but obliterated that old idea. Mobilizing for total war demanded the labor and resources of an entire society. Twenty-four million men registered for the draft and millions more women—who were never conscripted into service—nonetheless signed up to process their neighbors' draft cards, or began to knit military uniforms, or learned to cook without meat or wheat (which were

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[12] Stephanie McCurry, "Enemy Women and the Laws of War in the American Civil War," *Law and History Review* 35, no. 3 (August 2017): 708.

[13] Kerber, *No Constitutional Right to Be Ladies*, 243-245, 283; McCurry, "Enemy Women and the Laws of War in the American Civil War," 708.

[14] See, for example, McCurry, *Women's War*, especially Chapters 1 and 3; Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge: Harvard University Press, 2010); Drew Gilpin, *Mothers of Invention: Women of the Slaveholding South in the American Civil War* (Chapel Hill: University of North Carolina Press, 1996); and Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred A. Knopf, 2008). To be sure, according to McCurry, the Civil War-era authors of the new laws of war—including Franz Lieber, progenitor of the Lieber Code—also sought to *preserve* the traditional division between male citizen-soldiers and innocent, female objects of protection, in spite of the new facts on the ground.

reserved for the soldiers), or even volunteered to serve in the Navy (as nurses and non-commissioned yeomen) and the Army (as nurses and Signal Corps "Hello Girls").[15] And as women took on new obligations of citizenship, they also came to demand the rights of citizenship in new ways. Leading suffragists, for example, began to argue that it was women's myriad wartime sacrifices, specifically, which proved their worthiness for the franchise.[16] Soon after the war (and after almost 100 years of trying), they convinced Congress and thirty-six state legislatures of the same, securing the passage of a constitutional amendment which guaranteed millions of American women (though not all American women) the right to vote.[17]

From then on, the gendered division between prototypically male citizen-soldiers, on the one hand, and quintessentially female civilians, on the other, only further eroded. During the Second World War, for example, women as well as men were asked to help win the war by paying into the nation's first mass income tax, abiding by unprecedented price controls, and buying war bonds.[18] Millions of women also joined the paid work force for the first time,

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[15] See, for example, Jeanne Holm, *Women in the Military: An Unfinished Revolution*, rev. ed. (Novato: Presidio Press, 1992); *Women in the United States Military, 1901-1995: A Research Guide and Annotated Bibliography*, comp. Vicki L. Friedl (Westport: Greenwood Press, 1996), 201; Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008), especially Chapters 3 and 4; and Elizabeth Cobbs, *The Hello Girls: America's First Women Soldiers* (Cambridge: Harvard University Press, 2017).

[16] See, for example, Capozzola, *Uncle Sam Wants You*, 103-104; and Christine Stansell, *The Feminist Promise: 1792 to the Present* (New York: Modern Library, 2010), 169-174. This argument knowingly echoed those made in favor of Black men's enlistment during and enfranchisement after the American Civil War. See also Kerber, *No Constitutional Right to Be Ladies*, 240-241, 243, 282.

[17] U.S. Constitution, amend. 19. Although Black women were not excluded from the scope of the amendment, for example, they were generally barred from voting until the passage of the Voting Rights Act of 1965.

[18] See, for example, James T. Sparrow, "'Buying Our Boys Back': The Mass Foundations of Fiscal Citizenship in World War II," *Journal of Policy History* 20, no. 2 (2008): 263-286; and

sustaining the United States' industrial production—and specifically its defense industries—while their husbands and sons went overseas.[19] Approximately 350,000 women also volunteered to serve in the newly-created, all-female divisions of the Army, Navy, Coast Guard, Marine Corps, and Air Force—and, in the years afterwards, got to share in the benefits of the G.I. Bill alongside their brothers-in-arms.[20]

Indeed, the end of the Second World War—and, with it, the advent of atomic weapons—in no way dissolved women's ties to the U.S. military, or to a steadily expanding national security state. To the contrary: beginning in 1948, women became fully integrated, permanent members of every branch of the armed forces, and women subsequently volunteered to serve in both the Korean War and the Vietnam War as well—and, from the mid-1960s on, at ever higher and higher rates.[21] Un-enlisted women, too, found their daily lives transformed by the global

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James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2013).

[19] This shift was most pronounced for married, middle-class, white women, many of whom had not been employed before the war. See, for example, Melissa A. McEuen, *Making War, Making Women: Femininity and Duty on the American Home Front, 1941-1945* (Athens: University of Georgia Press, 2011).

[20] Holm, *Women in the Military*, 100; Laurie Scrivener, "U.S. Military Women in World War II: The SPAR, WAC, WAVES, WASP, and Women Marines in U.S. Government Publications," *Journal of Government Information* 26, no. 4 (July-August 1999): 361-383; Conor Lennon, "G.I. Jane Goes to College? Female Educational Attainment, Earnings, and the Servicemen's Readjustment Act of 1944," *The Journal of Economic History* 81, no. 4 (December 2021): 1223-1253. To be sure, although female soldiers were incorporated within the terms of the G.I. Bill, men—and specifically heterosexual men—were its primary beneficiaries. See also Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009).

[21] The Women's Armed Services Integration Act of 1948 made women into a permanent part of the postwar military but also established a 2% cap on women's enlistment, which was not removed until Congress passed the Female Military Officer Career Restriction Removal Act almost twenty years later. See *Women's Armed Services Integration Act of 1948*, Public Law 80-625, *U.S. Statutes at Large* 62 (1948): 356-375; and *Female Military Officer Career Restriction Removal Act*, Public Law 90-130, *U.S. Statutes at Large* 81 (1967): 374-384. On women's

Cold War—not least because they, just as much as any actual soldiers, needed to prepare for the possibility of a nuclear attack. As a result, if the United States' decades-long fight against communism fostered a "domestic revival"—which it certainly did, from the baby boom onward—it was one which simultaneously spurred the permanent militarization of private (and traditionally feminine) spaces and institutions.[22] Western moms gave up their backyards to Minuteman missile silos, and housewives all around the country alternately signed up for "family-style self-help" civil defense programs and celebrated their own state-of-the-art ovens and refrigerators as visible symbols of capitalist superiority.[23] The family home became an object of anxiety, a political and cultural battlefield, and, increasingly, a space literally fortified by nuclear shelters, home security systems, and guns.[24] By the 1960s and '70s, by some measures, no one living in America was "just" a private citizen anymore.

For seven decades, in other words, the United States was nearly constantly at war—and its perennial conflicts irrevocably transformed American women's relationship to state violence and, consequently, to the state more broadly. Accordingly, it would make sense to propose that these same conflicts also radically reshaped how various women (and various men, for that matter) worked to lay claim to the rights and obligations of twentieth-century citizenship. And,

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participation in the military throughout this period, and specifically in the Korean War and the Vietnam War, see also Holm, *Women in the Military*.

[22] Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York Basic Books, 1988), 10. See also Laura McEnaney, *Civil Defense Begins at Home: Militarization Meets Everyday Life in the Fifties* (Princeton: Princeton University Press, 2000); and Elaine Tyler May, *Fortress America: How We Embraced Fear and Abandoned Democracy* (New York: Basic Books, 2017).

[23] McEnaney, *Civil Defense Begins at Home*, 69; May, *Homeward Bound*; Gretchen Heefner, *The Missile Next Door: The Minuteman in the American Heartland* (Cambridge: Harvard University Press, 2012).

[24] See, for example, May, *Fortress America*; and Robert O. Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012).

as a matter of fact, this dissertation argues precisely that, by unearthing connections—between America's military fortunes and the closer-to-home battles fought at the U.S. Supreme Court—that many other legal historians have failed to recognize and draw out.

At the same time, however, this dissertation argues—perhaps even more strongly—that its four, central Supreme Court decisions followed no clear-cut, linear progression. If, throughout these same seven decades, American women became increasingly, more intimately involved in the U.S. military and in warfare more broadly, the Supreme Court only sometimes conceded as much. Just as often, across these four cases, the Court intervened to demarcate women's distance from war—or, at the very least, from bona fide combat. And, occasionally, the Court did just the opposite: it envisioned a future in which men's and women's ties to combat were all but identical—even though they weren't yet in the present day—and then reached a hypothetical conclusion to match.

In every instance, the Court trafficked in compromises and contradictions, and set off a string of unintended consequences as well. There was no easy path to sex equality—charted out through armed conflict or otherwise—and sometimes no path to equality at all. But that's entirely the point. It is these compromises, contradictions, and unintended consequences which animate this dissertation—and which account for why *Schwimmer*, *Reid*, *Griswold*, and *Goldberg*, held up and measured against one another, really mattered.[25]

[25] The Supreme Court's decision in *Rostker v. Goldberg* is most often referred to with the one-name appellation "*Rostker*." However, because this dissertation examines this case from its origins in 1971 (eight years before the eponymous Bernard Rostker became Director of the Selective Service System) and alongside other, similar challenges to the U.S. military draft—all of which are referred to by the name(s) of the individual(s) challenging the draft, rather than by the opposing, government party—this dissertation uses "*Goldberg*" instead.

Consider again, for example, *Griswold v. Connecticut* (1965)—where this project began. There, as we've seen, the Planned Parenthood League of Connecticut harnessed the ideological power—and the prevailing anxieties—of the Cold War to consolidate support for legalizing contraception. In its own organizational materials as well as in the legal briefs it submitted to the Supreme Court, the PPLC maintained that married women, in particular, were obliged to serve their country by making informed decisions about when (and when not) to have children—and that lawmakers and jurists, in turn, were obliged to stay out of married women's bedrooms and out of their private affairs. In this way, the PPLC made a local legislative fight into part of a war for American democracy and for the fate of the free world. And it worked astonishingly well—but only because Justice Douglas and his colleagues on the bench came to agree that the Cold War was an omnipresent and all-important struggle, and that winning it depended on housewives and stay-at-home mothers just as much as it did on the American soldiers now stationed all around the globe.

Eight years earlier, however, when the Supreme Court decided *Reid v. Covert* (1957), its every logic was almost exactly the opposite. The case involved two women, Dorothy Krueger Smith and Clarice Covert, who had each killed their military-officer husbands while living with them at two different U.S. military bases overseas. For killing their husbands, Smith and Covert had both been charged with violating the Uniform Code of Military Justice (or UCMJ) and tried and convicted by military courts-martial, rather than by civilian juries convened back in the United States. Several years later, at the Supreme Court, it was the Department of Justice which defended the proposition that Smith and Covert were amenable to military jurisdiction: because service wives (and happy marriages) were integral to the armed forces' morale and international reputation, and because getting married—and becoming military dependents—had necessarily

and irrevocably altered the two women's legal identities. It was Covert and Smith's shared attorney, by contrast, who argued that they were still independent, private citizens—still entitled, by the Fifth and Sixth Amendments, to receive trials by jury—regardless of their marital status.

And it was the service wives, in the end, who carried the day. Unlike the PPLC, which secured a constitutional right to privacy by repackaging normative domesticity towards its own ends, Smith and Covert reacquired their constitutional rights only by minimizing marriage's importance. What's more, unlike the *Griswold* Court, which affirmed that even ordinary women were obliged to help win the Cold War, the *Reid* Court determined that there was in fact a meaningful difference between enlisted service personnel (who could be court-martialed) and everyone else (who could not, at least in places and times of peace). Indeed, the *Reid* plurality removed Covert and Smith from court-martial jurisdiction because that was the only way to make clear that they *had* been (wrongly) tried and convicted in places and times of peace—and, thus, the only way to reassert civil control over the postwar military and its global ambit. For the *Reid* Court, in other words, it wasn't just that civilian service wives weren't obliged to wage war just like their husbands; it was that service wives—and their enduring civilian status—marked the outer limits of war itself. Wherever they could not be prosecuted, there could be "no actual hostilities…under way."[26]

The two additional Supreme Court cases in this study—*United States v. Schwimmer* (1929) and *Rostker v. Goldberg* (1981)—present a similarly startling contrast.

Schwimmer was Rosika Schwimmer, a Hungarian immigrant and a world-famous pacifist who was barred from citizenship—first by a district court in 1927 and then by the

[26] *Reid v. Covert*, 354 U.S. 1, 34-35 (1957).

Supreme Court in 1929—after she refused to bear arms in defense of the United States. Schwimmer was not the first resident alien asked to make such a promise. Naturalization examiners had become preoccupied with petitioners' loyalty during the First World War and, in the years since, had both eased the paths to citizenship for hundreds of thousands of immigrant men who'd served in the U.S. military and rejected the petitions for citizenship of tens of thousands more who'd exempted themselves from the draft instead. But Rosika Schwimmer was the first pacifist petitioner whose appeal made it all the way to the Supreme Court—which meant that it was in Rosika Schwimmer's case, specifically, that the Court made one's readiness to go to battle into the sine qua non of American citizenship.

What made this especially astounding was that, as a woman—and as a then-fifty-two-year-old woman at that—Rosika Schwimmer was neither required nor even permitted to serve as a combatant in the U.S. armed forces. That had been true during World War I and it would prove true, yet again, during World War II. Nonetheless, in the so-called interwar period—and in the years after millions of American women were finally enfranchised—the Supreme Court imagined that they might very well be obliged to take up arms in the future. That is to say, the ostensibly-peacetime *Schwimmer* Court invented a wartime obligation that did not in fact pertain—and, as the precedent was repeatedly reapplied throughout the 1920s, '30s, and '40s, federal judges continued to penalize female petitioners by applying formally equal standards to patently unequal circumstances.

United States v. Schwimmer was eventually overturned in 1946. But in the subsequent decades—even as American women became a permanent and ever-larger part of the U.S. armed forces—they were still never conscripted into service. During the Vietnam War, in the late 1960s and early 1970s, a small number of draft resisters—men who refused to participate in the war

and refused to perform their own compulsory service—began to challenge this discrepancy head-on, arguing that the all-male draft burdened them unduly and violated their rights to due process and equal protection. There were several such cases; by the time one reached the Supreme Court, in 1981, the draft itself had come to an end. Nonetheless, in *Rostker v. Goldberg*, the Court upheld all that remained: legislation which required male citizens and male resident aliens—and no women at all—to register with the Selective Service Administration as soon as they turned eighteen, just in case the draft were ever revived.

The *Goldberg* Court's logic was two-fold. On the one hand, it determined that any future, emergency draft would prioritize combat troops—all of whom would necessarily be men—since female soldiers, even those already enlisted in the military, were then barred from direct combat and close combat support. On the other hand, it determined that however many noncombat positions did need to be filled—even in this far-off, worst-case scenario—they could be filled by female volunteers. And thus, in both ways, the *Goldberg* Court's reasoning ran counter to the *Schwimmer* Court's from fifty-two years earlier. Whereas the *Schwimmer* Court had supposed that women might one day become combatants, the *Goldberg* Court—assessing an armed force with more servicewomen performing more military roles than ever before—rejected that same possibility. And whereas the *Schwimmer* Court had expected that women might one day be forced to join up, the *Goldberg* Court instead relied upon volunteer servicewomen's willingness to enlist *without* being compelled to justify their exclusion from registration and conscription, and to obviate the military obligations of every other woman in the country.

What are we to make of these four cases, and of their myriad divergences and distinctions? To say that the composition of the Court changed again and again between the late 1920s and early 1980s—and that new justices inevitably brought new perspectives to bear—is

assuredly true but also insufficient. *Schwimmer*, *Reid*, *Griswold*, and *Goldberg* not only reflected *new* understandings of the often-overlapping matters at hand—of the prerequisites for and responsibilities of citizenship, for instance, or the consequences and rewards of marriage, or the deference owed (or not owed) to military authorities—but understandings that were all but diametrically opposed. Indeed, if *Schwimmer*, *Reid*, *Griswold*, and *Goldberg* shared one common and overriding concern—if they all asked the Supreme Court to determine how American women were obliged and *not* obliged to serve their country in time of war—then they also made clear that no one answer automatically prevailed.

Without exception, across these four cases, the Court's decisions reflected the idea that the twentieth-century United States was almost constantly at war—but, depending on the day, the justices either intervened to encourage that reality or to mitigate its effects. The Court's sympathies were likewise unpredictable: pacifist resident alien women, already marginalized and excluded from the American body politic, suffered further under *Schwimmer*; by contrast, in *Reid*, two once-convicted killers became unlikely emblems of civil government and the constitutional order. In *Griswold*, the Court found common cause with anticommunists who anxiously made the private, family home into a Cold War battlefield; in *Goldberg*, on the other hand, it dismissed the concerns of draft-age men—motivated, at least in part, out of fear for their own lives—who wished to share the actual battlefield as well. In sum, rather than conforming to any kind of recognizable pattern, the four decisions in this study instead reveal that there was no such thing.

Of course, even if they'd been more internally consistent—even if they'd revealed, as I initially expected, that women's rights proceeded (for better or worse) in tandem with women's deeper entanglement in perpetual warfare—four Supreme Court cases adjudicated across seven

decades could not have radically revised our understandings of the twentieth-century United States. But even this small number of cases, compared and contrasted with one another, can prod us to question our assumptions; to look in unexpected places for points of continuity and discontinuity; and to contemplate new ways of thinking and writing about women, war, and the law—and about all three together—alongside scores of other scholars.

These scholars, for example, have come to regard war as a domestic as well as an international force—and as one which has exerted a "constant rather than episodic" impact, in the words of one historian, on the American legal system and American statebuilding.[27] They've begun to reckon with war alongside its endless reverberations—and to analyze developments both within and outside of periods of active hostilities, and within and outside of the U.S. military proper.[28] They've explored the surprising and significant ways that American women have participated in war—not only in particular military conflicts but across broad swaths of time—and interrogated why the opposite idea (that women can't or shouldn't fight) has

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[27] Mary L. Dudziak, "Making Law, Making War, Making America," in *The Cambridge History of Law in America, Volume III: The Twentieth Century and After (1920-)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 682. See also Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012).

[28] See, for example, Faust, *This Republic of Suffering*; May, *Homeward Bound*; McCurry, *Women's War*; McEnaney, *Civil Defense Begins at Home*; Self, *All in the Family*; Sparrow, *Warfare State*; Emily S. Rosenberg, *A Date Which Will Live: Pearl Harbor in American Memory* (Durham: Duke University Press, 2003); Patrick Hagopian, *The Vietnam War in American Memory: Veterans, Memorials, and the Politics of Healing* (Amherst: University of Massachusetts Press, 2009); Kate Brown, *Plutopia: Nuclear Families, Atomic Cities, and the Great Soviet and American Plutonium Disasters* (New York: Oxford University Press, 2013); Jennifer Mittelstadt, *The Rise of the Military Welfare State* (Cambridge: Harvard University Press, 2015); Laura McEnaney, *Postwar: Waging Peace in Chicago* (Philadelphia: University of Pennsylvania Press, 2018); Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Cambridge: Harvard University Press, 2018); and Natasha Zaretsky, *Radiation Nation: Three Mile Island and the Political Transformation of the 1970s* (New York: Columbia University Press, 2018).

nonetheless appealed to so many political actors, and to so many litigants and judges, over time.[29] They've assessed the evolving character and content of women's citizenship across a multitude of legal regimes—and, accordingly, treated women's political and civil rights as no more and no less important than women's civic obligations.[30] And they've examined married women alongside unmarried women, feminists alongside antifeminists, servicemembers alongside civilians and even pacifists—and alongside all those who might not fit into such neatly divided categories.[31]

In various ways, this dissertation's chapters on *Schwimmer*, *Reid*, *Griswold*, and *Goldberg*—which address the decisions as four, often-paradoxical parts of a larger whole and as singular, often-under-examined subjects in their own right—also endeavor to do all the above.

Chapter 1, "'Their Mere Refusal to Bear Arms': *United States v. Schwimmer* (1929) and the Pacifist Women Who Couldn't Be Citizens," begins by demonstrating that, contrary to what historians have long assumed, Rosika Schwimmer was in fact not the first pacifist resident alien

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[29] See, for example, Brown, *Plutopia*; Capozzola, *Uncle Sam Wants You*; Heefner, *The Missile Next Door*; Holm, *Women in the Military*; Kerber, *No Constitutional Right to Be Ladies*; Kerber, *Women of the Republic*; and McCurry, *Women's War*.

[30] See, for example, Canaday, *The Straight State*; Kerber, *No Constitutional Right to Be Ladies*; Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); Margot Canaday, "Heterosexuality as a Legal Regime," in *The Cambridge History of Law in America, Volume III: The Twentieth Century and After (1920-)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 442-471; Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009); Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York: Oxford University Press, 2013); and Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2015).

[31] See, for example, Kerber, *No Constitutional Right to Be Ladies*; Mittelstadt, *The Rise of the Military Welfare State*; Self, *All in the Family*; Stansell, *The Feminist Promise*; and Catherine A. Lutz, *Homefront: A Military City and the American Twentieth Century* (Boston: Beacon Press, 2001).

woman to be barred from American citizenship. Schwimmer's petition for naturalization was the first to reach the Supreme Court—undoubtedly because she was a uniquely notorious public figure—but she was denied naturalization for the same basic reason as everyone else who endured the same fate: because she refused to bear arms in defense of the United States. Nonetheless, this chapter argues, the Court's decision in *United States v. Schwimmer* was vitally important, because it gave constitutional sanction to an inherently paradoxical and distinctly gendered new doctrine: which required would-be-citizen women, and only women, to be willing to take up arms without ever being obligated to do the same.

Throughout the 1920s, '30s, and '40s, whenever the *Schwimmer* precedent was reapplied—by naturalization examiners and federal judges and, in one instance, by the Supreme Court yet again—it imposed distinctive burdens on pacifist women in other ways as well. For, as this chapter outlines for the first time, the *Schwimmer* doctrine arose at the very same moment that millions of immigrant women were first made to endure naturalization proceedings on their own (instead of becoming naturalized automatically through marriage)—and at the very same moment that thousands of expatriated women, previously stripped of their American citizenship for marrying foreign-born men, were likewise made to apply for repatriation independently. When *Schwimmer* was ultimately overturned in 1946, in a Supreme Court case involving a resident alien man who *had* been required to register for the military draft during the Second World War, it only further laid bare *Schwimmer*'s initial incongruity.

Chapter 2, "'Simply Because They're Married to Servicemen': *Reid I* (1956), *Reid II* (1957), and the Postwar Right to Trial by Jury," examines "the first and only time" that the

Supreme Court reversed itself so completely in identical legal proceedings.[32] In what became known as *Reid I*, decided in 1956, the Court upheld Dorothy Krueger Smith and Clarice Covert's convictions—by courts-martial—for premeditated murder. In *Reid II*, decided in 1957, the Court overturned them: not because Smith and Covert hadn't knowingly killed their husbands, but because civilian, dependent service wives were in fact not triable by military courts (or at least not in places and times of peace).

The chapter argues that this decision, long regarded as an important precedent in connection with military jurisdiction, was equally important in connection with women's citizenship. For accepting Smith and Covert's convictions meant accepting that their dependency—on their military-officer husbands and on the military itself—rendered their Fifth and Sixth Amendment-guaranteed rights to trial by jury obsolete. And rejecting their convictions, by contrast, meant affirming that they remained independent legal persons even after marriage. Ultimately, by doing the latter, the Court meaningfully reined in the postwar U.S. military and decreed that court-martial jurisdiction ended precisely where service wives' individual rights began.

Chapter 3, "'A Policeman in Every Home?' *Griswold v. Connecticut* (1965) and the Cold War Right to Marital Privacy," assesses the enduring puzzle that is the Supreme Court's decision in *Griswold*, and argues that its most salient aspects—including its defense of civil liberties and rights retained by the people, its endorsement of contraception as a boon to marriage, and its assignment of privacy rights not to women but to the marital relationship—all had their roots in the political and ideological conflicts of the global Cold War. This outcome was not inevitable.

[32] Frederick Bernays Wiener, "Persuading the Supreme Court to Reverse Itself: Reid v. Covert," *Litigation* 14, no. 4 (Summer 1988): 10.

But, as the chapter outlines, the Planned Parenthood League of Connecticut (which appealed the case to the Supreme Court) worked long and hard to make it so, steadily honing a Cold War-inflected promotional and legal strategy over the course of more than a decade. Throughout the 1950s and early 1960s, that strategy failed more often than it succeeded. By 1965, however, it gave rise to a paramount constitutional victory: Justice William O. Douglas's majority opinion struck down Connecticut's ban on birth control and made family planning (and family planning specifically) into the law of the land.

The chapter devotes a great deal of attention to the PPLC's most effective gambits, including its deployment of population control literature; its attention to totalitarian threats, both from the Soviet Union and within the United States itself; and its repeated insistence that only "a policeman in every home" could enforce Connecticut's especially oppressive birth control ban. But if these tactics precipitated a never-before-affirmed constitutional right to privacy, they were also nearly impossible to replicate in the subsequent decades, as privacy became the cornerstone of more and more civil liberties.

Chapter 4, "'Whatever the Need…It Could Be Met by Volunteers': *Rostker v. Goldberg* (1981) and the Servicewomen Who Wouldn't Be Drafted," reframes the Court's decision in *Goldberg* by situating it within a whole series of cases—going back to the late 1960s—which likewise upheld the constitutionality of male-only registration and conscription. In so doing, it helps account for how legal defenses of the all-male draft ironically outlived the draft itself (which ended in 1973) and helps explain how and why those defenses increasingly turned to already-enlisted servicewomen—whose numbers and military roles were then increasing—to justify the same. Ultimately, the chapter argues, what distinguished *Goldberg* from the opinions that came before it was not that it diminished the importance of volunteer servicewomen but that

it did something quite like the opposite. Indeed, the *Goldberg* decision affirmed that some number of American women—150,000 as of 1980, probably 100,000 more by 1985, as many as 80,000 more than that in an expected emergency—would always need to join the service. But it proposed that all of these women could be depended upon to sign up of their own accord, leaving the obligation of Selective Service registration for young men and young men alone.

In the four decades since the Supreme Court decided *Rostker v. Goldberg*, American servicewomen have only become more and more integral to the U.S. military. As of 2022, women made up approximately 17% of active-duty personnel (up from approximately 7% in 1980), and women have been authorized to take on every kind of combat role since 2015.[33] Nonetheless, *Goldberg* has never been overturned. The dissertation's conclusion thus examines recent efforts to undo this abiding distinction between the sexes—all of which have come to naught—and briefly considers the ways in which *Schwimmer*, *Reid*, and *Griswold* have likewise left imprints on American law and American life.

[33] In 1980, when President Jimmy Carter first proposed to revitalize the Selective Service System—and to begin registering America's young women as well as its young men—there were approximately 150,000 women serving in the U.S. armed forces, of approximately 2.05 million total armed forces personnel. As of October 2022, there were approximately 230,000 women serving in the U.S. armed forces, of approximately 1.3 million total armed forces personnel. See "DoD Personnel, Workforce Reports, & Publications," Defense Manpower Data Center, https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports (accessed September 27, 2023). On the end of female soldiers' combat restrictions, see, for example, Elisabeth Bumiller and Thom Shanker, "Equality at the Front Line: Pentagon is Set to Lift Ban on Women in Combat Roles," *New York Times*, January 24, 2013, Section A, 1; and Matthew Rosenberg and Dave Philipps, "Pentagon Opens All Combat Roles to Women: 'No Exceptions,'" *New York Times*, December 4, 2015, Section A, 1.

CHAPTER 1
"Their Mere Refusal to Bear Arms":
United States v. Schwimmer (1929) and the Pacifist Women Who Couldn't Be Citizens

On May 27, 1929, Rosika Schwimmer became "a woman without a country."[1] She wasn't, at that moment, in any imminent danger. She had fled political violence and persecution in her native Hungary in 1920, had arrived in America as a refugee in 1921, and had been living comfortably—if not entirely without conflict—in Chicago and New York ever since.[2] But she'd been a resident alien all that time. And now, after an expensive, years-long legal battle, the U.S. Supreme Court had decreed that she could not become a naturalized citizen.[3]

Schwimmer, of course, was distraught—and fairly indignant. "I would move away if I could," she told the *New York Times*, but how would she acquire a passport? And where would she go? What country, if not "the leading nation of the world," would receive her?[4]

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[1] *United States v. Schwimmer*, 279 U.S. 644 (1929); "A Woman Without a Country," *TIME Magazine*, June 10, 1929, 13.

[2] Transcript of Record at 1-6, *United States v. Schwimmer*, 279 U.S. 644 (1929), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104532890/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=fd4e169d&pg=1 (accessed October 2, 2023) [hereafter cited as Transcript of Record, *United States v. Schwimmer*, 279 U.S. 644 (1929)]; "Mrs. Schwimmer Without a Country," *New York Times*, May 29, 1929, 11; Ronald B. Flowers, *To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court* (Lanham, MD: Scarecrow Press, Inc., 2003), 93-94; Tara Zahra, *Against the World: Anti-Globalism and Mass Politics Between the World Wars* (New York: W. W. Norton & Company, 2023), 93-95.

[3] *United States v. Schwimmer*, 279 U.S. 644, 653 (1929); Flowers, *To Defend the Constitution*, 93-94, 109-110.

[4] "Mrs. Schwimmer Without a Country," *New York Times*, May 29, 1929, 11. Schwimmer's immediate concerns were well-founded but misplaced: in order to travel to Berlin for an international meeting of women's suffrage activists, she soon requested and was permitted to obtain an "emergency" passport, "re-entry permit," and "certificate of identification." See "Mme. Schwimmer to Sail," *New York Times*, June 7, 1929, 31.

Schwimmer also knew (as did the *Times* editors who reprinted her remarks) that far more than her own future was at stake. For Rosika Schwimmer was one of the most well-known peace activists then living in the United States, and her exclusion from citizenship—now already more than a decade after the First World War—seemed like nothing less than a rejection, from on high, of pacifism itself.

The Court's ruling hinged on the Naturalization Act of 1906 and, specifically, on its prescribed oath of allegiance.[5] Would-be U.S. citizens had been called upon to "support the constitution" for almost as long as the Constitution itself had been in force.[6] But in 1906, Congress had amended the required text to read, in part, "that he will support *and defend* the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same" [emphasis mine].[7] In the years since, the state officials responsible for administering the oath had effectively narrowed its meaning even further. By 1917, as the country was preparing for war, at least some naturalization examiners had begun to ask applicants for citizenship, "If necessary, are you willing to take up arms in defense of this country?"[8] By 1923, the Naturalization Bureau had made that into Question 22 of the standard

[5] *United States v. Schwimmer*, 279 U.S. 644, 646-649, 651-653 (1929).
[6] *An Act to establish an uniform rule of Naturalization; and to repeat the act heretofore passed on that subject*, Public Law 3-20, *U.S. Statutes at Large* 1 (1795): 414-415.
[7] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607.
[8] Dorothy Dunbar Bromley, "The Pacifist Bogey: An Apology to Prospective Citizens," *Harper's Magazine* 161, no. 10 (October 1, 1930): 554; Candice Bredbenner, "A Duty to Defend?: The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946," *Journal of Policy History* 24, no. 2 (2012): 243-244.

naturalization questionnaire.[9] And, when forced to answer Question 22, Rosika Schwimmer had affirmed her pacifism and sworn instead, "I would not take up arms personally."[10]

To be sure, this was not the Court's sole cause for concern. Ever since she'd first visited the U.S. in 1914, Schwimmer had been regularly tarred as a "German spy" and a "Bolshevik agent"—or both—by various anti-radical, anti-feminist, anti-Semitic, and anti-immigrant politicians and members of the press.[11] Schwimmer was also, as the Court's 6-3 majority opinion noted, a self-described "uncompromising pacifist," with "no sense of nationalism" and "only a cosmic consciousness of belonging to the human family."[12] Furthermore, she was a prominent "lecturer and writer," liable to "exert her power to influence others" to oppose fighting as well, and thereby to seriously impair the state's capacity (and its constitutional mandate) to muster a "common defense."[13] Indeed, the members of the majority mustered a whole host of reasons to declare Schwimmer insufficiently "attached," and especially dangerous, to the American republic.[14] But at root, the Supreme Court denied her naturalization for the same basic reason that a naturalization examiner and a federal district judge had denied her naturalization a year and a half earlier: because of her own, preemptive conscientious objection.[15]

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[9] William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (New York: Oxford University Press, 1973), 284.
[10] Transcript of Record at 6, *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Schwimmer*, 279 U.S. 644, 646-647 (1929).
[11] Beth S. Wenger, "Radical Politics in a Reactionary Age: The Unmaking of Rosika Schwimmer, 1914-1930," *Journal of Women's History* 2, no. 2 (Fall 1990): 66-99.
[12] Transcript of Record at 11-13, *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Schwimmer*, 279 U.S. 644, 648-649, 651-652 (1929).
[13] *United States v. Schwimmer*, 279 U.S. 644, 648-649, 650-651, 651-652 (1929).
[14] *United States v. Schwimmer*, 279 U.S. 644, 646, 652-653 (1929).
[15] *United States v. Schwimmer*, 279 U.S. 644, 648, 651-652 (1929).

The verdict was not entirely without precedent. During the Civil War, for example, the Emancipation Proclamation had freed enslaved men and instantly ushered them into the Union military; and, afterwards, the Thirteenth Amendment (prohibiting involuntary servitude), the Fourteenth Amendment (establishing birthright citizenship and additional individual rights), and especially the Fifteenth Amendment (extending suffrage to Black men but not to Black women) had rewarded their national service.[16] More recently, in the decade since the First World War, state officials had both eased the path to citizenship for hundreds of thousands of immigrant men who'd served in the U.S. military and dismissed the petitions for citizenship of tens of thousands more who'd exempted themselves from the draft instead.[17] But it was no so-called "alien slacker" whose case ended up making it all the way to the highest court in the land: it was Rosika Schwimmer's. And so it was in *United States v. Schwimmer* that the Supreme Court first made one's readiness to go to battle—to carry a gun, open fire, and spill another person's blood—into the sine qua non of American citizenship. That Schwimmer was a woman, and a fifty-two-year-

[16] U.S. Constitution, amend. 13; U.S. Constitution, amend. 14; U.S. Constitution, amend. 15; Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), 240-241, 243, 282.

[17] During the First World War, resident alien men as well as citizen men were broadly subject to the various Selective Service laws. There were exceptions, however: men who hadn't yet filed a "declaration of intention" to become a U.S. citizen were generally exempted (by law if not always by practice), as were men who were still citizens of enemy nations (even if they'd already submitted those first Declaration of Intention forms), as were men who were still citizens of neutral nations, as long they agreed to *withdraw* their Declarations of Intention—and to accept that that they would "forever be debarred from becoming a citizen of the United States." After the war, however, some naturalization examiners and federal judges punished all of these so-called "alien slackers" equally, refusing, for example, to distinguish between declarants and nondeclarants and dismissing their petitions for citizenship no matter how or why they'd not served during the recent war. See *Selective Service Act of 1917*, Public Law 65-12, *U.S. Statutes at Large* 40 (1917): 76-83; *Chamberlain—Kahn Act*, Public Law 65-193, *U.S. Statutes at Large* 40 (1918): 845-896; *Selective Service Act Draft Requirements*, Public Law 65-210, *U.S. Statutes at Large* 40 (1918): 955-957; and Bredbenner, "A Duty to Defend?," 233, 236-245.

old woman at that—and thus neither compelled nor permitted to perform combatant service—was, per the majority opinion, explicitly beside the point.[18]

In this way, the members of the *Schwimmer* majority not only betrayed their own, enduring "post-war hysteria" (in the words of one contemporary commentator), but also dared to imagine an even more turbulent and violent future: in which American women, too, just might be sent to fight on the front lines of the next global conflict.[19] Or, perhaps, they affirmed the state's power to *create* such a future—almost in defiance of how unlikely, or how frankly unbelievable, it seemed. In fact, though few historians have recognized as much, that the Court's decision in *Schwimmer* was neither precipitated nor accompanied by any new congressional directives or military policies is precisely what made it so significant. For it gave rise to a wholly novel, inherently paradoxical, and distinctly gendered constitutional doctrine: which required would-be-citizen women, and only women, to be *willing* to take up arms without ever being *obligated* to take up arms.[20]

Pacifist men would also be denied naturalization under the *Schwimmer* precedent—and in higher numbers than pacifist women—until the decision was overturned in 1946. But that was only reasonable: during World War I, even immigrant men who were not yet naturalized U.S. citizens had been forced to register for the draft—and the same would prove true, after

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[18] *United States v. Schwimmer*, 279 U.S. 644, 651 (1929).
[19] Bromley, "The Pacifist Bogey," 553.
[20] This extended, gendered analysis is largely absent, for example, from broader surveys that examine male petitioners' and female petitioners' cases side-by-side (like Ronald Flowers's *To Defend the Constitution* and Candice Bredbenner's "A Duty to Defend?") and from articles and books that examine Rosika Schwimmer's naturalization proceedings on their own—without attending to other similar cases—which tend to ascribe too much explanatory power to Schwimmer's particular notoriety (like Beth Wenger's "Radical Politics in a Reactionary Age" and Tara Zahra's *Against the World*).

Schwimmer, during World War II.[21] These men, if and when they resisted their conscription, were staving off a real possibility of compulsory, combatant service. Not so for the pacifist women barred from citizenship in the years between the wars: who, no matter their citizenship status, would never be called to appear before a draft board. These women became conscientious objectors—and were officially classified as such by the Bureau of Naturalization—by refusing to make a commitment that was only ever hypothetical.[22]

This chapter chiefly examines the naturalization proceedings of six such women, in addition to Rosika Schwimmer: Margaret (Dorland) Webb, Mary "Mabel" (Harris) Boe, Martha Jane Graber, Marie Averil Bland, Rebecca Shelley (Rathmer), and Harta (Galpin) Losey. It was in these women's proceedings that the gender-specific *Schwimmer* doctrine—what this chapter calls the willingness-without-obligation doctrine—most clearly took shape. For here, naturalization examiners and federal judges in Indiana, Ohio, North Dakota, New York, Michigan, Washington state, and Washington, D.C. (and in one instance, the U.S. Supreme Court) endeavored to apply *Schwimmer*'s findings to far more typical would-be female citizens—who possessed none of Rosika Schwimmer's notoriety and whose lives resembled hers very little.

Where Schwimmer, for example, was an atheist (and a Jew), all six other women objected to arms-bearing because of their Christian faith. Webb, Graber, Boe, and Shelley even

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[21] Bredbenner, "A Duty to Defend?" 236-245, 249-250.

[22] Indeed, women were included alongside men in the "CONSCIENTIOUS OBJECTORS" files of the Bureau of Naturalization. See "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, 1903-1952 (T458, roll 8), Records of the Immigration and Naturalization Service, Record Group 85 (National Archives at Washington, D.C.), images 3744-3929, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service].

belonged to historic peace churches, the (male) members of which had long been accommodated by both state and federal draft laws and excused from combatant service.[23] Where Schwimmer mainly promised to "defend" the United States in her writings and public lectures, these six women more readily vowed to serve as noncombatants. Graber and Bland were even trained nurses, and Bland had already treated shell-shocked U.S. soldiers in France right after the Great War. Where Schwimmer devoted her life to radical causes, all but one of these women had no interest in political activism. To the contrary, several could best be described as "ordinary American housewives"—the very thing, according to Acting Solicitor General Alfred A. Wheat, that Rosika Schwimmer was not.[24] In fact, Boe, Shelley, and Losey were forced to endure naturalization proceedings only because they were married—to foreign-born men.

No one had accused these women of being German spies or Bolshevik agents. No one had alleged that they would dream up anti-war propaganda. No: when Margaret Webb, Mabel Boe, Martha Graber, Marie Bland, Rebecca Shelley, and Harta Losey were barred from U.S. citizenship, it was entirely because they—themselves—refused to take up arms. And what's

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[23] The members of the historic peace churches—as recognized by the World War I-era Selective Service laws—were Margaret Webb (a Quaker), Martha Graber (a Mennonite), Mabel Boe (a member of the Church of the Brethren), and Rebecca Shelley (also a Mennonite, though she maintained moral and political objections to arms-bearing as well). Marie Bland (an Episcopalian) and Harta Losey (a Seventh-day Adventist) also refused to bear arms because of their Christian faith. On the history of conscientious objection and objectors' treatment during the First World War, see Flowers, *To Defend the Constitution*, especially Chapter 2; Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008), especially Chapter 2; John Whiteclay Chambers II, "Conscientious Objection" in *The Oxford Companion to American Military History*, ed. John Whiteclay Chambers II (New York: Oxford University Press, 1999), 179-180; and Laura M. Weinrib, "Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties," *Emory Law Journal* 65, no. 4 (2016): 1051-1137.

[24] Alfred A. Wheat quoted in "A Woman Without a Country," *TIME Magazine*, June 10, 1929, 13.

more, they were not alone. Although they left behind fewer records, dozens more resident alien women were likewise classified as conscientious objectors in the years between World War I and World War II—including several who were denied naturalization in the mid-1920s, before Rosika Schwimmer's case had even reached a district court.[25]

United States v. Schwimmer, then, was neither the beginning nor the end of pacifist women's exclusion from citizenship. Quite the opposite: the Supreme Court's decision gave constitutional affirmation to a broader and more enduring effort, and one that distinctly burdened resident alien women in other ways as well. For the willingness-without-obligation doctrine arose and evolved while the very conditions of American women's citizenship were being remade as well—for the better, for the most part, but with unintended and sometimes invidious consequences.

In 1906, when Congress passed the amended Naturalization Act at issue in *Schwimmer* and its progeny, the vast majority of immigrant women were in fact exempted from almost every aspect of the standard naturalization proceedings. Instead, they became U.S. citizens automatically, as wives: through marriage to a native-born American man or upon the naturalization of a resident alien husband. It was precisely because their citizenship was derived secondhand that they were not required to take the oath of allegiance—their allegiance was to their husbands and only then to the state—and, accordingly, that they were not required to

[25] "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service. Rosika Schwimmer believed herself to be "'the first woman denied citizenship by…the United States of America, solely for having refused to promise to bear arms'"—and later scholars have assumed the same—see, for example, Flowers, *To Defend the Constitution*, 322; and Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998), 184. But, as this chapter demonstrates, this was decidedly not the case.

"support and defend" the country and its Constitution. Even if, therefore, legislators intended the oath to serve as a binding pledge to take up arms in defense of the United States, they also intended it to be taken up almost entirely by the immigrant men who might one day be drafted into service.[26]

Women born and raised in the United States enjoyed a similarly indirect relationship to the state. Married or unmarried, they possessed unequal political and civil rights as well as unequal obligations—bearing no duty to serve on a jury, for instance, or in the U.S. military—because their domestic responsibilities were presumed to take precedence, and their loyalty presumed to be conditional.[27] In fact, only a year after revising the Naturalization Act, Congress passed the 1907 Expatriation Act, which decreed that "any American woman who marries a foreigner shall take the nationality of her husband."[28] The same did not apply to American men, whose marriages to foreign-born women not only had no effect on their own citizenship status but continued to expedite their wives' paths to naturalization.[29] Thousands of American women, however, were expatriated in one fell swoop—as were thousands more who married foreign-born

[26] After the Supreme Court decided *United States v. Schwimmer*, critics of the precedent frequently made use of this gendered history of naturalization—even though Rosika Schwimmer herself was not married. See, for example, "Women, War and Citizenship," *New York Times*, December 12, 1929, 30; and John L. Cable, "The Demand of Women for Equal Citizenship," *New York Times*, April 13, 1930, 146. (John Cable also sponsored the Cable Act—see below.) On women's secondhand citizenship, see also Bredbenner, *A Nationality of Her Own*; and Kerber, *No Constitutional Right to Be Ladies*.

[27] Kerber, *No Constitutional Right to Be Ladies*, especially Chapters 1, 4, and 5.

[28] *Citizenship and Expatriation Act of 1907*, Public Law 59-193, *U.S. Statutes at Large* 34 (1907): 1228-1229.

[29] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607; *Citizenship and Expatriation Act of 1907*, Public Law 59-193, *U.S. Statutes at Large* 34 (1907): 1228-1229.

men after the law was passed—and with little recourse.[30] Some expatriates found they could no longer access social services; some lost property; some, not unlike Rosika Schwimmer, were rendered stateless.[31] In 1915, when a California-born woman challenged the legislation, the Supreme Court upheld it, declaring that even women's birthright citizenship (and only women's birthright citizenship) could be revoked in the face of the "ancient principle" of marital unity.[32]

Then, in 1917, the United States joined the war in Europe.

Almost immediately, mobilizing for war—the first total war—made unprecedented demands of an unprecedented number of Americans.[33] Whereas twenty-four million men (including over three million resident aliens) registered for the military draft, women were not conscripted into national service of any kind.[34] Nevertheless, millions of women offered up their labor and resources to the war effort—and as they knit military uniforms, or learned to cook without meat or wheat (which were reserved for the soldiers), or helped to process their neighbors' draft cards, or set up local vigilance societies, or even volunteered to serve in the Navy (as nurses and non-commissioned yeomen) and the Army (as nurses and Signal Corps "Hello Girls"), they also asserted and carried out new obligations of American citizenship.[35]

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[30] Bredbenner, *A Nationality of Her Own*, 4; Kerber, *No Constitutional Right to Be Ladies*, 41-42.
[31] Bredbenner, *A Nationality of Her Own*, 1, 45-79; Kerber, *No Constitutional Right to Be Ladies*, 41-42.
[32] *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).
[33] This dissertation borrows a distinction from Stephanie McCurry, who distinguishes between the nineteenth century's "people's wars" and the twentieth century's "total wars," beginning with World War I. See Stephanie McCurry, "Enemy Women and the Laws of War in the American Civil War," *Law and History Review* 35, no. 3 (August 2017): 667-673.
[34] Capozzola, *Uncle Sam Wants You*, 56; Bredbenner, "A Duty to Defend?," 236.
[35] Capozzola, *Uncle Sam Wants You*, especially Chapter 3 and Chapter 4; Elizabeth Cobbs, *The Hello Girls: America's First Women Soldiers* (Cambridge: Harvard University Press, 2017); *Women in the United States Military, 1901-1995: A Research Guide and Annotated Bibliography*, comp. Vicki L. Friedl (Westport: Greenwood Press, 1996), 201.

By the same token, the advent of total war also reoriented long-established campaigns for women's rights. Prominent suffragists, for example, began to cast aside the activists in their ranks (like Rosika Schwimmer) who'd long argued that women's votes would bring about world peace—and started to insist, instead, that it was women's wartime sacrifices which proved their worthiness for the franchise.[36] By the fall of 1918, even President Woodrow Wilson was calling for suffrage as "a vitally necessary war measure," which would recompense women's "services rendered," give credence to the Allies' fight for liberty abroad, and make the United States worthy of its world power status.[37] Likewise, the various reformers who'd been working to overturn the Expatriation Act suddenly found scores of new supporters—not only in tandem with the suffragists but also among the hundreds of women who were stripped of their U.S. citizenship the moment their German-born husbands were declared enemy aliens.[38]

Both strategic realignments paid off in spades. In August 1920, less than two years after the armistice, legislators in thirty-six states ratified the Nineteenth Amendment to the Constitution, guaranteeing millions of American women (though not all American women) the right to vote and enabling them to lay claim to their own, unmediated position in the body

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[36] Capozzola, *Uncle Sam Wants You*, 103-104; Wenger, "Radical Politics in a Reactionary Age," 70-73; Christine Stansell, *The Feminist Promise: 1792 to the Present* (New York: Modern Library, 2010), 169-174; Dagmar Wernitznig, "Living Peace, Thinking Equality: Rosika Schwimmer's (1877-1948) War on War," in *Living War, Thinking Peace (1914-1924): Women's Experiences, Feminist Thought, and International Relations*, eds. Bruna Bianchi and Geraldine Ludbrook (Newcastle upon Tyne: Cambridge Scholars Publishing, 2016), 132-133.
[37] Woodrow Wilson, Address by the President of the United States, 65th Cong., 2nd sess., *Congressional Record* 56, pt. 11: 10928-10929.
[38] Bredbenner, *A Nationality of Her Own*, 5-7; Kerber, *No Constitutional Right to Be Ladies*, 41-42.

politic.[39] Only two years after that, in September 1922, Congress passed the Cable Act (named for its sponsor, Ohio Representative John L. Cable), which enshrined women's independent nationality rights—both by putting an end to fifteen years of marital expatriation and by closing off married women's automatic paths to U.S. citizenship.[40] Two years after that, more notoriously, Congress enacted the Immigration Act of 1924, which sharply limited the number of foreigners permitted to enter the country, augmented an already restrictive national origins quota system, and put a stop to Asian immigration entirely.[41] But because of the Cable Act, even the resident alien women who were still eligible for naturalization proceedings were required to swear to their own oaths of allegiance—including the married women, for the first time in American history—and just as Question 22 of the standard naturalization questionnaire ("If necessary, are you willing to take up arms in defense of this country?") was becoming a key barometer of a petitioner's fitness for citizenship.

Schwimmer and its progeny emerged from this ferment. In any earlier era, most pacifist women would have had no trouble becoming citizens. Even unmarried women, applying for naturalization on their own, would not have been asked about their attitude towards combat—not least because, in most states, they would not have been able to vote to keep America out of war.

Not so by the mid-1920s. If the exigencies of World War I and its aftermath had strengthened women's firsthand ties to the state, they had also transformed the terms of American citizenship more broadly—made them more exacting and more closely tied to the

[39] U.S. Constitution, amend. 19. Although Black women were not excluded from the scope of the amendment, for example, they were generally barred from voting until the passage of the Voting Rights Act of 1965.
[40] *Married Women's Citizenship Act*, Public Law 67-346, *U.S. Statutes at Large* 42 (1922): 1021-1022.
[41] *Immigration Act of 1924*, Public Law 68-139, *U.S. Statutes at Large* 43 (1924): 153-154.

national defense. Thus, when resident alien women were suddenly asked to bear arms—and the pacifists among them, like Margaret Webb and Martha Graber, categorically refused—they were denied naturalization in both a manner and to an extent never before possible.

But immigrant women alone did not account for the unprecedented numbers of pacifist women who were barred from citizenship (and thus deprived of the right to vote, forbidden to run for public office, excluded from certain government benefits, and prohibited from accepting certain jobs) between the 1920s and the 1940s. The same regime also ensnared native-born women (and only native-born women, as opposed to native-born men): women who lost their birthright citizenship under the 1907 Expatriation Act and who were subsequently required to apply for repatriation—and to take the oath of allegiance—under Sections 2 and 4 of the 1922 Cable Act.[42]

When they'd held U.S. citizenship, women like Mabel Boe and Harta Losey had neither been expected to bear arms nor ordered to prove their loyalty to the United States in any way. To the contrary, their loyalty had been summarily discounted, by law, when they'd married their foreign-born husbands. When they applied for repatriation, in 1929 and 1940, they were made to pursue a fundamentally different kind of citizenship—one that demanded a firsthand commitment to violence—and thus one they refused to abide. But when they were denied naturalization, it was just as much the result of their one-time, second-class status. That was why they were forced to undergo naturalization proceedings in the first place—and, consequently, why they were uniquely burdened by the formally sex-equal standards that the Cable Act, Question 22 of the naturalization questionnaire, and *United States v. Schwimmer* all imposed.

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[42] *Married Women's Citizenship Act*, Public Law 67-346, *U.S. Statutes at Large* 42 (1922): 1021-1022.

Despite these rigid standards, and the vast bureaucracy poised to enforce them, some number of pacifist resident alien women—whether single or married, born in the U.S. or overseas—slipped through the cracks. So did some pacifist resident alien men.[43] It was all but unavoidable, precisely because individual naturalization examiners and federal judges were invested with such vast authority to decide the fates of the petitioners who came before them. The same system that enabled a judge to rifle through Rosika Schwimmer's personal correspondence, or to push Mabel Boe to consider whether she might use a "loaded shotgun" to protect the lives of her children, also left room for other judges to be more lenient—or, simply, to refrain from asking too many tough questions.[44]

Marie Bland, for example, almost became a naturalized citizen because no one noticed that, while taking the oath of allegiance alongside several other men and women, she "dropped [her] hand" when the clerk read the words "support and defend" (she turned herself in minutes later).[45] Martha Graber *did* eventually become a naturalized citizen—though only after her

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[43] Marie Bland, for instance, marshaled several examples while making her case to the Supreme Court. See Brief for the Petitioner-Appellee at 37-38, *United States v. Bland*, 283 U.S. 636 (1931), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104679897/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=61d2170d&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Petitioner-Appellee, *United States v. Bland*, 283 U.S. 636 (1931)]. In addition (as explained later in the chapter), Margaret Webb's husband and Mabel Boe's husband were both admitted to citizenship despite sharing their wives' religious commitment to pacifism.

[44] Transcript of Record at 11-13, *United States v. Schwimmer*, 279 U.S. 644 (1929); "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 373-383; James H. Sinclair at U.S. Congress, House, Select Committee on Immigration and Naturalization, *Hearings on H.R. 3547, Bill To Permit Oath of Allegiance by Candidates for Citizenship To Be Made with Certain Reservations*, 71st Cong., 2nd sess., 1930, 34-35 [hereafter cited as *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930].

[45] Transcript of Record at 13-14, *United States v. Bland*, 283 U.S. 636 (1931), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104679813/SCRB?u=chic_rbw&sid=bookmark-

petitions were denied twice before—because a new judge on the Court of Common Pleas of Allen County, Ohio believed that she should not "be required to go beyond what any other woman would be able to do in the event of war."[46] But only five months later, in May 1931, Bland's appeal reached the Supreme Court—which declared, once again, that neither conscientious-objecting men nor conscientious-objecting women could join the American body politic.[47] *Schwimmer*'s willingness-without-obligation doctrine was difficult to enforce but it was even more difficult to upend.

In fact, it was never truly dislodged. For when *Schwimmer* was ultimately overturned, in 1946, it was in *Girouard v. United States*: a case involving a resident alien man who *had* been called to register during World War II, and who'd pledged to perform noncombatant military service alongside 10,000 of his Seventh-day-Adventist co-religionists.[48] In particular, the majority opinion drew upon legislation—including the Selective Training and Service Act of 1940 and the 1942 Second War Powers Act—that, by definition, pertained neither to resident alien women nor to female citizens of the United States.[49] There was no reckoning for the Supreme Court and no especial relief for the pacifist women who'd been treated unfairly.

SCRB&xid=8ec6578b&pg=1 (accessed October 2, 2023) [hereafter cited as Transcript of Record, *United States v. Bland*, 283 U.S. 636 (1931).

[46] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.

[47] *United States v. Bland*, 283 U.S. 636 (1931) was decided in tandem with *United States v. Macintosh*, 283 U.S. 605 (1931)—a case involving the petition for citizenship of a pacifist resident alien man—on May 25, 1931.

[48] *Girouard v. United States*, 328 U.S. 61, 61-62, 69 (1946).

[49] *Girouard v. United States*, 328 U.S. 61, 66-67 (1946). The 1940 Selective Training and Service Act applied only to male citizens and male resident aliens between the ages of twenty-one and thirty-six. The 1942 Second War Powers Act created an expedited path to citizenship for servicemembers—including non-combatant personnel—but was signed into law two months before women were first permitted to enlist in the Women's Army Auxiliary Corps. See *Selective Training and Service Act of 1940*, Public Law 76-783, *U.S. Statutes at Large* 54

But this only made *United States v. Schwimmer* more extraordinary. It was precisely in the interwar period—ostensibly peacetime—that the U.S. Supreme Court countenanced a radical re-imagining of women's place on the battlefield and in the national polity. The commitment that *Schwimmer* demanded from these women—to be willing to bear arms without ever being obligated to bear arms—was hypothetical by design. It only stood to reason that it was neither validated nor meaningfully challenged by the advent of another, actual total war. Until then, however, its consequences for pacifist women were very real indeed.

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I. Before *Schwimmer*

The Immigration Act of 1917, enacted by Congress just months before the U.S. entered the Great War, prohibited several "classes of aliens" from becoming American citizens—including prostitutes, polygamists, and persons with chronic alcoholism—but pacifists were not among them.[50] During and after the war, when naturalization examiners began increasingly to ask petitioners for citizenship if they would be willing to take up arms in defense of the United States, they were acting on their own mandate. For the most part, by all accounts, resident alien women—who were neither obligated nor eligible to serve in the U.S. military and who were still, in this period, often naturalized automatically through marriage—were spared from answering.[51]

(1940): 885-897; and *Second War Powers Act, 1942*, Public Law 77-507, *U.S. Statutes at Large* 56 (1942): 176-187.

[50] *Immigration Act of 1917*, Public Law 64-301, *U.S. Statutes at Large* 39 (1917): 874-898.

[51] Rosika Schwimmer, for example, initially left Question 22 blank, thinking that it did not apply to her, until she was forced to answer. Commentators writing about Schwimmer's case at the time—and historians examining it in the years since—have largely agreed that resident alien women were largely exempted from answering Question 22. See, for example, Flowers, *To Defend the Constitution*, 88-90; Bromley, "The Pacifist Bogey," 554; and Bredbenner, *A Nationality of Her Own*, 184. As this chapter demonstrates, however, Schwimmer was neither the first woman asked to bear arms nor the first woman who refused.

But precisely because naturalization examiners (and the federal judges who ratified their recommendations) had accorded themselves so much authority, there was nothing to stop them from scrutinizing anyone in particular—perhaps especially if the petitioner was a single woman, and if her exclusion from citizenship would attract no notice and no alarm.[52] It was in this way that two rather ordinary women living in Peoria, Illinois—rather than Rosika Schwimmer—became the first resident alien women denied naturalization for refusing to bear arms in defense of the United States.[53]

Bertha Staiger and Frieda Aberle were both born in Germany, Staiger in 1873 and Aberle in 1888. Each had lived in the U.S. for at least a decade before filing a declaration of intention to become a citizen (the "first papers" of any naturalization proceedings), which they both did in the summer of 1918, just a few months before the armistice that would end the First World War.[54] Under the Naturalization Act of 1906, they needed to wait two more years before they

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[52] As per Sections 3 and 4 of the Naturalization Act of 1906, federal courts had "exclusive jurisdiction to naturalize aliens as citizens of the United States." The Bureau of Immigration and Naturalization provided these courts with "blank forms," including the standard naturalization questionnaire (although it wasn't always uniformly administered) and standardized Declaration of Intention and Petition for Naturalization forms. Procedures varied by district and by state, but every Order of Court Denying Petition included fields for the "motion" of a naturalization examiner (to deny the petition), for the signature of a federal judge, and for the judge's reasoning. See *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607.

[53] These are the first two cases (both settled on the same day) that I have been able to find, using the aforementioned "CONSCIENTIOUS OBJECTORS" cards of the Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service. It is possible that an even earlier case—or perhaps several—did not make it into these government files.

[54] Bertha Staiger, Declaration of Intention (June 24, 1918), Petition for Naturalization (July 9, 1920), Order of Court Denying Petition (July 8, 1921), Naturalization Records for the U.S. District Court for the Southern District of Illinois (1921-1922), Records of District Courts of the United States, Record Group 21 (National Archives at Chicago), images 265-266, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Bertha Staiger, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921)]; Frieda Aberle, Declaration of Intention (September 27, 1918), Petition for Naturalization (October 1,

could file their petitions for naturalization (the "second papers").[55] Staiger submitted hers on July 9, 1920, Aberle on October 1 (and in August, meanwhile, the requisite thirty-second state ratified the Nineteenth Amendment to the Constitution).[56]

According to their naturalization forms, neither Staiger nor Aberle had a husband or any children, and both women worked to support themselves: Staiger as a shirtmaker, and Aberle as a domestic. As required by the same forms, they both "renounce[d] forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty," affirmed that they were not "disbeliever[s] in or opposed to organized government," and further affirmed that they were "attached to the principles of the Constitution of the United States." They affirmed because they wouldn't swear—on each form, for example, the word "sworn" was manually crossed out and replaced—which suggests that they were Quakers, or Mennonites, or members of another religious denomination that forbade taking secular oaths *and* forbade arms-bearing as well. It suggests, too, that the court clerks who processed their forms were both aware of their religious principles and accustomed to accommodating them.[57]

1920), Order of Court Denying Petition (July 8, 1921), Naturalization Records for the U.S. District Court for the Southern District of Illinois (1921-1922), Records of District Courts of the United States, Record Group 21 (National Archives at Chicago), images 326-327, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Frieda Aberle, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921)].

[55] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607.

[56] Bertha Staiger, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921); Frieda Aberle, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921).

[57] Bertha Staiger, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921); Frieda Aberle, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921).

Nonetheless, both women's petitions for citizenship were denied—on the same day, July 8, 1921—and by the same federal judge, Louis FitzHenry, who held a seat on the U.S. District Court for the Southern District of Illinois.[58] On Staiger's form, FitzHenry wrote that she was "not in harmony with principles of constitution [*sic*]." On Aberle's, that she was "unwilling to assume the duties of citizenship." He added no further details, and no transcript from either hearing (if the women even received outright hearings) seems to have been preserved. But either the naturalization examiner (P.M. Blazier, who moved to deny both petitions) or Judge FitzHenry (who signed the orders denying them) must have asked if they would consider bearing arms.[59] Because, shortly after their petitions were rejected, their names appeared in the Correspondence and Case Files of the Bureau of Naturalization, under the subject heading "CONSCIENTIOUS OBJECTORS."[60]

But if Bertha Staiger and Frieda Aberle, remarkably, became conscientious objectors a year before the 1922 Cable Act took effect—and two years before Question 22 ("If necessary, are you willing to take up arms in defense of this country?") became part of the standard

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[58] Louis FitzHenry served on the U.S. District Court for the Southern District of Illinois from 1918 until 1933. See "FitzHenry, Louis," Federal Judicial Center, https://web.archive.org/web/20230615174041/https://www.fjc.gov/node/1380766 (accessed June 15, 2023).

[59] Bertha Staiger, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921); Frieda Aberle, Declaration of Intention (1918), Petition for Naturalization (1920), Order of Court Denying Petition (1921).

[60] Bertha Staiger (INS Reference Number 734-P-1154), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3929, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Bertha Staiger, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service]; Frieda Aberle (INS Reference Number 734-P-1182), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3923, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Frieda Aberle, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service].

naturalization questionnaire—they were not alone for long. At least three more thoroughly ordinary women made it into these same government files over the next few years, as naturalization officials became more and more exacting and as establishing every resident alien woman's firsthand loyalty became the law of the land.

Rose and Ida Ammann left Switzerland for the United States in 1909. They arrived with their parents, Caroline and Charles, when Ida was twenty-four and Rose was almost twenty-seven. After they settled in Portland, Oregon, the two sisters remained unmarried. Rose worked first as a nurse's aid and then as a seamstress; Ida worked first as a laundress and then as a billing clerk. When they both filed their second papers, on November 29, 1922, Ida also requested that her name be legally changed to Edith.[61]

Mary King immigrated from Belfast, Ireland not long after the Ammann family. She, too, settled in Portland, Oregon, where she became the secretary for a local chapter of the Y.W.C.A. Like the Ammann sisters (and like Staiger and Aberle), King had no husband nor any children.[62]

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[61] Ida Ammann and Rose Ammann, 1910 census, Portland (Ward 8), Multnomah County, Oregon, T624, roll T64_1286, page 14A, ED 198, image 27, *Ancestry.com* (accessed September 20, 2023); Rose Blanche Ammann, Declaration of Intention (March 24, 1920), Petition for Naturalization (November 29, 1922), Order of Court Denying Petition (March 15, 1923), Naturalization Records for the U.S. District Court for the District of Oregon (1859-1942), Records of District Courts of the United States, Record Group 21 (National Archives at Seattle), images 462-463, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Rose Blanche Ammann, Declaration of Intention (1920), Petition for Naturalization (1922), Order of Court Denying Petition (1923)]; Ida Ammann, Declaration of Intention (June 6, 1919), Petition for Naturalization (November 29, 1922), Order of Court Denying Petition (March 15, 1923), Naturalization Records for the U.S. District Court for the District of Oregon (1859-1942), Records of District Courts of the United States, Record Group 21 (National Archives at Seattle), images 465-466, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Ida Ammann, Declaration of Intention (1919), Petition for Naturalization (1922), Order of Court Denying Petition (1923)].

[62] Mary King, Declaration of Intention (April 6, 1921), Petition for Naturalization (September 26, 1923), Order of Court Denying Petition (March 20, 1924), Naturalization Records for the U.S. District Court for the District of Oregon (1859-1942), Records of District Courts of the

She was a Quaker, and the Ammann sisters may have been as well: for all three women affirmed—rather than swore—that they were neither anarchists nor polygamists, and that they'd fulfilled all the requirements for U.S. citizenship.[63] King filed her second papers on September 26, 1923.[64]

Almost exactly one year apart—on March 15, 1923 for the Ammanns and on March 20, 1924 for Mary King—the same district judge, Charles E. Wolverton, rejected all three applications for citizenship.[65] On each "Order of Court Denying Petition," he wrote the same phrase: "the petitioner refuses to bear arms for the protection or defense of the United States in time of war, being a conscientious objector."[66] Wolverton made no reference to gender. But in this way, he also made explicit what Judge FitzHenry had not: that resident alien women, too,

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United States, Record Group 21 (National Archives at Seattle), images 415-416, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Mary King, Declaration of Intention (1921), Petition for Naturalization (1923), Order of Court Denying Petition (1924)].

[63] Bromley, "The Pacifist Bogey," 557; Rose Blanche Ammann, Declaration of Intention (1920), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Ida Ammann, Declaration of Intention (1919), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Mary King, Declaration of Intention (1921), Petition for Naturalization (1923), Order of Court Denying Petition (1924).

[64] Mary King, Declaration of Intention (1921), Petition for Naturalization (1923), Order of Court Denying Petition (1924).

[65] Rose Blanche Ammann, Declaration of Intention (1920), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Ida Ammann, Declaration of Intention (1919), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Mary King, Declaration of Intention (1921), Petition for Naturalization (1923), Order of Court Denying Petition (1924). Charles Wolverton served on the U.S. District Court for the District of Oregon from 1905 until his death in 1926. See "Wolverton, Charles Edwin," Federal Judicial Center, https://web.archive.org/web/20230615205100/https://www.fjc.gov/node/1390026 (accessed June 15, 2023).

[66] Rose Blanche Ammann, Declaration of Intention (1920), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Ida Ammann, Declaration of Intention (1919), Petition for Naturalization (1922), Order of Court Denying Petition (1923); Mary King, Declaration of Intention (1921), Petition for Naturalization (1923), Order of Court Denying Petition (1924).

had to commit to bearing arms, or else be regarded as conscientious objectors—and excluded from American citizenship—instead.

As best I can determine, Bertha Staiger, Frieda Aberle, Rose and Edith Ammann, and Mary King never appealed their exclusions from citizenship. (Mary King, at least, applied again in 1929—just before the Supreme Court handed down its decision in *United States v. Schwimmer*—and was denied naturalization for a second time.)[67] Unlike several of the pacifist women barred from citizenship after *Schwimmer*, they received little to no press attention and failed to arouse the sympathy of their congressional representatives.[68] That they merited Bureau of Naturalization case files at all was, at least in part, a matter of happenstance: a result of the fact that they or someone they knew happened to correspond with a federal official, sometimes years later.[69]

Rosika Schwimmer's own writings, for example, suggest that she'd never heard of Staiger, or Aberle, or King, or the Ammanns. Most likely, the many state officials and private

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[67] Mary King, Declaration of Intention (April 26, 1929), Naturalization Records for the U.S. District Court for the District of Oregon (1859-1942), Records of District Courts of the United States, Record Group 21 (National Archives at Seattle), image 301, *Ancestry.com* (accessed September 26, 2023).

[68] Unlike Margaret Webb, Mabel Boe, Martha Graber, or Marie Bland, for example, Bertha Staiger, Frieda Aberle, Rose and Edith Ammann, and Mary King were never mentioned during the congressional hearings held in 1930 and 1932 (see below). In her *Harper Magazine* article on *United States v. Schwimmer* and its aftermath, Dorothy Bromley mentioned that Mary King was denied naturalization in 1929—but seemed to assume that this was King's first rejection from citizenship, meted out in the wake of *Schwimmer*, rather than her second. See Bromley, "The Pacifist Bogey," 557.

[69] Another person, for example, seems to have corresponded on Bertha Staiger's behalf, and Frieda Aberle's name only made it into the Bureau of Naturalization files sometime in 1930. See Bertha Staiger, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service; and Frieda Aberle, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service.

citizens who endeavored to prevent Schwimmer, in particular, from becoming a naturalized American had never heard of them either.[70] It was one of the oddest aspects of the long and winding road to *United States v. Schwimmer*. On the one hand, Schwimmer was preceded by at least five (and possibly more) pacifist women who were denied naturalization in relative anonymity, precisely because they were themselves relatively anonymous. On the other hand, as Schwimmer's case inevitably garnered the kind of national attention that was out of reach for almost anyone else, it only became more and more difficult for Schwimmer herself to become a citizen—so much so that, ultimately, she became the first would-be conscientious objector to appear before the U.S. Supreme Court. But even her earlier naturalization proceedings also bear investigating—both for how they differed from, and for how they resembled, those of the pacifist women who came before and after.

Rosika Schwimmer, the eldest daughter of a middle-class Hungarian Jewish family, first came to the United States in 1914. Then in her late twenties, she was already an experienced journalist and feminist organizer, and she'd been collaborating with American suffragists, like Carrie Chapman Catt, for the previous ten years. In fact, it was Catt who personally arranged for Schwimmer's rather abrupt passage out of England, where she'd recently begun working for the International Woman Suffrage Alliance—and where she'd just been declared an "enemy alien" for opposing the Great War.[71] It was likewise at Catt's urging that, immediately upon her arrival

[70] As explained later in the chapter, Rosika Schwimmer's many critics not only opposed her naturalization but sought to directly influence the proceedings. As a result, Schwimmer seems to have believed—and later scholars seem to have believed as well—that a woman being forced to answer Question 22, and being held accountable for her answer, was entirely out of the ordinary. See, for example, Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 363-372; and Flowers, *To Defend the Constitution*, 88-96.
[71] Wenger, "Radical Politics in a Reactionary Age," 66, 68-69.

in the U.S., Schwimmer embarked upon a twenty-two-state, sixty-city lecture tour meant to win over German and Jewish immigrants, in particular, to the suffrage cause.[72]

Initially, audiences received her warmly. She was "'Hungary's great Jewess.'"[73] The "'most brilliant European woman of to-day.'"[74] She quickly began to anger her fellow suffragists, however, even before she started to earn the ire of the American public. For contrary to Catt's instructions, Schwimmer refused to advocate for women's enfranchisement without simultaneously advocating for pacifism—she believed that women's votes would bring about an end to the ongoing war and to *all* wars—and she began to inveigh against other feminist leaders, like Catt and Jane Addams, for their insufficient commitment to world peace.[75]

Schwimmer continued to amass adversaries. In 1914 and 1915, she met with President Woodrow Wilson and Secretary of State William Jennings Bryan—and failed to persuade them to negotiate a mediated end to the fighting.[76] In late 1915, she convinced the industrialist Henry Ford to take charge of the mediation efforts instead—only to see their "Peace Ship" expedition to The Hague become an object of derision (both in the press and among her fellow pacifists) and a wellspring of ill will.[77] Ford disembarked in Oslo, under cover of darkness, and foreswore the entire project.[78] Schwimmer's critics started to blame her not only for involving Ford in a

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[72] Wenger, "Radical Politics in a Reactionary Age," 69-70; "Finding Aid": v, Rosika Schwimmer Papers, 1890-1983 (Mss Col 6398), Manuscripts and Archives Division, New York Public Library, New York, NY, https://web.archive.org/web/20230618032011/https://nyplorg-data-archives-production.s3.amazonaws.com/uploads/collection/pdf_finding_aid/schwimmerr.pdf (accessed June 18, 2023).
[73] Quoted in Wenger, "Radical Politics in a Reactionary Age," 66.
[74] Quoted in Wenger, "Radical Politics in a Reactionary Age," 70.
[75] Wenger, "Radical Politics in a Reactionary Age," 70-73.
[76] Wenger, "Radical Politics in a Reactionary Age," 70; Zahra, *Against the World*, 30, 35.
[77] Wenger, "Radical Politics in a Reactionary Age," 73-76; Zahra, *Against the World*, 29, 36-39.
[78] Wenger, "Radical Politics in a Reactionary Age," 75; Zahra, *Against the World*, 38-39.

doomed endeavor but for personally inflaming his anti-Semitism.[79] After the "Peace Ship" came to naught, she returned to Hungary, but the damage was already done.[80] Even in her absence, Schwimmer became a lightning rod for criticism—which only gave the suffragists she'd already begun to alienate, like Carrie Catt, more reason to distance themselves from their former friend.[81]

But their abandonment of Schwimmer wasn't only personal. It also foretold a much more thoroughgoing transformation. With America's entry into the war in 1917, Catt threw the weight of her National American Woman Suffrage Association (NAWSA) behind the war effort—and behind the same repressive federal government that passed the Espionage and Sedition Acts and enabled the imprisonment of hundreds of "absolutist" conscientious objectors and persecuted thousands more Selective Service "slackers."[82] Consequently, when the Nineteenth Amendment became part of the U.S. Constitution, not long after the Allied powers won the war, it was without Rosika Schwimmer's support (and largely without the assistance of the more radical suffragists in the National Woman's Party).[83] And as the First Red Scare took hold, and hundreds of suspected subversives were deported (and thousands more arrested), the NAWSA feminists—and scores more women's club members, too—only became increasingly wary of the pacifists among their ranks.[84]

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[79] Wenger, "Radical Politics in a Reactionary Age," 74, 82-83; Zahra, *Against the World*, 38-39.
[80] Wenger, "Radical Politics in a Reactionary Age," 76-77.
[81] Wenger, "Radical Politics in a Reactionary Age," 76-80; Wernitznig, "Living Peace, Thinking Equality," 132-133.
[82] Capozzola, *Uncle Sam Wants You*, 41-53, 55-62, 65-66, 77-80, 103-104, 105-106. See also *Espionage Act*, Public Law 65-24, *U.S. Statutes at Large* 40 (1917): 217-231; and *Sedition Act*, Public Law 65-150, *U.S. Statutes at Large* 40 (1917): 553-554.
[83] Capozzola, *Uncle Sam Wants You*, 103-104, 105-106, 108-114; Stansell, *The Feminist Promise*, 169-175.
[84] Wenger, "Radical Politics in a Reactionary Age," 77-82; Kirsten Delegard, *Battling Miss Bolsheviki: The Origins of Female Conservatism in the United States* (Philadelphia: University of Pennsylvania Press, 2012).

Over in Hungary, meanwhile, Schwimmer's travails only grew worse: after a brief stint as the world's first female ambassador—for the short-lived Hungarian Democratic Republic—she soon became destitute, persecuted first by communist revolutionaries and then by White Terror counterrevolutionaries.[85] Twice denied a passport, she fled to Vienna, where she recuperated in a sanatorium and began making plans to return to America.[86] Nonetheless, Catt offered no assistance when Rosika Schwimmer finally arrived back in Chicago—and filed a declaration of intention to become a U.S. citizen—in the fall of 1921.[87]

To be sure, Catt never argued openly against Schwimmer's admission to citizenship. But she continued to keep her distance even as more public opposition mounted throughout the decade—as it very well did, and especially among American women. In fact, according to an unpublished essay that Schwimmer wrote in July 1930, titled "An Adventure in Citizenship," it was specifically the leaders of various women's voluntary associations who colluded—and eventually succeeded—in sabotaging her naturalization proceedings and preventing her from becoming an American.[88]

Schwimmer believed that in 1924, for example—"*Two and a quarter years*," her essay emphasized, before she was even eligible to apply for her second papers—the Ladies Auxiliary of the American Legion adopted a preemptive "resolution of protest against [her] naturalization"

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[85] Zahra, *Against the World*, 93-95.
[86] Wenger, "Radical Politics in a Reactionary Age," 77; Zahra, *Against the World*, 94-95.
[87] Another friend, Lola Maverick Lloyd, helped Schwimmer immigrate to and get settled in the United States in Catt's place. Schwimmer arrived in New York on August 26, 1921, moved to Chicago on September 8, and filed a declaration of intention on November 16. See Transcript of Record at 1, *United States v. Schwimmer*, 279 U.S. 644 (1929); and Wenger, "Radical Politics in a Reactionary Age," 77, 80.
[88] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 364-366, 368-369, 372.

at their annual meeting in Indianapolis. Additionally, she believed, the ladies then forwarded their resolution to Secretary of Labor James J. Davis, who oversaw the Bureau of Naturalization—and who passed their message along to Fred Schlotfeldt, the District Director of Naturalization in Chicago.[89]

Two years later, in September 1926, when Schwimmer did file her second papers—whereupon she was tasked with filling out her naturalization questionnaire—she initially left Question 22 blank.[90] She'd inferred, not unreasonably, that—like Question 23 ("Did you file a questionnaire with a draft board during the war?")—Question could not possibly apply to resident alien women.[91] But Schlotfeldt forced her to the answer the former (though not the latter) and Schwimmer came to believe that the Ladies Auxiliary's pressure campaign was to blame.[92] (At least one journalist, writing about Schwimmer's naturalization proceedings in *Harper's Magazine*, came to the same conclusion.[93]) No matter how it happened, exactly, Schwimmer was trapped: as soon as she responded "I would not take up arms personally," any

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[89] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 364-366; Flowers, *To Defend the Constitution*, 89-90, 133n13. In that footnote, 133n13, Flowers writes: "I have not confirmed any of Schwimmer's accusations against the American Legion Auxiliary. The 'Summary of Proceedings' of the Auxiliary"s [*sic*] national convention, held in Saint Paul in September 1924, does not mention Schwimmer…A hagiographic history of the American Legion Auxiliary for 1924-1934 does not refer to Schwimmer but does indicate that by 1924 the Auxiliary was past its growing pains and had reached a maturity that enabled it to be active on many fronts, including urging Congress to enact the 1924 law restricting immigration." Nonetheless, Flowers duly records Schwimmer's explanation of events, as I have done here.

[90] Transcript of Record at 1, *United States v. Schwimmer*, 279 U.S. 644 (1929); Flowers, *To Defend the Constitution*, 88-89.

[91] Transcript of Record at 6, *United States v. Schwimmer*, 279 U.S. 644 (1929); Flowers, *To Defend the Constitution*, 89, 132n12.

[92] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 364-366; Flowers, *To Defend the Constitution*, 89.

[93] Bromley, "The Pacifist Bogey," 555. Later scholars have repeated this same claim: see also Harbaugh, *Lawyer's Lawyer*, 284; and Bredbenner, *A Nationality of Her Own*, 184.

chance of a rubber-stamped naturalization disappeared.[94] It was hearing after hearing, and appeal and after appeal, from that moment on.

Separately, in 1925, Colonel Lee Alexander Stone, of the Chicago Military Intelligence Association, began to investigate Schwimmer for suspected seditious activities—at the behest, she came to believe, of the Illinois Federation of Women's Clubs.[95] The clubwomen's primary motive, ostensibly, was to browbeat a local speaker's bureau into removing Schwimmer from their roster.[96] (Ironically, this only made Schwimmer more eager to become a U.S. citizen, for she would need a passport to be able to travel back to Europe, where she might still be able to make a living as a lecturer.)[97] But Stone's organization also produced a "spy report," which perpetuated the lie that Schwimmer had been a wartime German spy (and which Schwimmer, writing in 1930, called "the gem of my vast collection of slanders and libels").[98] Even more important, it induced Schwimmer to write to Stone directly—thereby creating a written record of her most radical personal beliefs.

It was in her correspondence with Stone that Schwimmer described herself as an "uncompromising pacifist," with "no sense of nationalism" and "only a cosmic consciousness of belonging to the human family." She hoped that explaining her principles would prove her

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[94] Transcript of Record at 6, 8-10, 11, *United States v. Schwimmer*, 279 U.S. 644 (1929); Flowers, *To Defend the Constitution*, 89-91, 93, 95-96.
[95] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 368-370; Flowers, *To Defend the Constitution*, 91-93; Wernitznig, "Living Peace, Thinking Equality," 123.
[96] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 368-369.
[97] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 365; Flowers, *To Defend the Constitution*, 91-92.
[98] Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 368-369; Flowers, *To Defend the Constitution*, 91-92.

harmlessness. Instead, as before, Stone forwarded the letters to Fred Schlotfeldt—and these specific phrases became powerful pieces of evidence against her naturalization, up to and including at the U.S. Supreme Court.[99]

After exchanging his own series of letters with Schwimmer—in which she endeavored to further clarify her views on pacifism, religion, the horrors of "liv[ing] under feudal, under soviet, and under white terror regimes," and the relative, evident merits of American democracy—Schlotfeldt nonetheless determined that Schwimmer was incapable of swearing sincerely to the oath of allegiance.[100] He conveyed as much (and all of Schwimmer's missives) to the U.S. District Court for the Northern District of Illinois before she appeared there in October 1927.[101] But while this court hearing, too, touched upon Schwimmer's particular political and philosophical commitments, it also involved—in fact mostly involved—questions that could have been asked of any other resident alien woman.

This was, at least in part, Schwimmer's own intention. In the months leading up to the hearing, as well as under direct questioning from another naturalization examiner (a Mr. A. Jordan replaced an "out of town" Schlotfeldt) and the district judge George A. Carpenter, Schwimmer maintained that her gender (and her age) made her unwillingness to bear arms

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[99] Transcript of Record at 11-14, *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Schwimmer*, 279 U.S. 644, 648-649, 651-652; Schwimmer, "An Adventure in Citizenship," Appendix C in Flowers, *To Defend the Constitution*, 368-370; Flowers, *To Defend the Constitution*, 91-93. In this same letter to Stone, Schwimmer also wrote that she was "an absolute atheist"—which even the district judge George Carpenter suggested was irrelevant—and which did not make it into the Supreme Court's decision. See also "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 379.

[100] Transcript of Record at 6-13, *United States v. Schwimmer*, 279 U.S. 644 (1929); Flowers, *To Defend the Constitution*, 93.

[101] Flowers, *To Defend the Constitution*, 93, 96; "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 374-375, 378-379.

entirely beside the point.[102] "I can not see," she insisted, "that *a woman's* refusal to take up arms is a contradiction to the oath of allegiance" [emphasis mine].[103] In fact, according to Schwimmer, it was a measure of how much she "prize[d] the privilege of American citizenship" that she did not outright lie when filling out her naturalization questionnaire. "[F]or all practical purposes," she explained, "I might have done so, as even men of my age—I was 49 years old last September—are not called to take up arms."[104] She never equivocated, to be clear, but she returned time and again to the limits of American state power as she understood them. She was "willing to [do] everything that…American women are asked to do," and no more and no less.[105]

Judge Carpenter, by contrast, seemed intent upon muddying the waters. At several moments, for example (he repeatedly took over the questioning from the naturalization examiner), Carpenter reiterated that "our women do not fight" and would never be made to fight in the future, only to transition seamlessly into hyper-specific questions about the limits of Schwimmer's resistance to arms-bearing (would she "use [her] fists?" would she "carr[y] a gun?") and about the attitude she might adopt towards "other women" who *did* choose to bear arms instead.[106]

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[102] Transcript of Record at 6-14, *United States v. Schwimmer*, 279 U.S. 644 (1929); "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 373-383. George Carpenter served on the U.S. District Court of Northern Illinois from 1910 until 1933. See "Carpenter, George Albert," Federal Judicial Center, https://web.archive.org/web/20230620135215/https://www.fjc.gov/node/1378856 (accessed June 20, 2023).
[103] Transcript of Record at 9, *United States v. Schwimmer*, 279 U.S. 644 (1929); "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 378.
[104] Transcript of Record at 11, *United States v. Schwimmer*, 279 U.S. 644 (1929).
[105] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 375-377.
[106] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 375-377.

Tellingly, Carpenter also held open the possibility that, as an American citizen, Schwimmer might very well be drafted into wartime service of some kind—perhaps in partnership with the "Y.M.C.A., or the knights of Columbus," or perhaps "as a nurse or as some one to give cheer to the soldiers"—and asked, several times, if she would fulfill this obligation he'd just invented.[107] She agreed (while continuing to express that she was "willing to do everything an American citizen has to do, except fighting").[108] So Carpenter used even this line of questioning, too, to ask Schwimmer about her own propensity for physical violence.

He dreamed up a series of increasingly preposterous scenarios. What if Schwimmer were "called to the service…as a nurse," and she were stationed at some far-away front lines and she "saw someone coming…with a pistol in his hand to shoot the back of an officer of our country, and [she] had a pistol handy by."[109] Would she use that pistol, "to kill the enemy" and to "save the life" of the officer?[110] (No.) Would she warn the officer, so that he might "defend himself?"[111] (Yes.) Would she "thro[w herself] on the assailant," to tackle him or try to wrest the pistol away from him, even if it meant she might die herself?[112] (Yes.) What if the assailant were

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[107] Transcript of Record at 13, *United States v. Schwimmer*, 279 U.S. 644 (1929); "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 375, 378.
[108] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 375.
[109] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 378.
[110] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 380.
[111] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 380. One of Schwimmer's attorneys initially put forth this particular question—presumably, hoping that it would help exculpate her—but Judge Carpenter continued to pursue it, and it seems to have had the opposite of the intended effect.
[112] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 380.

"ten feet off," so that she couldn't take him down or save the officer's life without shooting her own pistol, which was, once again, "handy by?"[113] (No.)

For Judge Carpenter, none of these answers sufficed. Even as a now-fifty-year-old woman, Schwimmer had to be ready and willing not only to perform noncombatant service, and not only to die in the line of duty, but to shoot and kill another human being. It was only when she refused—rather than at any other moment of her testimony—that Carpenter declared "The application is denied."[114]

He didn't stop there. As reported the next day in the *New York Times*, "Carpenter pointed to the flag over the courtroom entrance and said: 'You cannot be a half-way citizen under that flag. You must do what our Constitution requires of all American citizens—promise to serve that flag and defend it with your life, if necessary.'"[115] Perhaps the pageantry allowed him to ignore that Schwimmer was in fact prepared to give up her life—and to do all that the Constitution required of those half-way citizens, native-born American women.

The *Times* concluded with a "dispatch" from Chicago, from Rosika Schwimmer herself: "I appeal to Circuit Court of Appeals."[116]

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II. *Schwimmer v. United States* (1928) and *United States v. Schwimmer* (1929)

[113] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 381.
[114] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 378.
[115] "Mme. Schwimmer Is Barred From Citizenship; Asserts She Would Not Kill Nation's Enemy," *New York Times*, October 14, 1927, 1.
[116] "Mme. Schwimmer Is Barred From Citizenship; Asserts She Would Not Kill Nation's Enemy," *New York Times*, October 14, 1927, 1.

Unlike Bertha Staiger's or Edith Ammann's, Rosika Schwimmer's exclusion from citizenship immediately generated a measure of public outrage—and even more widespread surprise. Newspaper editorials across the country questioned the relevance of a fifty-year-old woman's willingness to bear arms.[117] Even some Bureau of Naturalization officials reportedly balked at the unusually speculative nature of Judge Carpenter's interrogation.[118]

Above all else, however, it was the mere fact that Rosika Schwimmer appealed to a higher court that most distinguished her case from those of the pacifist immigrant women denied naturalization before her. Appearing before the Seventh Circuit Court of Appeals and, later on, before the U.S. Supreme Court only brought Schwimmer further national attention—which, in turn, only raised the stakes of her potential naturalization. But even more, it was these decisions which helped to transform an individual, procedural question—could this woman, or this woman, or this woman become an American citizen?—into a comprehensive, and distinctly gendered, constitutional doctrine.

At first, it seemed as though Schwimmer might become a naturalized citizen after all. In late 1927, Schwimmer (with the help of her attorneys, Olive Rabe and William Gemmill) appealed to the U.S. Court of Appeals for the Seventh Circuit.[119] And on June 29, 1928, in *Schwimmer v. United States*, 27 F.2d 742, the appellate court found unanimously in her favor.[120]

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[117] Flowers, *To Defend the Constitution*, 98.
[118] Flowers, *To Defend the Constitution*, 98.
[119] Transcript of Record at 14-15, *United States v. Schwimmer*, 279 U.S. 644 (1929).
[120] *Schwimmer v. United States*, 27 F.2d 742, 744 (7th Cir. 1928). Olive Rabe argued the case for Schwimmer, Fred Schlotfeldt for the government. The three judges who handed down the decision were Samuel Alschuler and Albert Anderson (both of whom held a seat on the Seventh Circuit) and Robert Baltzell (a judge for the U.S. District Court for the District of Indiana). See "Alschuler, Samuel," Federal Judicial Center, https://web.archive.org/web/20230620141049/https://www.fjc.gov/node/1377136 (accessed June 20, 2023); "Anderson, Albert Barnes," Federal Judicial Center,

The opinion hinged on the court's interpretation of the Naturalization Act of 1906. The law's "fourth subdivision" (a subset of the same section that set forth the oath of allegiance), required that an applicant for citizenship "has *behaved* as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same" [emphasis mine].[121] According to the Seventh Circuit, however, the district court had not denied Schwimmer's petition on the basis of her "conduct" but, to the contrary, on the basis of "a hypothetical question" ("22. If necessary, are you willing to take up arms in defense of this country?") and the "mere views" she had expressed in response ("I would not take up arms personally").[122]

Of course, Question 22 was *always* hypothetical. It asked petitioners to make a guess, as much as a promise, about how they might act in an unknown and unknowable future conflict. But that wasn't the problem. Rather, the members of the Seventh Circuit objected—in Schwimmer's case alone—because she was a "woman fifty years of age."[123]

The opinion quoted from Emerich de Vattel's still-definitive *Law of Nations* and referred, as well, to "any present law of the United States" and "all the conscription acts of which we have knowledge." According to every one of these authorities, the Seventh Circuit explained, women (and especially middle-aged women) were "considered incapable of bearing arms." They

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https://web.archive.org/web/20230927025753/https://www.fjc.gov/node/1377176 (accessed September 27, 2023); and "Baltzell, Robert C.," Federal Judicial Center, https://web.archive.org/web/20230620141432/https://www.fjc.gov/node/1377411 (accessed June 20, 2023).

[121] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607; *Schwimmer v. United States*, 27 F.2d 742, 743 (7th Cir. 1928).

[122] *Schwimmer v. United States*, 27 F.2d 742, 743, 744 (7th Cir. 1928).

[123] *Schwimmer v. United States*, 27 F.2d 742, 744 (7th Cir. 1928).

possessed no "'obligation'" to defend the country in time of war. They could not now and most likely would never be drafted into combatant service. A fifty-year-old woman's would-be conscientious objection, therefore, was "immaterial" to her fitness for citizenship—and there was no good reason to prevent Rosika Schwimmer from becoming a naturalized American.[124]

The Seventh Circuit did not pass judgment on Bureau of Naturalization policy more broadly. But the decision's implications—not only for Judge Carpenter, but also for Judge FitzHenry, and Judge Wolverton, and any other district judge who'd ostensibly fallen prey to the same kind of category error—were vast and unavoidable. If Rosika Schwimmer could become an American citizen, why not any other conscientious-objector woman—or perhaps, if naturalization examiners' interpretation of the oath of allegiance mattered so little, why not any other conscientious-objector man?

Faster than their counterparts at the Department of Justice, administrators at the Department of Labor (which included the Bureau of Naturalization) understood that *Schwimmer v. United States* spelled disaster. Between July and September 1928, Acting Secretary of Labor Carl Robe White continually implored Attorney General John Sargent to appeal to the U.S. Supreme Court.[125] White tried to underscore the scale of the problem—and to offer up potential legal arguments. He needed the justices to validate that petitioners' beliefs, as much as their actions, were the province of naturalization hearings; that female petitioners' beliefs, as much as male petitioners', were required to meet the standards set by the oath of allegiance; and that only naturalization examiners, rather than the petitioners themselves, could determine whether those

[124] *Schwimmer v. United States*, 27 F.2d 742, 744 (7th Cir. 1928).
[125] Flowers, *To Defend the* Constitution, 103-106, 138n52, 138n53, 138n56, 138n62, 138n63, 138n65, 138n66.

standards had been met.[126] Otherwise, not only would this one woman become an American citizen, but the entire edifice of U.S. naturalization policy would collapse.

But the officials responsible for bringing the appeal—Solicitor General William Mitchell and Acting Solicitor General Gardner Lloyd (who filled in for Mitchell during an "extended vacation")—were reluctant, precisely because the "'test case'" they were being handed was Schwimmer's own.[127] Mitchell, for example, told colleagues that he feared it would be difficult to convince the justices to overlook Schwimmer's gender—not least because the state officials who'd handled her case so far had furnished such a "'slim record'" of anything but her personal unwillingness to take up arms.[128] Later on, Lloyd likewise concluded that there was "'nothing in the record to show that the woman is not attached to the principles of the Constitution.'"[129] Admittedly, this came as something of a shock. He wrote that "'like most everybody else who reads the papers and tries to keep informed about what is going on in the world,'" he had already decided that Schwimmer "'was a most pestiferous woman'"—but he simply couldn't find sufficient proof.[130]

Eventually, however, the Justice Department relented. In September, less than a month after deciding not to go forward with an appeal, the government reversed course and filed a petition for a writ of certiorari with the Supreme Court.[131] And, as they put together their legal

[126] Flowers, *To Defend the Constitution*, 103-105.
[127] Flowers, *To Defend the Constitution*, 106-107.
[128] Flowers, *To Defend the Constitution*, 104.
[129] Flowers, *To Defend the Constitution*, 105.
[130] Flowers, *To Defend the Constitution*, 105-106.
[131] Transcript of Record at 21, *United States v. Schwimmer*, 279 U.S. 644 (1929); Flowers, *To Defend the Constitution*, 105-108.

briefs, Mitchell and his team endeavored to furnish what they felt had been missing: namely, a more accurate accounting of Schwimmer's perniciousness.[132]

In part, that meant discrediting Schwimmer's testimony if and when it seemed to exonerate her. "The respondent is a very clever woman," explained the Brief for the United States. "She was allowed, very largely, to make out her case by written answers to the question propounded to her, and her answers were skillfully prepared and delivered with the evident purpose of sticking to her convictions, but at the same time glossing over the difficult points in an effort to pass the naturalization test."[133] For example, while Schwimmer had indicated that she only opposed arms-bearing for herself, she in fact—the government argued—objected to any and all armed defense, even by draft-age men, and would undoubtedly "agitate against" their constitutionally-required service, too, "in her speeches and writings" in the future.[134]

Indeed, in lieu of much new evidence—the brief's principal source was still Schwimmer's correspondence with Col. L. A. Stone of the Chicago Military Intelligence Association, in which she'd made pronouncements like "I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist"—the government emphasized Schwimmer's chosen career and, accordingly, her potential influence.[135] In fact, the nineteen-

[132] Flowers, *To Defend the Constitution*, 106-108.
[133] Brief for the United States at 5-6, *United States v. Schwimmer*, 279 U.S. 644 (1929), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104882004/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=4aa8d73a&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the United States, *United States v. Schwimmer*, 279 U.S. 644 (1929)].
[134] Brief for the United States at 6, *United States v. Schwimmer*, 279 U.S. 644 (1929).
[135] Brief for the United States at 5, *United States v. Schwimmer*, 279 U.S. 644 (1929).

page brief mentioned that Schwimmer was a "woman who is a writer, author, and propagandist" five separate times.[136]

On the one hand, the government aimed to neutralize Schwimmer's gender: to make her primary position—that, as a middle-aged woman, she was "incapable" of taking up arms—seem all but irrelevant, if not entirely moot. On the other hand, the brief also made plain that Schwimmer was especially threatening because she was a woman who refused to behave like other women (even Jane Addams!). At oral arguments, Acting Solicitor General Alfred Wheat was even more explicit. As reported in *Time Magazine*, he "told the court that, if 'an ordinary American housewife' held her beliefs it wouldn't matter, but that in the 'brilliant Schwimmer mind' those same beliefs were dangerous."[137]

In this way, the government's argument ignored—or perhaps even deliberately erased—women like Bertha Staiger, Frieda Aberle, Mary King, and Rose and Edith Ammann, all of whom were undeniably ordinary (albeit unmarried) and who'd been denied naturalization for far less than Rosika Schwimmer. The Brief for the United States even quoted (at great length) from jury instructions that Judge Charles Wolverton had handed down in a male petitioner's trial, but not from his orders against King or the Ammanns.[138] The Justice Department may very well not have been aware of those orders—that various high-ranking officials were so anxious about the feebleness of their appeal suggests as much—but the omission was also part and parcel of a larger legal strategy. Time and time again, rather than argue that Rosika Schwimmer's exclusion

[136] Brief for the United States at 2, 5, 8, 9, 17, *United States v. Schwimmer*, 279 U.S. 644 (1929).
[137] "A Woman Without a Country," *TIME Magazine*, June 10, 1929, 13.
[138] Brief for the United States at 13-15, *United States v. Schwimmer*, 279 U.S. 644 (1929).

from citizenship was standard Naturalization Bureau practice, the government brief made it seem exceptional instead.

There were other precedents the government failed to make use of as well: like the case of William Roeper, a would-be conscientious objector who'd been denied citizenship by a Delaware district court in *In re Roeper* all the way back in 1921.[139] (As best I can determine, Roeper was the only pacifist resident alien, prior to Schwimmer, whose exclusion from citizenship resulted in a published opinion—and yet the government brief overlooked it entirely.)[140] Or the years-later, summary dismissals of petitions from tens of thousands of immigrant men who'd lawfully exempted themselves from the draft during the Great War.[141] (Rather than capitalize on these many cases, the Justice Department insisted they were inapposite, since Schwimmer had not "availed [herself] of a statutory immunity from military service.")[142] All told, the government brief—through what it excluded as much as through what it included—managed to simultaneously suggest that Rosika Schwimmer's gender was of no consequence; that Schwimmer was a particularly untrustworthy woman; and that she was a singularly treacherous person, even more so than thousands of already-deemed-disloyal men.

All three lines of argument seemed to resonate with the Supreme Court, but especially the last (which must have come as a surprise to Solicitor General Mitchell, who'd yearned for an easier "'test case'").[143] On May 27, 1929, in *United States v. Schwimmer*, 279 U.S. 644, six

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[139] *In re Roeper*, 274 F.490 (Del. 1921). On Roeper's case, see also Capozzola, *Uncle Sam Wants You*, 81.
[140] For the same reason, presumably, the Supreme Court also failed to cite *In re Roeper* in its decision in *United States v. Schwimmer*.
[141] Brief for the United States at 18-19, *United States v. Schwimmer*, 279 U.S. 644 (1929). See also Bredbenner, "A Duty to Defend?," 233, 236-245.
[142] Brief for the United States at 18-19, *United States v. Schwimmer*, 279 U.S. 644 (1929).
[143] William Mitchell quoted in Flowers, *To Defend the Constitution*, 107.

justices ruled to reverse the Seventh Circuit's decision and to affirm the district court's instead.[144] And the majority opinion, delivered by Justice Pierce Butler, did everything it could to make Rosika Schwimmer seem particularly unworthy of citizenship.

The opinion, for example, reprinted several excerpts from Schwimmer's written and oral testimony in Chicago as well as several more from her correspondence with Fred Schlotfeldt and with Colonel Stone.[145] Not all of the quotes were damning—for instance, the majority made note of Schwimmer's "steadfast opposition to any undemocratic form of government" and also incorporated her own explanations of the phrases "uncompromising pacifist" and "no sense of nationalism"—but taken together, they suggested that Schwimmer's was an extremely unusual case and that her beliefs merited both intense scrutiny and considerable skepticism.[146]

What's more, the various excerpts helped contextualize Schwimmer's answer, in response to Question 22 of the standard naturalization questionnaire, that she "would not take up arms personally."[147] This was where Schwimmer's difficulties undoubtedly began—but the Court could not pretend that Schwimmer herself was now or would ever be called upon to head into combat. Thus, the opinion articulated two additional reasons to exclude Schwimmer from citizenship: first, because her "objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms"; and second, because "she is disposed to exert her power to influence others to such opposition."[148]

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[144] *United States v. Schwimmer*, 279 U.S. 644, 653 (1929).
[145] *United States v. Schwimmer*, 279 U.S. 644, 647-649 (1929).
[146] *United States v. Schwimmer*, 279 U.S. 644, 647-648 (1929).
[147] *United States v. Schwimmer*, 279 U.S. 644, 646-647 (1929).
[148] *United States v. Schwimmer*, 279 U.S. 644, 651, 652 (1929).

Both reasons not only held Schwimmer responsible for her unwillingness to bear arms—irrespective of her non-obligation to bear arms—but also seized upon her public standing (and evident notoriety) in order to do so. This did not mean, however, that the *Schwimmer* precedent could never apply to any other petitioner. To the contrary: the more the majority opinion worked to distinguish Rosika Schwimmer from anyone else, the more it ended up ensuring that its findings could embrace anyone at all—pacifist women as well as pacifist men, and all of them anything but extraordinary.

Consider, for example, the way in which the opinion differentiated between a "pacifist" and a "conscientious objector." In the Court's telling, a pacifist was an acceptable member of the American body politic, for he or she merely "seeks to maintain peace and to abolish war."[149] A conscientious objector, on the other hand, was someone who both would not take up arms *and* would "encourage others" to do the same.[150] It was a definition perfectly crafted to include Schwimmer—despite her gender and despite her "inability" to bear arms.[151] But it left no room to contemplate a person who wished to avoid military service, on his (or her) own, without exerting any influence. In other words, it wasn't just that a woman could be a conscientious objector because she—just as much as any man—could sway the people around her. It was that everyone, man or woman, stopped being a pacifist and became a conscientious objector the moment her or she resisted arms-bearing—even in the absence of any such obligation.

The majority elaborated on this theme in a paragraph that compared Schwimmer to the conscientious objectors—all men, of course—who had troubled the state "during the recent

[149] *United States v. Schwimmer*, 279 U.S. 644, 652 (1929).
[150] *United States v. Schwimmer*, 279 U.S. 644, 652 (1929).
[151] *United States v. Schwimmer*, 279 U.S. 644, 651 (1929).

war."[152] Notably, the opinion blurred any distinctions that might have existed between those who'd enlisted but received "noncombatant certificates" from the government; those who'd registered for the draft but requested "exemption from any form of military service" whatsoever; and those who'd resisted entirely and been detained for "disobedience, desertion, propaganda and sedition."[153] In the eyes of the Court, all of these conscientious objectors were, by definition, insufficiently attached to the principles of the Constitution—just like Rosika Schwimmer.[154]

The comparison was a useful one, because it tied Schwimmer to convicted criminals and to a supposedly existential threat that the nation had already struggled to combat—and, specifically, by cracking down on American citizens' civil rights and civil liberties. If the government had been justified in its treatment of those already-citizens, how much more so, the majority suggested, was it justified in denying Rosika Schwimmer citizenship in the first place. Even more, the comparison was essential to what would become (in this chapter's parlance) the willingness-without-obligation doctrine: it wasn't just that Schwimmer's inability to take up arms couldn't explain away her unwillingness to do so. It was that she'd committed precisely the same offense as those thousands of men who'd failed to fulfill the obligations that they did in fact possess. And any other pacifist woman—even without Schwimmer's public platform—might go wrong in the very same way.

The *Schwimmer* opinion was not unanimous. Justice Oliver Wendell Holmes penned a forceful dissent, joined by Justice Louis Brandeis, which began by declaring that Schwimmer was "a woman of superior character and intelligence, obviously more than ordinarily desirable as

[152] *United States v. Schwimmer*, 279 U.S. 644, 652 (1929).
[153] *United States v. Schwimmer*, 279 U.S. 644, 652 (1929).
[154] *United States v. Schwimmer*, 279 U.S. 644, 651, 652 (1929).

a citizen of the United States."[155] Holmes's evidence was exactly the same as the majority's: that Schwimmer's only failings were "an extreme opinion in favor of pacifism" and a personal unwillingness to take up arms in defense of the United States.[156] He dispensed with the latter by noting that "she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to."[157] But where the Seventh Circuit had stopped there—at Schwimmer's physical and legal ineligibility for military service—Holmes went further.

He insisted that Schwimmer's "extreme opinion in favor of pacifism" was in fact not too dissimilar from the opinion of "most people"—who looked upon war with "horror," imagined it only as a "a last resort" and, even if they were less "optimistic" than Schwimmer that it could be eliminated entirely, "welcome[d] any practicable combinations that would increase the power on the side of peace."[158] Accordingly, Holmes also did not regard Schwimmer's pacifism as a sign of her disloyalty but rather as an expression of her commitment to a nation and to a government that could be "improved"—a stance that was not "materially different" from another petitioner's that, say, the President should serve a seven-year term or that Prohibition should come to a speedy end.[159]

It was particularly striking that Holmes—who'd written the opinion, ten years earlier, in *Schenck v. United States*—defended pacifism so emphatically here. But he distinguished between the two cases: during World War I, Charles Schenck had helped print leaflets urging

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[155] *United States v. Schwimmer*, 279 U.S. 644, 653 (1929). Justice Edward Sanford also dissented but on different (and narrower) grounds. He wrote: "I agree, in substance, with the views expressed by the Circuit Court of Appeals, and think its decree should be affirmed." See *United States v. Schwimmer*, 279 U.S. 644, 655 (1929).
[156] *United States v. Schwimmer*, 279 U.S. 644, 653 (1929).
[157] *United States v. Schwimmer*, 279 U.S. 644, 653-654 (1929).
[158] *United States v. Schwimmer*, 279 U.S. 644, 653-654 (1929).
[159] *United States v. Schwimmer*, 279 U.S. 644, 654 (1929).

draft-age men to resist their own conscription; Rosika Schwimmer (Holmes believed) would never do the same, even if and when "a war came" again.[160] The comparison (the opposite of the one made by the majority between Schwimmer and those jailed for propaganda and sedition) reflected Holmes's faith in Schwimmer herself, as well as his seeming conviction that the individual rights that could be restricted in wartime deserved more protection in peacetime—or at least until the hypothetical offender actually committed an offense. (The majority, which penalized Schwimmer for her imagined future conduct, appeared to disagree with both propositions.)[161]

It was also this comparison which gave rise to one of Holmes's most vivid and enduring turns of phrase, which wedded together the requirements of the Naturalization Act of 1906 and the guarantees of the First Amendment:

> Some of [Schwimmer's] answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.[162]

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[160] *Schenck v. United States*, 249 U.S. 47 (1919); *United States v. Schwimmer*, 279 U.S. 644, 654 (1929).

[161] The "metaphor…of a pendulum swinging back and forth between protection of rights during peacetime and protection of security during wartime" is a common but flawed one, as evidenced by the fact that the majority (rather than Holmes and Brandeis) prevailed in the decidedly peacetime case of *United States v. Schwimmer*. See Mary L. Dudziak, "Making Law, Making War, Making America," in *The Cambridge History of Law in America, Volume III: The Twentieth Century and After (1920-)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 680-717.

[162] *United States v. Schwimmer*, 279 U.S. 644, 654-655.

Calls to defend "freedom for the thought that we hate" have resounded in First Amendment jurisprudence (and First Amendment scholarship) ever since.[163] Rosika Schwimmer's fate, however, was sealed: until her death in 1948, she would never become an American citizen.[164]

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III. Making Sense of *Schwimmer*: Margaret (Dorland) Webb, Mary Mabel (Harris) Boe, and Martha Jane Graber

Two days after the Supreme Court issued its decision in *United States v. Schwimmer*, Anthony Griffin, a Democratic Representative from New York, introduced a bill "To amend the naturalization law."[165] Griffin, who'd served in the National Guard in the Spanish-American War, was no pacifist. In the years since she'd filed her second papers in Chicago, however, Rosika Schwimmer had moved to New York City—and most likely to Griffin's district.[166] The

[163] See, for example, Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (Lawrence: University Press of Kansas, 1999); and Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (New York: Basic Books, 2007).
[164] Though she never became a citizen, Schwimmer was also never deported. In the 1930s and 1940s, she lived on the Upper West Side of Manhattan. See Flowers, *To Defend the Constitution*, 94, 319-323; Rosika Schroinmer [*sic*], 1930 census, Manhattan, New York County, New York, Family History Library microfilm publication 2341289, page 28B, ED 412, image 56, *Ancestry.com* (accessed October 4, 2023) [hereafter cited as Rosika Schroinmer [*sic*], 1930 census]; and Rosika Schwimmer, 1940 census, New York, New York County, New York, T627, roll m-t0627-02637, page 5A, ED 31-603, image 9, *Ancestry.com* (accessed October 4, 2023) [hereafter cited as Rosika Schwimmer, 1940 census].
[165] U.S. Congress, House, *A Bill To amend the naturalization law*, H.R. 3547, 71st Cong., 1st sess., introduced in House May 29, 1929 [hereafter cited as H.R. 3547, 71st Cong., 1st sess., 1929].
[166] Schwimmer moved to New York in 1926 (even as her naturalization proceedings continued to move forward in Illinois) and settled on the Upper West Side of Manhattan. Anthony Griffin represented New York's 22nd congressional district—which then included parts of Manhattan and the Bronx—from 1918 until his death in 1935. See Flowers, *To Defend the Constitution*, 94, 229; Rosika Schroinmer [*sic*], 1930 census; Rosika Schwimmer, 1940 census; "GRIFFIN, Anthony Jerome," Biographical Directory of the United States Congress, https://bioguide.congress.gov/search/bio/G000457 (accessed October 4, 2023); and Jeffrey B. Lewis, Brandon DeVine, Lincoln Pitcher, and Kenneth C. Martis, *Digital Boundary Definitions*

congressman was also a longtime proponent of immigration to the United States, aghast at the "hypothetical" nature of Question 22 and the prospect of "ask[ing] aged men and women whether or not they would actually bear arms in time of war," and he found himself profoundly moved by Justice Holmes's dissent.[167] He dashed off the bill, he later said, "five minutes after reading [the] opinion."[168]

Griffin's proposed legislation, H.R. 3547, did not eliminate the need to take the oath of allegiance, nor did it revise the requirements to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic" or to demonstrate that one was "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." It did, however, append an exception:

> Except that no person mentally, morally, and otherwise qualified shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes.[169]

This text was carefully constructed. The 1906 Naturalization Act—adopted at a time when the vast majority of immigrant women were naturalized automatically through marriage—had only ever referred to a hypothetical petitioner with a singular, masculine pronoun.[170] Griffin's amendment, by contrast, used "his or her."[171] Its allusion to "the lawfulness of war as a means of settling international disputes" was even more pointed. It reminded the members of the

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of United States Congressional Districts, 1789-2012 (2013), retrieved from https://cdmaps.polisci.ucla.edu on October 4, 2023.

[167] See, for example, Anthony Griffin at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 4-5, 8-9; and Flowers, *To Defend the Constitution*, 229-231.

[168] Flowers, *To Defend the Constitution*, 230.

[169] H.R. 3547, 71st Cong., 1st sess., 1929.

[170] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607.

[171] H.R. 3547, 71st Cong., 1st sess., 1929.

House that their colleagues in the Senate had recently approved the Kellogg-Briand Treaty, which bound the United States and fourteen other countries in "the renunciation of war as an instrument of national policy."[172] The amendment, therefore, was not only meant to create a path to citizenship for Rosika Schwimmer—and for other pacifist petitioners like her—but also to demonstrate that the *Schwimmer* doctrine was inimical to American interests.

H.R. 3547 gave rise to congressional hearings, in May 1930, but the bill never made it out of the House Committee on Immigration and Naturalization.[173] Two years later, in December 1931, Griffin introduced H.R. 297, which added the phrase "but every alien admitted to citizenship shall be subject to the same obligations as the native-born citizen" to the end of the text above—a further amendment meant, as a frustrated Griffin explained, "for the 'boneheads' who could not understand that he did not intend to give naturalized pacifists special privileges."[174] H.R. 297 similarly resulted in congressional hearings, held in January 1932, but, once again, that was all.[175]

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[172] *International treaty providing for the renunciation of war. Signed at Paris, August 27, 1928; proclaimed, July 24, 1929*, *U.S. Statutes at Large* 46 (1928): 2343-2348.
[173] *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930.
[174] U.S. Congress, House, *A Bill To provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from citizenship*, H.R. 297, 72nd Cong., 1st sess., introduced in House December 8, 1931; Flowers, *To Defend the Constitution*, 240, 260n39.
[175] U.S. Congress, House, Select Committee on Immigration and Naturalization, *Hearings on H.R. 297, To Reconcile Naturalization Procedure with the Bill of Rights*, 72nd Cong., 1st sess., 1932 [hereafter cited as *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932]. Griffin also introduced H.R. 298—a bill which reproduced the text of H.R. 3547 exactly—at the same time that he introduced on H.R. 297, but the House hearings focused on the latter precisely because it was different from what had come before. See also U.S. Congress, House, *A Bill To provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from citizenship*, H.R. 298, 72nd Cong., 1st sess., introduced in House December 8, 1931; and Flowers, *To Defend the Constitution*, 240.

Even more proposals followed: between 1932 and 1939, Griffin and several other congresspeople introduced an additional five bills—three in the House, two in the Senate—that would have affirmatively enabled conscientious objectors to become naturalized citizens.[176] But none of them made it to a vote, either. (Nor did the one opposing bill, also introduced in 1929, that would have made an affirmative obligation to "bear arms in defense of the United States" part of the text of the Naturalization Act of 1906—at least in part because administrators from the Bureau of Naturalization felt such intervention was unnecessary in light of the Supreme Court's decision in *Schwimmer*.)[177]

Even the Griffin-backed bills, which gave rise to hearings, failed to go as far as they might have: they focused on "religious views" and "philosophical opinions" about war, for example, instead of addressing actual arms-bearing head-on.[178] Nonetheless, they faltered, up

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[176] U.S. Congress, Senate, *A Bill To permit naturalization of alien conscientious objectors*, S. 3275, 72nd Cong., 1st sess., introduced in Senate [by Sen. Bronson Cutting of New Mexico] January 25, 1932; U.S. Congress, House, *A Bill To provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from citizenship*, H.R. 1528, 73rd Cong., 1st sess., introduced in House [by Rep. Griffin] March 9, 1933 [hereafter cited as H.R. 1528, 73rd Cong., 1st sess., 1933]; U.S. Congress, House, *A Bill To provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from citizenship*, H.R. 5170, 74th Cong., 1st sess., introduced in House [by Rep. Caroline O'Day of New York] January 31, 1935 [hereafter cited as H.R. 5170, 74th Cong., 1st sess., 1935]; U.S. Congress, House, *A Bill To provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from citizenship*, H.R. 8259, 75th Cong., 1st sess., introduced in House [by Rep. O'Day] August 17, 1937 [hereafter cited as H.R. 8259, 75th Cong., 1st sess., 1937]; U.S. Congress, Senate, *A Bill Authorizing the naturalization of certain aliens*, S. 165, 76th Cong., 1st sess., introduced in Senate [by Sen. Gerald Nye of North Dakota] January 4, 1939 [hereafter cited as S. 165, 76th Cong., 1st sess., 1939].

[177] U.S. Congress, Senate, *A Bill To amend an Act entitled "An Act to provide for a uniform rule for the naturalization of aliens throughout the United States, and establishing a Bureau of Naturalization," approved June 29, 1906, as amended*, S. 1506, 71st Cong., 1st sess., introduced in Senate [by Sen. Daniel Steck of Iowa] June 14, 1929. See also Flowers, *To Defend the Constitution*, 236, 259n31.

[178] For example, this was one of American Civil Liberties Union Executive Director Roger Baldwin's major objections to Griffin's bills. See Flowers, *To Defend the Constitution*, 236-239.

against members of Congress who alternately expressed their respect for the Supreme Court's ruling, their conviction that un-naturalized resident aliens deserved none of the constitutional protections reserved for citizens, or their certainty that a growing number of pacifist Americans would inexorably endanger the nation, if and when the next war inevitably arrived.[179] The Kellogg-Briand Treaty, it turned out, was rather ineffective—even before it was discredited entirely by the outbreak of the Second World War.[180]

But if the various bills accomplished very little, they still revealed a great deal about the political culture of the so-called interwar period—and, more specifically, about the ways in which the Supreme Court's decision in *United States v. Schwimmer* did and did not effect larger changes. Indeed, while *Schwimmer* might have made naturalization decisions more uniform, the results weren't quite so simple. The congressional hearings on H.R. 3547 and on H.R. 297—held in 1930 and in 1932, respectively—instead offered up evidence of a naturalization system still dependent on state officials' individual discretion and on their intensive scrutiny of individual pacifists' principles and beliefs.[181] In particular, the hearings illustrated that federal judges faced pressure to apply—but struggled mightily with *how* to apply—the *Schwimmer* precedent to thoroughly ordinary pacifist women, like Margaret Webb, Mabel Boe, and Martha Graber: all of whom, at least at first, were excluded from American citizenship.[182]

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[179] For a succinct summary of the various supporters and opponents of the various bills, see Flowers, *To Defend the Constitution*, 230-246.

[180] Proponents of the bills to naturalize would-be conscientious objectors frequently drew Congress' attention to the Kellogg-Briand Treaty. See, for example, *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 10-11, 25-26, 29, 199, 203, 205, 208, 219, 220, 227-229, 240-242, 246.

[181] *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930; *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932.

[182] In March 1932, the Senate also held hearings on S. 3275—see U.S. Congress, Senate, Subcommittee on Immigration, Committee on the Judiciary, *Hearings on S. 3275, Naturalization*

Undoubtedly, not unlike before *Schwimmer* became the law of the land, several more pacifist women were likewise denied naturalization in this same period—and with less fanfare.[183] (Some number of pacifist women were also *granted* naturalization, in the face of *Schwimmer*'s findings.)[184] Even Margaret Webb, Mabel Boe, and Martha Graber never appealed their decisions to higher courts and never received reported case numbers. But their stories—words of praise from their congressional representatives, sympathetic excerpts from newspaper reports,

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of Alien Conscientious Objectors, 72nd Cong., 1st sess., 1932—but these did not examine the naturalization cases of Margaret Webb, Mabel Boe, or Martha Graber.

[183] Mary King, for example, seems to have been denied naturalization for a second time in 1929, but she received no mention in the *Hearings on H.R. 297* and only one brief mention in the *Hearings on H.R. 3547* (a professor from Goshen College included her name in a letter he sent to the Committee on Immigration and Naturalization—see *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 95). Several more women's names also appear in the "CONSCIENTIOUS OBJECTORS" cards in this same post-*Schwimmer* period, though they likewise were not mentioned at the congressional hearings. See, for example, Elly Pudleiner (INS Reference Number 23-6296), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3922, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Elly Pudleiner, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service]. I have not been able to find an Order of Court Denying Petition for Pudleiner, who immigrated from Germany, but—although she was married to an Alabama-born man and had two American-born children—she was still classified as an un-naturalized alien in both the 1930 federal census and the 1940 federal census. See Elly Pudleiner, 1930 census, Berrien Springs, Berrien County, Michigan, Family History Library microfilm publication 2340712, page 5B, ED 43, image 10, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Elly Pudleiner, 1930 census]; and Elley [*sic*] Pudliner [*sic*], 1940 census, Oronoko, Berrien County, Michigan, T627, roll m-t0627-01733, page 5A, ED 11-66, image 9, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Elley [*sic*] Pudliner [*sic*], 1940 census].

[184] In October 1930, for example, Dorothy Dunbar Bromley wrote in *Harper's Magazine*: "With the Pacifist Inquisition spreading so rapidly it is heartening to hear of two district judges who have not lacked the courage to admit Quakers. In October of last year Judge Paul J. McCormick of Los Angeles granted citizenship papers to the Reverend R. Ernest Lamb, pastor of the First Friends' Church, *and to his wife*. In their case, curiously enough, the Naturalization Bureau had raised no objections whatsoever…Another Quaker, *Mrs. Hannah Starr Outland* of Media, Pennsylvania, was recently admitted to citizenship with no hitch in the proceedings. The Quakers are of course not without influence in their own State" [emphasis mine]. See Bromley, "The Pacifist Bogey," 559.

and full or partial transcripts from their naturalization proceedings—made their way into the halls of Congress.

It was in these three women's naturalization proceedings that the distinctly gendered *Schwimmer* doctrine—which held that women must be willing, without ever being obligated, to take up arms in defense of the United States—was tested, reworked, reaffirmed, and tested again. Grouped together in two rounds of congressional hearings, moreover, Webb, Boe, and Graber also came to represent a discrete cohort of petitioners: pacifist women who were harmed as much by the *Schwimmer* decision as by the 1922 Cable Act, and by the simultaneously equal and unequal standards they were forced to meet in order to become American citizens.[185]

❖ Margaret (Dorland) Webb

Margaret Dorland was born in Ontario in 1882. The summer before she turned twenty-five, she married John Webb, another Ontario native. Over the next six years, while still in Canada, Margaret and John had four children: William, Elizabeth, Edith, and David. In 1917, just a few months after David was born, the Webbs immigrated to the United States. They arrived through Detroit and settled in Indiana not long after that.[186]

Under the Naturalization Act of 1906, would-be citizens were required to reside in the United States for at least five years before filing their first papers. In 1922, the year that the

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[185] See, for example, Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 219-222; and John L. Cable, "The Demand of Women for Equal Citizenship—Removal of Discriminations Against Them Is to Come Up Again at Washington Where a Naturalization Law Amendment Is Pending," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 221-225.

[186] Margaret Hubbs Dorland Webb, Petition for Naturalization (April 14, 1955), Petitions for Naturalization, U.S. District Court for the Central District of California, Los Angeles (1940-1991), Records of District Courts of the United States, Record Group 21 (National Archives at Riverside), images 1274-1275, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Margaret Hubbs Dorland Webb, Petition for Naturalization (1955)].

Webbs would have first been eligible to apply, Congress passed the Cable Act. Accordingly, although they were married, John and Margaret each had to petition for naturalization separately—and Margaret had to take the oath of allegiance on her own.[187]

On March 28, 1929, Margaret Webb appeared at a hearing—ultimately her first of two—before a naturalization examiner, Edward J. Kennedy, and a Wayne County Circuit Court judge, Gustave H. Hoelscher.[188] Webb was then forty-six years old (above the age of conscription even if she were a man), a housewife and mother of four, and an observant Quaker, with religious (rather than philosophical or political) objections to arms-bearing, which state and federal draft laws had long respected.[189] Nonetheless, two weeks before the Supreme Court heard oral arguments in *United States v. Schwimmer*, Kennedy and Hoelscher subjected Webb to a series of

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[187] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607; *Married Women's Citizenship Act*, Public Law 67-346, *U.S. Statutes at Large* 42 (1922): 1021-1022.

[188] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 175. Gustave Hoelscher served on the Wayne County Circuit Court from 1924 to 1967. See Mike Emery, "New judge honored to preside in Wayne County Circuit Court," *Palladium-Item* (Richmond, IN), June 25, 2021, accessed September 26, 2023, https://www.pal-item.com/story/news/local/2021/06/25/wayne-county-indiana-circuit-court-new-judge-april-drake/5349611001/.

[189] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 175-176; Margart [*sic*] Webb, 1920 census, Richmond (Ward 4), Wayne County, Indiana, T625, roll T625_474, page 13B, ED 167, image 26, *Ancestry.com* (accessed September 20, 2023); Margaret D. Webb, 1930 census, Richmond, Wayne County, Indiana, Family History Library microfilm publication 2340372, page 7B, ED 32, image 14, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Margaret D. Webb, 1930 census]. The World War I-era draft laws, for example, ultimately applied to men "between the ages of eighteen and forty-five, both inclusive" and exempted "member[s] of any well-recognized religious sect or organization…whose existing creed or principles forbid its members to participate in war in any form" from combatant service. See *Selective Service Act of 1917*, Public Law 65-12, *U.S. Statutes at Large* 40 (1917): 76-83; and *Selective Service Act Draft Requirements*, Public Law 65-210, *U.S. Statutes at Large* 40 (1918): 955-957.

probing questions about her readiness to kill and to die—all while, simultaneously, arguing with each other about how to approach her case.

When Kennedy, for example, asked Webb if she was a "conscientious objector" and if, therefore, she could only "support and defend" the United States insofar as she could avoid "bloodshed," Judge Hoelscher interjected to muse aloud, "I guess she won't have to go to war, though," and to ask Webb, instead, if she "would be willing to do service in the Red Cross."[190] At several more moments, too, Hoelscher seemed to deliberately put forth questions that Webb might answer more favorably, like if she would "be loyal" to America in time of war (yes, though she would never "approve") and, repeatedly, if she "could kill in self-defense" (she could not—which arguably proved her sincerity, even as it seemed to take the judge by surprise).[191]

But Kennedy, the naturalization examiner, kept returning to his most basic claim: that the oath of allegiance demanded the same commitment—to pledge to serve in time of war, and without any "reservation"—from every would-be citizen.[192] And when Judge Hoelscher protested that women would never, really, be drafted into combatant service, Kennedy offered up two conflicting—and therefore revealing—justifications. First, he insisted, "They have not been called on *yet*" [emphasis mine]. A few minutes later, he declared, "I don't think it is so much a question of [Webb being drafted], but the fact there is a requirement.[193] In the first instance, he argued that the state could, and very well might, compel women's military service; in the second,

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[190] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 176.
[191] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 176, 177.
[192] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 177.
[193] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 177.

that the state was so powerful that what it would and would not, and could and could not, compel was all but immaterial. These exchanges betrayed an ideological incoherence, but they also made clear how little that incoherence mattered: either way, Margaret Webb's bid for citizenship was in trouble.

It would be several more months, however, before her petition was rejected entirely. Because *United States v. Schwimmer* was already in motion, Kennedy and Hoelscher—and Webb, with little say in the matter—agreed to postpone until after the Supreme Court decided that case.[194] In this way, Margaret Webb's second naturalization hearing, held in September 1929, offered one of the clearest illustrations of *Schwimmer*'s immediate impact, as well as its particular meaning—as interpreted and reconstituted by the naturalization bureaucracy—for a broader "class" of pacifist resident alien women.[195]

Indeed, towards the end of Webb's second hearing, Judge Hoelscher made plain that, as he understood it, he was "not permitted to override, disagree with, nor to criticize" the *Schwimmer* precedent—no matter his personal feelings, and no matter the distinguishing facts of this case.[196] To that end, he (rather than the naturalization examiner) posed a series of questions aimed at putting Rosika Schwimmer's words—drawn from the testimony she gave at her own naturalization hearing—into Margaret Webb's mouth (such as "You do not care how many other women fight, but you consider it a question of conscience with you. That is it, isn't it?").[197] Even

[194] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 1st sess., 178.
[195] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 178.
[196] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 182.
[197] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 180-181.

more important, when an attorney representing Webb argued that she might be naturalized because she did not possess Schwimmer's "absence of…nationalistic feeling," the judge rebuffed him. "They [the Supreme Court] don't decide it on that," he explained, "They just say that in addition."[198] According to Judge Hoelscher, Schwimmer's basic refusal to take up arms—rather than anything that made her different from or more dangerous than any other pacifist woman—was all that had made her unworthy of becoming a U.S. citizen.

In much the same way, at Webb's second naturalization hearing, Judge Hoelscher also stopped challenging the idea that she might one day be forced to enlist. To the contrary, he asked her time and time again (albeit always in slightly different words): What if women *were* drafted in the next war? What if you were given a gun and sent to the front lines? What if you came face to face with an enemy soldier? If you were *made* to fight, then would you be willing to fight?[199] Each time, in reply, Webb volunteered to do more than what was required of American women: to "render noncombatant service," to turn over any and all of her "property," even to "lay down [her] life"—but never to kill another human being.[200] And for that, even though she did not and would not possess any obligation to take up arms, Margaret Webb could not become an American citizen.[201]

Still, one final irony remained. Margaret Webb's husband John was also a Quaker. In fact, when the family had first arrived in the United States, John had been the pastor of a Quaker

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[198] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 182.
[199] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 178, 179, 181.
[200] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 178, 179, 180.
[201] Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183.

church.[202] In September 1918, however, two months before the end of the Great War, he'd registered with Wayne County's Local Draft Board No. 1, as was required (with few exceptions) of all men between the ages of eighteen and forty-five then residing in the United States.[203] His draft number had almost certainly not been called. Under the Selective Service Act of 1917, even if he *had* been called up, he most likely would have been assigned to noncombatant service—or the kind of service that Margaret had sworn to perform, but to no avail.[204] Nonetheless, on October 2, 1928, John had been admitted to U.S. citizenship.[205]

Since the members of Congress debating H.R. 3547 and H.R. 297 did not reproduce any records from John's naturalization proceedings—only from Margaret's—it is difficult to know exactly what occurred. Question 22 had already been added to the standard naturalization questionnaire, but it was not always uniformly applied, and perhaps John had not been compelled to answer it. Perhaps he'd been more circumspect about his unwillingness to bear arms than his wife would be the following year. Perhaps his assigned naturalization examiner had determined that John's willingness to register for the draft was proof enough of his loyalty. At the very least,

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[202] John Richard Webb, serial no. 2941, order no. 201, Local Draft Board No. 1, Richmond, Wayne County, Indiana, World War I Selective Service System Draft Registration Cards (1917-1918), M-1509 (National Archives at Washington, D.C.), image 19, *Ancestry.com* (accessed October 2, 2023) [hereafter cited as John Richard Webb, draft registration card]; John R. Webb, 1920 census, Richmond (Ward 4), Wayne County, Indiana, T625, roll T625_474, page 13B, ED 167, image 26, *Ancestry.com* (accessed September 20, 2023); John Richard Webb, 1902 Indiana Yearly Meeting, South Eight Street, Wayne County, Indiana, Quaker Meeting Records (1681-1935), Earlham College Friends Collection & College Archives, Richmond, IN, image 50, *Ancestry.com* (accessed September 26, 2023).
[203] John Richard Webb, draft registration card; *Selective Service Act of 1917*, Public Law 65-12, *U.S. Statutes at Large* 40 (1917): 76-83; *Selective Service Act Draft Requirements*, Public Law 65-210, *U.S. Statutes at Large* 40 (1918): 955-957.
[204] *Selective Service Act of 1917*, Public Law 65-12, *U.S. Statutes at Large* 40 (1917): 76-83.
[205] Margaret Hubbs Dorland Webb, Petition for Naturalization (1955).

the Supreme Court hadn't yet decided *United States v. Schwimmer*—and so a federal judge couldn't have yet been made to apply it.

According to the 1930 federal census, all four of the Webb children had already been naturalized as well. Margaret alone was still identified as an "Alien."[206]

❖ Mary Mabel (Harris) Boe

Mary Mabel Harris was born in Des Moines, Iowa on August 20, 1891.[207] She was, at the very least, a third-generation American citizen. Her father, a farmer, was born in Illinois. Her mother, a homemaker, and all four of her grandparents were born in Ohio.[208] Mabel—she most often went by "Mabel"—was the third of six children and the oldest girl.[209] Two more of her sisters were born in Iowa, too, and then the Harris family moved to North Dakota.[210]

In June 1909, when Mabel was just shy of eighteen years old, she married Jorgen Boe.[211] They stayed in North Dakota, and very close to home (in the 1910 U.S. census, the Harrises and

[206] Margaret D. Webb, 1930 census.
[207] Mary Mabel Boe, Petition for Naturalization (November 10, 1928), Order of Court Denying Petition (September 12, 1929), Ward County (Volume F-42, page 70), Naturalization Records, State Historical Society of North Dakota, Bismarck, ND [hereafter cited as Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929)].
[208] Mabel Harris, 1900 census, Township 160, Ward County, North Dakota, T623, roll 1234, page 4, ED 246, image 7, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Mabel Harris, 1900 census]; Zora Harris [sister of Mabel Harris], 1910 census, Sauk Prairie, Ward County, North Dakota, T624, roll T624_1149, page 5B, ED 192, image 10, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Zora Harris, 1910 census].
[209] Mabel Harris, 1900 census; Jorgen Boe, Petition for Naturalization (April 9, 1924), Order of Court Admitting Petitioner (September 25, 1924), Ward County (1924-1934), Naturalization Records (1873-1952), State Historical Society of North Dakota, Bismarck, ND, images 51-52, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924)].
[210] Mabel Harris, 1900 census; Zora Harris, 1910 census; Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).
[211] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).

the Boes appeared on the same sheet of paper).[212] But Jorgen had been born in Norway—and he was still, at the time of their marriage, a Norwegian subject.[213] Thus, under the Expatriation Act—passed just two years earlier—at the moment they tied the knot, Mabel was stripped of her American citizenship and of all the rights and privileges included therein.[214]

Jorgen and Mabel had three children (Jennie, John, and Rachel) in seven years, all of whom were born in North Dakota and born with U.S. citizenship.[215] And Jorgen, at least, was eventually permitted to join them. He filed his first papers in April 1922.[216] In April 1924, when he filed his second papers, one of the witnesses who testified to the truthfulness of his application materials (every petitioner needed two) was Mabel's younger sister Zora—who was, of course, still an American citizen.[217] Like Mabel, Jorgen was a pacifist. In fact, sometime in the 1920s, he became a minister at their local Church of the Brethren congregation, the members of which—commonly known as Dunkards—objected both to arms-bearing and (like Quakers and

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[212] Zora Harris, 1910 census; Mable [*sic*] Boe, 1910 census, Sauk Prairie, Ward County, North Dakota, T624, roll T624_1149, page 5B, ED 192, image 10, *Ancestry.com* (accessed September 20, 2023).
[213] Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924).
[214] *Citizenship and Expatriation Act of 1907*, Public Law 59-193, *U.S. Statutes at Large* 34 (1907): 1228-1229; James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221.
[215] Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924).
[216] Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924).
[217] *Bureau of Immigration and Naturalization Establishment Act of 1906*, Public Law 59-338, *U.S. Statutes at Large* 34 (1906): 596-607; Mabel Harris, 1900 census; Zora Harris, 1910 census; Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924). Zora Harris remained an American citizen for the rest of her life. She married an American-born man named Arthur Larson in 1927. See Zora Larson, 1930 census, Minot, Ward County, North Dakota, Family History Library microfilm publication 2341478, page 5A, ED 45, image 9, *Ancestry.com* (accessed September 20, 2023).

Mennonites as well) to the taking of secular oaths.[218] Nonetheless, Jorgen—who, not unlike John Webb, registered for the World War I draft in the fall of 1918—was admitted to citizenship on September 25, 1924.[219]

But Mabel was not naturalized alongside her husband. The Cable Act, passed two years earlier, had not only failed to restore the citizenship of those native-born women expatriated in the past, but had also closed off any automatic paths to citizenship for married women moving forward.[220] Consequently, Mabel needed to file her own petition for naturalization—which she did, rather inauspiciously, on November 10, 1928, just nine days before the Supreme Court granted a writ of certiorari in *United States v. Schwimmer*.[221]

Mabel's petition for naturalization laid bare, at once, both the tediousness and the absurdity of her situation. On the fourth line of the form, she crossed out "Immigrated to the United States from" and wrote instead, spilling over into the space between the lines, "Born and

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[218] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221. On both Jorgen and Mabel's naturalization documents, the word "sworn" is crossed out in favor of "affirmed." See Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924); and Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).

[219] Jorgen Boe, Petition for Naturalization (1924), Order of Court Admitting Petitioner (1924); Jorgen Blai [*sic*] Boe, serial no. 2260, order no. 55, Local Draft Board, Minot, Ward County, North Dakota, World War I Selective Service System Draft Registration Cards (1917-1918), M-1509, roll ND 26 (National Archives at Washington, D.C.), image 356, *Ancestry.com* (accessed October 2, 2023).

[220] *Married Women's Citizenship Act*, Public Law 67-346, *U.S. Statutes at Large* 42 (1922): 1021-1022; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221.

[221] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929); Transcript of Record at 21, *United States v. Schwimmer*, 279 U.S. 644 (1929).

lived in U.S. all my life – lost citizenship thru marriage to my husband before he became a naturalized citizen."[222] On the fifth line, which asked when she'd filed a declaration of intention, she wrote "Exempt Under Act of Sept. 22-1922"—it was the one concession meted out to the thousands of women who applied for repatriation—and added, too, "My husband is a naturalized citizen."[223] On the sixth line, in the space where she should have listed the names of her children, she worked in yet another reference to her husband's naturalization status, writing, in parentheses, "(My husband, Jorgen Boe was naturalized Sept. 25-1924, at Minot, N.D. We were married June, 23rd, 1909)." On the seventh line, Mabel disclaimed the allegiance she'd never really given to "Haakon VII. King of Norway"; and on the ninth line, she filled in that she'd "resided continuously in the United States…since the 20 day of August anno Domini 1891"—namely, her date of birth.[224]

On September 12, 1929, however—five months after the Supreme Court decided *United States v. Schwimmer* and the same month that Margaret Webb was barred from citizenship as well—Mabel Boe was likewise denied naturalization. The Order of Court Denying Petition followed a motion from the naturalization examiner assigned to her case (an L. L. Welch) and

[222] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).
[223] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929). Although the Cable Act did not restore the citizenship of those women who had been expatriated in the past, it did specify that expatriates "may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: (a) No declaration of intention shall be required…" See *Married Women's Citizenship Act*, Public Law 67-346, *U.S. Statutes at Large* 42 (1922): 1021-1022.
[224] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).

was signed by John C. Lowe, District Judge of North Dakota's Fifth Judicial District.[225] Mabel, the judge wrote, "refuses to bear arms in case of necessity."[226]

At the congressional hearings on H.R. 3547 and on H.R. 297—two of the legislative proposals that would have enabled pacifists to become naturalized U.S. citizens—the basic facts of Mabel Boe's exclusion from citizenship sparked especial indignation. In the first round of hearings, for example, held on May 8 and 9, 1930, North Dakota Representative James H. Sinclair turned Mabel into his "prize exhibit."[227] At the second round, held on January 26 and 27, 1932, her "novel story" received prominent placement as well.[228] It was a litany of injustices: Mabel, her supporters lamented, had lived in the United States all her life.[229] Her foreign-born, fellow-Dunkard husband had been naturalized without any trouble whatsoever.[230] (At these same hearings, Margaret Webb's defenders didn't emphasize John's naturalization status, but Jorgen's admission to citizenship—perhaps because Mabel had once been a native-born citizen—came up early and often.) What's more, Mabel had waited to apply for citizenship until, unbeknownst to

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[225] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929); James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34. John Lowe served as District Judge of the Fifth Judicial District from 1920 until 1942. See "John C. Lowe," State of North Dakota Courts, https://web.archive.org/web/20230627152748/https://www.ndcourts.gov/john-c-lowe (accessed June 27, 2023).

[226] Mary Mabel Boe, Petition for Naturalization (1928), Order of Court Denying Petition (1929).

[227] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 32-36.

[228] *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 4, 11, 183, 219-222.

[229] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221.

[230] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221.

her, *Schwimmer* was about to be decided.[231] And, unlike Rosika Schwimmer, she was no radical activist, but rather a housewife and a mother of three.[232]

In fact, one of the most striking moments at Boe's naturalization hearing—as conveyed to the Committee on Immigration and Naturalization by Representative Sinclair—had revolved precisely around her three children. After Boe had made clear that she would not be willing to bear arms in time of war, Judge Lowe had posed a harrowing hypothetical:

> Supposing enemies should come to your home for the purpose of carrying off your children to kill them, and suppose there was a loaded shotgun handy, by the use of which you would save their lives, would you use it.[233]

"Mrs. Boe," Sinclair reported, had "remained silent and thoughtful for a while and then spoke."

> No. I think I would not. I think I would let them take my children rather than disobey the word of God, but first I would try to save them some other way. I believe if I would do right, the Lord would help me out of my trouble in some way.[234]

The exchange was not altogether outlandish. During the First World War, would-be conscientious objectors had often been asked about their willingness to kill in self-defense, as a means of determining the genuineness of their convictions.[235] At their own naturalization

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[231] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 220-221.
[232] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34.
[233] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34; Exhibit VI, "American-Born Woman Alien in Arms Oath Case," in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 183; Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 221.
[234] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34-35.
[235] Capozzola, *Uncle Sam Wants You*, 57, 60, 70-71, 74-75; Donald Eberle, "The Plain Mennonite Face of the World War One Conscientious Objector," *Journal of Amish and Plain Anabaptist Studies* 3, no. 2 (2015): 178-179, 195-196.

hearings, Rosika Schwimmer and Margaret Webb had been asked versions of the same.[236] Mabel Boe alone, however, had been asked if she would be willing to kill *outside* of a wartime context—and in an imagined scenario that threatened her life *and* the lives of her children. Consequently, Representative Sinclair highlighted this particular moment not only to praise Boe's "honest[y]," but also to evoke sympathy on her behalf.[237] "I don't suppose she had any idea that she would ever be asked that kind of a question," Sinclair reported. "It was rather a shock to her, knowing her as I do."[238]

What's more, according to Sinclair, Judge Lowe himself had told Mabel, "'I regret very much that a woman of your type can not be accepted to citizenship'"—but the judge's evident sympathy had not pushed him to protest against *Schwimmer*, and Sinclair's own sympathy likewise failed to inspire a vote on either of the proposed bills.[239] The congressman speculated about sponsoring "a separate bill, providing for the naturalization of Mrs. Boe" and giving rise to "a test case," but that never came to fruition, either.[240] Instead, Mabel Boe would have to wait over a decade to once again become a United States citizen—just like her American-born parents, her American-born siblings, and her Norwegian immigrant husband.

❖ Martha Jane Graber

[236] "Rosika Schwimmer's Naturalization Hearing," Appendix D in Flowers, *To Defend the Constitution*, 380-381; Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 177.
[237] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 35.
[238] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 35.
[239] James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34.
[240] Elisabeth May Craig, "Women Must Fight—Ruling Is Under Fire," *New York World*, April 6, 1930, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 221.

Martha Jane Graber immigrated to the United States from Alsace-Lorraine in 1910, when she was ten years old.[241] Her family—her father Peter, born in France; her mother Verena, born in Switzerland; and her four siblings, Helen, Marie, Jacob, and Emma—settled in Iowa.[242] Around 1925, Martha moved on her own to Ohio, where she attended Bluffton College, a Mennonite school, and subsequently became a registered nurse and, eventually, superintendent of the local Bluffton hospital.[243]

Martha Graber petitioned for citizenship twice in 1929: first in February and then in July—or, once after the government was granted certiorari in *United States v. Schwimmer*, and once after the case was decided in the government's favor.[244] Both times, her petition was rejected by Judge Fred C. Becker, of the Court of Common Pleas of Allen County, Ohio, for the

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[241] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172, 173; "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1; Martha J. Graber, 1930 census, Jefferson, Henry County, Iowa, Family History Library microfilm publication 2340393, page 6B, ED 8, image 12, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Martha J. Graber, 1930 census].

[242] Martha Graber, 1920 census, Marion, Washington County, Iowa, T625, roll T625_516, page 7A, ED 134, image 13, *Ancestry.com* (accessed September 20, 2023); Martha J. Graber, 1930 census; Washington County, Iowa, marriage certificate no. 92-019048 (1930), Carl John Landes and Martha Jane Graber, Iowa Marriage Records (1923-1937), State Historical Society of Iowa, Des Moines, IA, image 204, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Marriage certificate no. 92-019048 (1930), Carl John Landes and Martha Jane Graber]; Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 173, 174.

[243] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172, 173; "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1. Bluffton College (now Bluffton University) "was founded in 1899 as Central Mennonite College" and it remains "affiliated with Mennonite Church USA" to this day. See "History," Bluffton University, https://web.archive.org/web/20231004160542/https://www.bluffton.edu/about/bluffton-at-a-glance/history.aspx (accessed October 4, 2023).

[244] Transcript of Record at 21, *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Schwimmer*, 279 U.S. 644 (1929); "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.

same reason: because she "had conscientious objections to serving in the Army in time of war."[245]

It was the transcript from Graber's July hearing which made its way into official congressional testimony.[246] In many ways, it resembled Margaret Webb's and Mabel Boe's hearings—not least because the same naturalization examiner, Edward Kennedy, interrogated both Graber and Webb.[247] Like Webb, moreover, Graber was rebuffed when she tried to bring up her religious principles (and the constitutional protections for religious freedom more broadly).[248] Graber, too, expressed multiple times that she was prepared to die (though not to kill) in service of her country.[249] And, when asked repeatedly if she would kill to protect her mother if not herself, Graber—not unlike Mabel Boe when she was asked about killing to protect her children—answered, in evident distress, that she would not.[250]

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[245] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1; Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172, 174-175.
[246] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172-175.
[247] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172; Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 175.
[248] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172, 174; Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 179.
[249] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 173-175; Exhibit V, Testimony in the Application for Citizenship by Margaret Webb of Richmond, Ind., in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 178, 179, 180.
[250] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 1st sess., 175; James H. Sinclair at *Hearings on H.R. 3547*, 71st Cong., 2nd sess., 1930, 34-35.

Most striking, however, was what was absent from Graber's hearing: no one—not the naturalization examiner, Edward Kennedy, not Judge Becker, not Graber's assigned representatives, and not even Graber herself—ever mentioned her gender or, accordingly, her ineligibility for combatant service. Instead, Graber defined the boundaries of what she was and was not willing to do, in times of war as well as outside of war, by the commitments she held as a registered nurse.

When asked how she planned to abide by the "support and defend" clause of the oath of allegiance, for example, Graber replied, "Defend the Constitution the best I can in my profession."[251] When this did not satisfy the examiner, he proposed an alternative scenario: "Suppose your country saw fit to demand your service in the Army in time of war as a combatant." Graber, however, reiterated that she "would go to the front in [her] profession."[252] When the examiner protested, once again, Graber remained steadfast. But she did not object that, in reality, she would never be "called upon to act as a combatant." Instead, she retorted, "That would not be professional as a nurse."[253]

Of course, Graber must have known—as must have her interlocutors—that nursing was the predominant way, and an entirely vital way, that American women had long contributed to their nation's war efforts.[254] But she never said so explicitly. Rather, she simply seemed more

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[251] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 172-173.
[252] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 173.
[253] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 173.
[254] On American women serving as nurses in wartime, see, for example, Daneen Wardrop, *Civil War Nurse Narratives, 1863-1870* (Iowa City: University of Iowa Press, 2015); Cheryl Mullenbach, *Women of the Spanish-American War: Fighters, War Correspondents, and Activists*

concerned with the obligations she possessed as a nurse—who had devoted her life to healing, rather than to hurting, other human beings—than she did with the obligations she possessed, or did not possess, as a would-be American citizen.

In this way, however, she played right into the state's hands—and contributed to the further evolution of the *Schwimmer* doctrine. Throughout the hearing, Kennedy and Becker did not bother to justify that women *could* be drafted, or that they *might* be sent to the front lines. Instead, they made sweeping, absolute statements: killing was an unavoidable part of war, and of American history; only the government could dictate what obligations were owed in exchange for the privilege of American citizenship ("be it to serve at battle, if necessary, to shed blood in time of war, or such other method as the government might ask"); and no one—not even an already-trained and experienced nurse—could become naturalized by pledging only to perform noncombatant service.[255]

Martha Graber was not deported after her second naturalization hearing. (As best I can determine, none of the pacifist women denied naturalization in the 1920s and '30s were.) To the contrary, Graber started putting down more roots. On July 8, 1930, almost exactly a year after her second rejection from citizenship, she married Carl Landes, a Mennonite pastor originally

(Guilford, CT: Lyons Press, 2022), especially Chapter 2; and Mary T. Sarnecky, *A History of the U.S. Army Nurse Corps* (Philadelphia: University of Pennsylvania Press, 1999).

[255] Exhibit IV, In the matter of the petition of Martha Jane Graber…, in *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 173, 174, 175.

from Oklahoma, now living in Philadelphia.[256] And on September 30, "Mrs. Carl Landis"—as most newspapers began to refer to her—received a third and final naturalization hearing.[257]

It wasn't that marrying Carl made anything easier, really: because of the Cable Act, Martha still couldn't be admitted to citizenship automatically. She didn't have any kind of change of heart, either: she still insisted, at her third hearing, "that she would not be willing to shed human blood in defense of the nation."[258] She still promised to "serve as a nurse in war time," too, even though she'd already stopped working as a nurse in Bluffton (so as to better care for her ailing mother—for whom she'd refused to kill another person, even hypothetically, the previous year).[259] But by September 1930, Fred Becker no longer presided over the Court of Common Pleas of Allen County, Ohio—and that made all the difference.

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[256] Marriage certificate no. 92-019048 (1930), Carl John Landes and Martha Jane Graber; "'Woman Without Country' Marries," *The Lima Morning Star and Republican-Gazette* (Lima, OH), July 14, 1930, 5. Carl's name was often rendered as "Carl Landis"—as in the newspaper article cited in this footnote—but Carl and Martha's marriage certificate (also cited in this footnote) and subsequent census documents all reflected the "Landes" spelling. See also, for example, Carl J. Landes and Martha Landes, 1940 census, Chicago, Cook County, Illinois, T627, roll m-t0627-00943, page 9B, ED 103-708, image 18, *Ancestry.com* (accessed September 20, 2023); and Carl J. Landes and Martha J. Landes, 1950 census, Morgan, Butler County, Ohio, Population Schedules for the 1950 Census, National Archives Identifier: 308350125, roll 3696, page 19, ED 9-97, image 20, Ancestry.com (accessed September 20, 2023).

[257] "'Woman Without Country' Marries," *The Lima Morning Star and Republican-Gazette* (Lima, OH), July 14, 1930, 5. See also, for example, "Immigration and Prosperity," *The Brattleboro Reformer* (Brattleboro, VT), October 7, 1930, 4; and "Allegiance," *The Circleville Herald* (Circleville, OH), October 8, 1930, 4.

[258] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.

[259] "'Woman Without Country' Marries," *The Lima Morning Star and Republican-Gazette* (Lima, OH), July 14, 1930, 5; "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.

Unlike his predecessor, the new judge—an A. M. Rodgers—granted Martha Graber's petition.[260] At this third hearing, the naturalization examiner (Edward Kennedy again) cited the *Schwimmer* precedent.[261] Martha's attorney, in turn, argued passionately (if rather inaccurately) that Rosika Schwimmer—unlike his client—"was an avowed atheist and communist and was found to have no sense of nationalism and also opposed the use of military force" more broadly.[262] Judge Rodgers, however, neither abided by *Schwimmer* nor relied upon this distinction between the two cases. But he nonetheless permitted Graber to swear to a modified oath of allegiance—"with the reservation that she would not bear arms"—because he believed that she "should [not] be required to go beyond what any other woman would be able to do in the event of war."[263]

It was particularly ironic, perhaps, that Graber had not made such an argument herself the year before. But even more, her admission to citizenship underscored just how difficult the willingness-without-obligation doctrine was to maintain—and how much naturalization policies, even after *Schwimmer*, still hinged on the discretion of individual federal judges for their enforcement.

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[260] A. M. Rodgers replaced Fred C. Becker on the Court of Common Pleas of Allen County, Ohio on May 10, 1930. See "Goes on Bench at Lima," *The Cincinnati Enquirer* (Cincinnati, OH), May 11, 1930, 1.
[261] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.
[262] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1, 6.
[263] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1.

In the months following Graber's third hearing, the federal government considered bringing an appeal.[264] But it never came to pass—not because naturalization officials decided to overlook Graber's admission to citizenship, exactly, but because they shifted their attention to yet another pacifist woman's admission to citizenship instead. It was Marie Averil Bland, another nurse, whose case would make it back to the U.S. Supreme Court in 1931. And it was Graber's second naturalization hearing, rather than her third, which would come to seem most relevant to the proceedings.

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IV. Reaffirming *Schwimmer*: Marie Averil Bland (and Douglas Macintosh)

Marie Averil Bland first arrived in the United States in February 1914, a few months before her thirty-first birthday.[265] Born in Canada, she'd also spent significant time in the U.K., where her father was a minister of the Church of England.[266] In November 1918, immediately following the armistice that ended the Great War, she journeyed back to Europe—to the port city of Brest, France—as part of an American "reconstruction unit" responsible for nursing "shell shocked" U.S. soldiers back to health.[267] In fact, as she later explained, it was this first-hand encounter with "the horrors of war"—rather than her family's religious beliefs or the messages

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[264] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1; "U.S. Asks Transcript of Nurses' Hearing," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 11, 1930, 12.

[265] Transcript of Record at 3, *United States v. Bland*, 283 U.S. 636 (1931); Marie Averil Bland, Petition for Naturalization (May 21, 1929), Order of Court Denying Petition (May 6, 1930), Petitions for Naturalization from the U.S. District Court for the Southern District of New York (1897-1944), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 351-352, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Marie Averil Bland, Petition for Naturalization (1929), Order of Court Denying Petition (1930)].

[266] Transcript of Record at 7, 14, *United States v. Bland*, 283 U.S. 636 (1931).

[267] Transcript of Record at 14, *United States v. Bland*, 283 U.S. 636 (1931).

she heard at her own Episcopal church—that led her to believe that Jesus Christ must have been a pacifist and that she must become a pacifist, too.[268]

After nine months overseas, Bland returned to New York, where she came to live with and work for the Smith family, on the Upper East Side of Manhattan.[269] She filed a declaration of intention on February 2, 1926 and a petition for naturalization on May 21, 1929—just six days before the Supreme Court decided *United States v. Schwimmer*.[270] Nonetheless, by April 14, 1930, she was all set to become an American citizen. She appeared in court, "together with many others," where a clerk administered the oath of allegiance to the whole group. Although the clerk never noticed, as he read the clause that began with "support and defend," Bland—who'd gleaned, from newspaper coverage of *Schwimmer*, that pacifists could not take this part of the oath—lowered her right hand. Only afterwards, she asked to please speak with the judge.[271] In other words, Marie Bland turned herself in.

Her goal, in requesting the meeting, was to ask if she might swear to a different oath—often administered to Quakers and to other pacifists who joined the federal government—which read "'I will support the Constitution of the United States and will, as far as my conscience as a

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[268] Transcript of Record at 9, 11, 14, *United States v. Bland*, 283 U.S. 636 (1931).
[269] Transcript of Record at 14, *United States v. Bland*, 283 U.S. 636 (1931); Marie Averil Bland, Petition for Naturalization (1929), Order of Court Denying Petition (1930); Marie Averil Bland, Declaration of Intention (February 2, 1926), Declarations of Intention for Citizenship, U.S. District Court for the Southern District of New York (January 19, 1842-October 29, 1959), Records of District Courts of the United States, Record Group 21 (National Archives at New York), image 1046, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Marie Averil Bland, Declaration of Intention (1926)]; Mary [*sic*] E. [*sic*] Bland, 1930 census, Manhattan, New York County, New York, Family History Library microfilm publication 2341301, page 1B, ED 545, image 2, *Ancestry.com* (accessed September 20, 2023).
[270] *United States v. Schwimmer*, 279 U.S. 644 (1929); Marie Averil Bland, Declaration of Intention (1926); Marie Averil Bland, Petition for Naturalization (1929), Order of Court Denying Petition (1930).
[271] Transcript of Record at 13-14, *United States v. Bland*, 283 U.S. 636 (1931).

Christian will allow, defend it against all enemies.'"[272] But the district judge, William J. Bondy, and the District Director of Naturalization in New York, Merton A. Sturges, refused to make such a concession.[273] Instead, Bland set off a chain of events that not only resulted in her own exclusion from citizenship, but also in an even more powerful affirmation of the gender-neutral *Schwimmer* doctrine.

In Bland's affidavit, which she submitted to Judge Bondy's court on April 22, 1930, she not only pledged her willingness to enlist as a non-combatant but also offered up demonstrable proof of her sincerity: namely, that she'd already volunteered on the front lines of post-war France—and not on behalf of the Canadian government, for that matter, but on behalf of the United States.[274] At Bland's two naturalization hearings, however, both held less than a week later, the various government officers assembled against her naturalization asked only about the future—and about the violence that she would *not* agree to enact.[275]

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[272] Transcript of Record at 13-14, *United States v. Bland*, 283 U.S. 636 (1931). That this modified version of the oath of allegiance was available to federal employees but not to petitioners for citizenship would become a major part of Bland's argument at the Supreme Court. See, for example, Brief for the Petitioner-Appellee at 8-10, *United States v. Bland*, 283 U.S. 636 (1931). Two years earlier, Rosika Schwimmer had also made a similar argument about the oath of allegiance taken by applicants for passports. See Brief for the Respondent at 17, *United States v. Schwimmer*, 279 U.S. 644 (1929), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104528503/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=a0260489&pg=1 (accessed October 2, 2023).

[273] Transcript of Record at 15-16, 20, *United States v. Bland*, 283 U.S. 636 (1931).

[274] Transcript of Record at 14-15, *United States v. Bland*, 283 U.S. 636 (1931).

[275] At Bland's first naturalization hearing, held on April 24, 1930, she appeared before J. A. G. Stitzer (the designated examiner), Charles P. Muller (the Assistant District Director of Naturalization), and Louis Weinberger (the assistant chief examiner). At Bland's second naturalization hearing, held only four days later on April 28, she appeared before Stitzer and Judge William Bondy. See Transcript of Record at 6-13, 16-19, *United States v. Bland*, 283 U.S. 636 (1931).

Indeed, whereas Bland's noncombatant service had convinced her that war must be abolished, the naturalization officials (and Judge Bondy) seemed to have taken the opposite lesson. For them, the next war was inevitable—and quite likely worse than the Great War that had preceded it. They not only imagined that a forty-seven-year-old woman like Marie Bland might be called up to serve in the future, but that she might be drafted into a "war of aggression," or into a war that directly endangered "the security of the homes of Americans," or into a war that threatened the very "existence of this country"—and whose outcome rested solely in "the hands" of that same forty-seven-year-old woman.[276] In response to each of these hypothetical scenarios, however, Bland reiterated that she would not bear arms—and so Judge Bondy denied her petition for citizenship.[277]

The judge's official reasoning was "the decision of the Supreme Court of the United States, in United States v. Schwimmer"—which might have laid the matter to rest.[278] But unlike so many other pacifist women, Bland—with the help of her attorney Emily Marx, a former New York State Assistant Attorney General and one-time counsel for the Downtown War Price and Rationing Board who now taught at Columbia University—promptly appealed to the U.S. Court of Appeals for the Second Circuit.[279]

Notably, whereas during her initial naturalization hearings, Bland had not answered any questions about her willingness to bear arms by pointing out that she was in fact ineligible for

[276] Transcript of Record at 8, 11, 17, *United States v. Bland*, 283 U.S. 636 (1931).
[277] Marie Averil Bland, Petition for Naturalization (1929), Order of Court Denying Petition (1930); Transcript of Record at 8, 11, 17, 20 *United States v. Bland*, 283 U.S. 636 (1931).
[278] Transcript of Record at 20, *United States v. Bland*, 283 U.S. 636 (1931).
[279] Transcript of Record at 20-21, *United States v. Bland*, 283 U.S. 636 (1931); Flowers, *To Defend the Constitution*, 202.

combatant service, this argument formed a major part of her legal brief to the Second Circuit.[280] The brief made clear, for example, that not only had every draft act in American history affirmatively exempted those with religious objections to arms-bearing, but that every one had also plainly excluded female citizens as well as female resident aliens.[281] What's more, it made clear *why* these women had always been excluded from arms-bearing—namely, because they'd been also been excluded from the franchise:

> It cannot seriously be contended that a 'fundamental principle of our Constitution' requires women to bear arms, when the Constitution itself shows that the 'fundamental principle' of a right to a voice in the government, was denied to them until the year 1920. If the duty of women to bear arms is a fundamental principle of the Constitution, it must have become such a principle sometime during the past ten years. It surely did not have that status on June 29, 1906, when the Naturalization Act was passed.[282]

To be sure, the brief was more concerned with pointing out the absurdity of Bland's predicament—and with evidencing Congress' legislative intent—than it was with seriously considering women's rights. But it also laid bare the unspoken logic of *Schwimmer* and its progeny: that American women's enfranchisement—secured as recompense for their wartime sacrifices—had endowed them with future, and equal, wartime obligations as well.

While putting together this distinctly gendered claim, however, Bland's lawyer also maneuvered to appeal at the same time as another resident alien man, Douglas Macintosh, who

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[280] Bland's attorney, Emily Marx, had also made a similar gender-based argument in her earlier brief to the district court—see Flowers, *To Defend the Constitution*, 203—but it had not come up in either of the hearings.

[281] Brief for the Petitioner-Appellant at 16, 17, 21, *Bland v. United States*, 42 F.2d 842 (2nd Cir. 1930), Appellate Case Files, 1954-1992, U.S. Court of Appeals for the Second Circuit, National Archives Identifier: 577901, Records of the U.S. Court of Appeals, Record Group 276 (National Archives at Kansas City) [hereafter cited as Brief for the Petitioner-Appellant, *Bland v. United States*, 42 F.2d 842 (2nd Cir. 1930)].

[282] Brief for the Petitioner-Appellant at 21, *Bland v. United States*, 42 F.2d 842 (2nd Cir. 1930).

had recently been denied naturalization in Connecticut.[283] As was Emily Marx's hope, the two cases—*Bland v. United States*, 42 F.2d 842 (2nd Cir. 1930) and *Macintosh v. United States*, 42 F.2d 845 (2nd Cir. 1930)—ended up being argued on the same day in May.[284] What's more, the Second Circuit ultimately ruled to grant citizenship to both petitioners.[285] In ways that Marx may not have anticipated, however, the conjunction of the two cases seemed to encourage the court to pay less attention to the fact of Bland's womanhood—and to the specific obligations she would and would not possess as a naturalized American.

Douglas Macintosh, not unlike Marie Bland, had also served as a non-combatant in World War I—in his case as a chaplain, first as part of the Canadian (rather than the American) military and then on behalf of the Y.M.C.A.[286] After earning a Ph.D. from the University of Chicago, he'd become a professor at the Yale Divinity School as well as an ordained Baptist minister and, while he'd come to abhor war while serving overseas, he also held personal "religious scruples" against arms-bearing.[287] In response to Question 22 of the standard naturalization questionnaire, he'd written: "I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country', however 'necessary' the war may seem to be to the government of the day."[288]

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[283] Flowers, *To Defend the Constitution*, 205.
[284] Flowers, *To Defend the Constitution*, 205, 207, 223n35.
[285] *Bland v. United States*, 42 F.2d 842, 845 (2nd Cir. 1930); *Macintosh v. United States*, 42 F.2d 845, 849 (2nd Cir. 1930).
[286] *Macintosh v. United States*, 42 F.2d 845, 846 (2nd Cir. 1930).
[287] *Macintosh v. United States*, 42 F.2d 845, 846, 847 (2nd Cir. 1930); *United States v. Macintosh*, 283 U.S. 605, 629 (1931); Flowers, *To Defend the Constitution*, 147-148, 151.
[288] *Macintosh v. United States*, 42 F.2d 845, 846 (2nd Cir. 1930).

That very conditional promise had not satisfied the state officials who'd subsequently denied his naturalization. On June 30, 1930, however, the Second Circuit ordered that Macintosh's petition be granted—first and foremost because American citizens with his same "conscientious religious scruples" had always been "excused from military service."[289] This made Macintosh's case distinguishable from Rosika Schwimmer's, the opinion explained, because she was an "absolute atheist" with "no sense of nationalism" and without any competing "sense of obligation to [her] God."[290] But this was a strikingly narrow interpretation, both of *United States v. Schwimmer*—which also hinged on Schwimmer's fundamental unwillingness to take up arms—and of Macintosh's petition for naturalization. It meant disregarding the fact that the professor's objections to arms-bearing were not only religious but also moral and political, and that he'd pledged to withhold not only his combatant service but also his broader "support" for the government if the United States entered into a military conflict with which he disagreed.[291]

By contrast, the court's opinion in *Bland v. United States* evinced only a fraction of that same creativity. Marie Bland's case, the Second Circuit found, was likewise only "distinguishable" from Schwimmer's because Bland, too, had religious reasons for objecting to arms-bearing.[292] While the court also noted that Schwimmer was "possessed of…propagandist proclivities," it did not take that same opportunity to explain that Bland herself was no radical

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[289] *Macintosh v. United States*, 42 F.2d 845, 847-849 (2nd Cir. 1930).
[290] *Macintosh v. United States*, 42 F.2d 845, 849 (2nd Cir. 1930).
[291] In fact, the Second Circuit held that "A citizen sharing views which amount to conscientious or religious scruples against bearing arms in what he regards as an unjustified war is akin to one having conscientious scruples against all wars." See *Macintosh v. United States*, 42 F.2d 845, 846, 848 (2nd Cir. 1930).
[292] *Bland v. United States*, 42 F.2d 842, 843, 844, 845 (2nd Cir. 1930).

activist and had no public platform. Likewise, while noting that "male citizens and male aliens" were the ones drafted into military service, the court never made explicit that Bland would be neither compelled nor permitted to bear arms herself.[293] Moreover, it gave Bland no credit for pledging—as opposed to Macintosh—to "nurse the wounded" in *any* future conflict, no matter how she felt about it.[294] There were many ways, in other words, that the Second Circuit might have distinguished Bland's case from Schwimmer's—and even from Macintosh's. Instead, it decided the two cases in tandem, glossing over all that made Bland unique—and inadvertently paving the way for the cases to be overturned in tandem as well.

Indeed, after the Department of Justice appealed both *Macintosh* and *Bland* to the U.S. Supreme Court, the two cases were effectively merged into one. They were argued separately (on successive days in April 1931) and given separate docket numbers (*United States v. Macintosh*, 283 U.S. 605, and *United States v. Bland*, 283 U.S. 636), but the *Bland* opinion was little more than a paragraph long—and it began, quite simply, "This case is ruled by the decision just announced in *United States v. Macintosh*, *ante*, p. 605."[295]

Thus it was in the *Macintosh* opinion, delivered by Justice George Sutherland, that the 5-4 Supreme Court majority laid out its dual ruling reversing the Second Circuit.[296] First and foremost, where the Second Circuit had accepted that Douglas Macintosh objections to arms-bearing were religious in nature, the Supreme Court was more painstaking in its assessment of

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[293] *Bland v. United States*, 42 F.2d 842, 844 (2nd Cir. 1930).
[294] *Bland v. United States*, 42 F.2d 842, 843 (2nd Cir. 1930).
[295] *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931).
[296] The sixth member of the *Schwimmer* majority, Chief Justice William Howard Taft, had retired in the intervening two years. His replacement, Chief Justice Charles Evan Hughes, wrote both the *United States v. Macintosh* and *United States v. Bland* dissents—see below.

his commitments—and more skeptical. Admittedly, even according to Sutherland's summary, Macintosh was no "uncompromising pacifist."[297] In fact, Macintosh had testified that he might even be willing to take up arms himself one day—but only in a "war which he could regard as morally justified," which accorded with his own understanding of the "moral principles of Christianity."[298] This was not enough, the Court insisted. Because Macintosh would not "promise in advance to bear arms"—not when he deemed it necessary but when the government did—he could not become an American citizen.[299]

But if the Supreme Court thus reinterpreted and made light of Macintosh's particular religious convictions, it also made clear that any pacifist believer—who might not call upon "*his own interpretation* of the will of God" but who would nonetheless refuse to take up arms—would be barred from citizenship as well.[300] Here, Sutherland's opinion turned not only to the Naturalization Act of 1906 but also to Congress' "war power," which the Court made seem almost-limitless.[301] Conscientious objectors, the majority held, had consistently been exempted from federal draft acts not because the Constitution guaranteed their religious liberty, but because Congress had consistently deigned to "relieve" them of their military obligations. In the next global conflict, Sutherland reasoned, Congress might very well make a different choice. And, even in the present, it could very well extend certain privileges to citizens alone, and not to un-naturalized resident aliens.[302] If in wartime, as the Court explained, Congress was empowered to restrict freedom of speech and freedom of the press, manage food prices, and confiscate the

[297] *United States v. Macintosh*, 283 U.S. 605, 618, 620 (1931).
[298] *United States v. Macintosh*, 283 U.S. 605, 619 (1931).
[299] *United States v. Macintosh*, 283 U.S. 605, 613-615, 624-627 (1931).
[300] *United States v. Macintosh*, 283 U.S. 605, 625 (1931).
[301] *United States v. Macintosh*, 283 U.S. 605, 622 (1931).
[302] *United States v. Macintosh*, 283 U.S. 605, 623-624 (1931).

property of enemy aliens—all so "that war may not result in defeat"—it was likewise empowered to determine who was and was not exempt from military service, and who was and was not eligible for citizenship, on those same grounds.[303]

In this way, the *Macintosh* Court ruled that a thoroughly ordinary petitioner—with no major public platform and an established record of (noncombatant) military service—was just as dangerous as Rosika Schwimmer. It was the *Bland* opinion, however, which made clear that Macintosh's threat did not depend on his gender—or, in other words, on his prospective obligation to bear arms. For the same 5-4 majority ruled to exclude Marie Bland from citizenship as well—and entirely on the strength of its "just announced" decision in *Macintosh*.[304]

Two years earlier, in *Schwimmer*, the justices had at least acknowledged Rosika Schwimmer's "inability" to take up arms—and had quoted so thoroughly from her naturalization questionnaire, as well as from her personal correspondence, because it required conspicuous effort to turn a fifty-two-year-old woman into a "conscientious objector" (and an especially dangerous one at that).[305] In Marie Bland's case, by contrast, the Court declared it "unnecessary to review her testimony."[306] The majority opinion offered only the barest summary of her case ("a native of Canada…came to the United States in 1914…refused to take the oath of allegiance…except with the written interpolation of the words, 'as far as far as my conscience as a Christian will allow'") and specified neither her sex nor her age (now forty-eight).[307] It did not mention that she'd already nursed American soldiers back to health after the Great War; did not

[303] *United States v. Macintosh*, 283 U.S. 605, 622-623 (1931).
[304] *United States v. Bland*, 283 U.S. 636 (1931).
[305] *United States v. Schwimmer*, 279 U.S. 644, 648-649, 651-652 (1929).
[306] *United States v. Bland*, 283 U.S. 636 (1931).
[307] *United States v. Bland*, 283 U.S. 636 (1931).

acknowledge that she (unlike Douglas Macintosh) had promised to do the same in the future, no matter what her opinion of the particular conflict in which she might be called to serve; and did not allow that she'd been not yet been allowed to act as a combatant instead.[308]

This, even more than the *Macintosh* opinion, represented an extraordinary extension of the *Schwimmer* doctrine. In Rosika Schwimmer's case, the Court had required pacifist women to be willing—even without ever being obligated—to take up arms in defense of the United States. In *Bland*, decided together with a male petitioner's case, it went one step further: conscientious-objector women were no different from conscientious-objector men. Whether or not one was, or ever would be, obligated to bear arms was no longer salient. It did not even bear mentioning.

Remarkably, the *Bland* dissent—written by the new Chief Justice, Charles Evans Hughes, and joined by the three justices who had also dissented in *Schwimmer*—demonstrated a similar inattention to the disparate obligations of citizenship. For Justice Hughes, not unlike Justice Sutherland, devoted the bulk of his time and energy to the Macintosh case and then "applie[d]" all that he'd written to Bland's set of circumstances.[309]

The contrast with Justice Holmes's *Schwimmer* dissent two years earlier was stark. There was no rousing defense of "freedom for the thought that we hate," and no confirmation of Marie Bland's many qualifications for citizenship. Even more striking, whereas Holmes had noted that Schwimmer "would not be allowed to bear arms if she wanted to," Hughes did not do the

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[308] In fact, the *Bland* majority held that "The *only* difference between the position she took, and that taken by the respondent in the *Macintosh* case, is that in addition to refusing positively to bear arms in defense of the United States under any circumstances, she required an actual amendment of the oath as already stated, instead of reserving the point by parol" [emphasis mine]. See *United States v. Bland*, 283 U.S. 636, 636-637 (1931).
[309] *United States v. Bland*, 283 U.S. 636, 637 (1931).

same.[310] Instead, he turned to the broad, prior ruling of the Circuit Court of Appeals. Bland, he maintained, should be permitted to take the oath of allegiance because her "religious scruples"—rather than her status as a middle-aged woman—made her pledge to bear arms unnecessary.[311] And in this way, the members of the *Bland* dissent, too, helped ensure that naturalization officials would continue treating pacifist resident alien women just the same as they treated pacifist resident alien men—for better and for worse.

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V. Reexamining *Schwimmer*: Rebecca Shelley (Rathmer), Harta (Galpin) Losey, and the Pacifist Men Who *Could* Become American Citizens

In the years after the Supreme Court handed down its two-fold ruling in *Macintosh* and *Bland*, the Bureau of Naturalization's Correspondence and Case Files for "CONSCIENTIOUS OBJECTORS" started to swell. The missives that had been arriving, throughout the 1920s, in drips and drabs were suddenly a constant stream: inquiries about current case law; appeals for advice or relief, sometimes on behalf of family members or friends; and, above all, reports of petitioners who had been—or were presently about to be—denied naturalization for refusing to bear arms in defense of the United States. Indeed, throughout the 1930s and into the early 1940s, more pacifist resident aliens were barred from U.S. citizenship than ever before—including, for the first time, a great many pacifist women.[312]

[310] *United States v. Schwimmer*, 279 U.S. 644, 653-654 (1929).
[311] *United States v. Bland*, 283 U.S. 636, 637 (1931).
[312] "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service.

Some of the female petitioners had settled in states, like Ohio or Washington, where the courts had been taking a hard line on arms-bearing for several years.[313] Even more, however, were among the first pacifist women ever denied naturalization in their respective jurisdictions.[314] Nonetheless, their travails left little mark outside of Naturalization Bureau's own files. To the contrary: whereas a smaller number of post-*Schwimmer* cases—Margaret Webb's, Mabel Boe's, Martha Graber's, even Marie Bland's—had become more well-known from the

[313] Caroline Naussner, for example, was denied naturalization in Ohio, in January 1932, because she was "not willing unqualifiedly take the prescribed oath of allegiance," and Jacoba Maria van Dalen was denied naturalization in Washington, in July 1936, because she "Refuses to bear arms to defend the U.S. if called upon." See Caroline Naussner (INS Reference Number 2530-P-44363), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3920, *Ancestry.com* (accessed October 11, 2023); Caroline Naussner, Petition for Citizenship (filed May 14, 1931, denied January 29, 1932), Naturalization Petition and Record Books for the U.S. District Court for Northern District of Ohio, Eastern (Cleveland) Division (1907-1946), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 63-64, *Ancestry.com* (accessed October 11, 2023); Jacoba Maria Van Dalen (INS Reference Number 3604-P-22855), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3910, *Ancestry.com* (accessed October 11, 2023); and Jacoba Maria Van Dalen, Petition for Citizenship (filed April 24, 1936, denied July 27, 1936), Naturalization Records of the U.S. District Court for the Western District of Washington (1890-1957), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 1049-1050, *Ancestry.com* (accessed October 11, 2023).

[314] Elly Pudleiner, for example, was most likely among the first pacifist women denied naturalization in Michigan, sometime around December 1930, and Gertrude Christian Lockhead Annas was among the first women denied naturalization in Massachusetts, in August 1935, because she "Refused to take oath of allegiance without reservation." See Elly Pudleiner, "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service; Elly Pudleiner, 1930 census; Elley [*sic*] Pudliner [*sic*], 1940 census; Gertrude Christian Lockhead Annus [*sic*] (INS Reference Number 1500-P-147203), "CONSCIENTIOUS OBJECTORS," Subject Index to Correspondence and Case Files of the Immigration and Naturalization Service, image 3912, *Ancestry.com* (accessed October 11, 2023); and Gertrude Christian Lockhead Annas, Petition for Citizenship (filed March 14, 1933, denied August 19, 1935), Petitions and Records of Naturalizations of the U.S. District Court and Circuit Courts of the District of Massachusetts (1906-1929), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 954-955, *Ancestry.com* (accessed October 11, 2023).

congressional hearings held in May 1930 and in January 1932, this larger post-*Bland* wave occasioned little attention and even less debate.[315]

It wasn't altogether for lack of trying: every two years or so—in the House in 1933, 1935, and 1937 and in the Senate in 1939—a small, dedicated group of congresspeople continued to introduce bills that would have allowed pacifists to become naturalized American citizens.[316] The 1939 bill would have affirmatively admitted "female alien[s]," specifically, who were "conscientiously opposed to war" or who had "expressed an unwillingness to serve in the armed forces."[317] But every effort came to naught: there were no more congressional hearings and no new legislative remedies. Naturalization decisions, therefore, remained firmly in the hands of individual examiners and district court judges—who now drew upon not only *Schwimmer* but also the joint, gender-neutral findings of *Macintosh* and *Bland* as well.

In the wake of *Macintosh* and *Bland*, only two pacifist women's petitions produced anything other than summary dismissals.[318] Both women—Harta Losey, a housewife and some-time missionary, and Rebecca Shelley, a writer and reformer—had been born and raised in the United States, had lost their citizenship through marriage under the 1907 Expatriation Act, and

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[315] Even when the pacifist petitioners became relatively well-known—at least within the halls of Congress—the legislators didn't always get the facts of their cases quite right. In the congressional hearings held in January 1932, for example—four or so months after Martha Graber (now Mrs. Carl Landes) was finally *granted* citizenship in Ohio—she was still listed as one of the "Applicants Rejected for Citizenship" in *Schwimmer*'s aftermath. See, for example, *Hearings on H.R. 297*, 72nd Cong., 1st sess., 1932, 4, 5, 152, 172-175.

[316] H.R. 1528, 73rd Cong., 1st sess., 1933; H.R. 5170, 74th Cong., 1st sess., 1935; H.R. 8259, 75th Cong., 1st sess., 1937; S. 165, 76th Cong., 1st sess., 1939.

[317] S. 165, 76th Cong., 1st sess., 1939.

[318] Published opinions were relatively unusual even prior to *Macintosh* and *Bland*. Rosika Schwimmer and Marie Bland's cases, for example, only received reported case numbers after they'd each appealed to the Seventh and Circuit Courts of Appeals, respectively. Margaret Webb, Mabel Boe, Martha Graber received no reported case numbers at all.

had been obliged to apply for repatriation (and to swear to the oath of allegiance) under the 1922 Cable Act. And both women's petitions were denied in the spring of 1941—Losey's in May, Shelley's in June—months after Congress had already authorized the nation's first peacetime draft, and after America's entry into the Second World War had already begun to seem increasingly inevitable.[319]

The new conflict might have been cause to reevaluate *Schwimmer* and its progeny—to admit that, in World War II just as in the World War I, American women were neither compelled nor permitted to take up arms—and to amend the willingness-without-obligation doctrine accordingly. Instead, the judges who heard Shelley and Losey's cases evinced no particular regard for the ways in which they were disadvantaged by formally equal U.S. naturalization policies, nor even for the ways in which their one-time, already-unequal American citizenship had made them amenable to naturalization proceedings in the first place.

In the end, what *Shelley v. United States* most clearly revealed was how and why a female petitioner would not be the one to bring about *Schwimmer*'s demise. And, by the same token, *In re Losey* most clearly foreshadowed how and why it would be a male petitioner instead.

❖ Rebecca Shelley (Rathmer)—and Mabel Boe (again)

Rebecca Shelley was first denied naturalization—for the first of six times—in June 1931.[320] She'd been born in Pennsylvania, forty-four years earlier, to a large Mennonite family.[321] Her parents, William and Salina, were also Pennsylvania natives. In fact, William, a

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[319] *Shelley v. United States*, 120 F.2d 734 (D.C. Cir. 1941); *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941); *Selective Training and Service Act of 1940*, Public Law 76-783, *U.S. Statutes at Large* 54 (1940): 885-897.
[320] Bredbenner, *A Nationality of Her Own*, 184-185, 184n71.
[321] Rebecca Shelly [*sic*], 1900 census, Westover, Clearfield County, Pennsylvania, T623, roll 1395, page 2, ED 63, image 3, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as

minister, could trace his lineage all the way back to Abraham Shelley, who'd been one of the first Mennonite men to help settle colonial Pennsylvania.[322]

Shelley's objections to arms-bearing, however, were not only the result of her faith. Unlike most resident alien women who were denied naturalization for refusing to bear arms, Shelley was a bona fide peace activist. In 1915, not long after the outbreak of the First World War, she'd answered a "Call to the Women of All Nations" and traveled to The Hague, where she and other pacifist women delegates (including Rosika Schwimmer and Jane Addams) had passed resolutions for "total disarmament, the establishment of a world court, and suffrage for all women" while also inaugurating the International Committee of Women for Permanent Peace.[323] Later that same year, she'd traveled to Detroit, where the industrialist and then-pacifist Henry Ford lived, had secured a one-on-one meeting with him, and had then introduced him to Schwimmer, thereby setting their ill-fated Peace Ship mission into motion.[324] Even after the U.S. finally entered the war, Shelley had continued to fight for peace, garnering the attention of the Federal Bureau of Investigation and a New York Joint Legislative Committee to Investigate Seditious Activities along the way.[325]

It wasn't Shelley's wartime activities that had endangered her citizenship status, however, or at least not directly. As a matter of fact, after the war—and a subsequent mental

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Rebecca Shelly [*sic*], 1900 census]; Rebecca Shelly [*sic*], 1910 census, Traverse (Ward 3), Grand Traverse County, Michigan, T624, roll T624_648, page 1B, ED 56, image 2, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Rebecca Shelly [*sic*], 1910 census].

[322] Rebecca Shelly [*sic*], 1900 census; Rebecca Shelly [*sic*], 1910 census; Bredbenner, *A Nationality of Her Own*, 183.

[323] Susan Goodier, "The Price of Pacifism: Rebecca Shelley and Her Struggle for Citizenship," *Michigan Historical Review* 36, no. 1 (Spring 2010): 74-80.

[324] Goodier, "The Price of Pacifism," 81-83.

[325] Goodier, "The Price of Pacifism," 83-86.

health crisis and a stint in a sanitarium—she'd all but retreated from public life.[326] By 1920, she'd moved in with her sister and brother-in-law on a Michigan farm, acquired and started publishing an agricultural trade journal (*The Michigan Poultry Breeder*), and altogether set about rebuilding a calmer and more relaxing "'life…upon the wreckage left by the World War.'"[327] By August 1922—for much the same reasons, one imagines—she had wed Felix Rathmer, an electrical engineer who shared her commitment to pacifism as well as her passion for nature.[328]

But it was then that Shelley's problems had begun: for although her new husband had been living in the U.S. for just about a decade, he was still a German citizen.[329] And as soon as she'd married him—just one month before the Cable Act was signed into law—Shelley had been stripped of her own birthright citizenship. She'd initially imagined that becoming repatriated would be easy, just "'a simple procedure involving little more than proof of nativity and a visit to the Naturalization Court.'"[330] Nonetheless, she'd waited to apply. The historian Susan Goodier has speculated that Shelley's radical record made it difficult for her to find employment and that the couple's financial struggles, in turn, made her reluctant to engage an attorney, and also that Shelley was anxious that Felix might be deported if her case attracted too much attention.[331] No

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[326] Goodier, "The Price of Pacifism," 86-87.
[327] Rebecca Shelly [*sic*], 1920 census, Park, St. Joseph County, Michigan, T625, roll T625_796, page 5B, ED 159, image 10, *Ancestry.com* (accessed September 20, 2023); "Finding Aid," Rebecca Shelley Papers, 1890-1984 (86123, Aa/2, UAm), Bentley Historical Library, University of Michigan, Ann Arbor, MI, https://findingaids.lib.umich.edu/catalog/umich-bhl-86123 (accessed October 4, 2023) [hereafter cited as "Finding Aid," Rebecca Shelley Papers]; Bredbenner, *A Nationality of Her Own*, 183; Goodier, "The Price of Pacifism," 89.
[328] "Finding Aid," Rebecca Shelley Papers; Goodier, "The Price of Pacifism," 87, 87n75; Calhoun County, Michigan, record no. 460 (1922), Felis [*sic*] M. Rathmer and Rebecca Shelley, Michigan Marriage Records (1867-1952), Michigan Department of Health and Human Services, Lansing, MI, image 350, *Ancestry.com* (accessed September 26, 2023).
[329] Goodier, "The Price of Pacifism," 87.
[330] Goodier, "The Price of Pacifism," 89.
[331] Goodier, "The Price of Pacifism," 87n75, 89.

matter her reasons, though, she changed her mind at a spectacularly bad time. She filed her first petition for naturalization on May 29, 1931—just four days after the Supreme Court decided *Macintosh* and *Bland*.[332]

Still, Shelley persisted. Not because she believed she could challenge the Court's now-multiple precedents, exactly, but because she believed they did not apply to her: because Rebecca Shelley, unlike Rosika Schwimmer or Douglas Macintosh or Marie Bland, had already been an American citizen once before.

Shelley was far from the first native-born expatriate denied naturalization for refusing to bear arms, of course, but throughout her many appeals, she called upon her organizing background—and her unshakeable political commitments—to make unusually bold claims. From her very first hearing at the Calhoun County, Michigan naturalization court, for example, she argued that the Expatriation Act had been unlawful from the start. That the ratification of the Nineteenth Amendment had, on its own, abrogated her expatriation and returned her to full citizenship. That she possessed a fundamental right to conscientiously object to war—which she'd exercised, during the last war, as a single woman—and which she would still be able to exercise, without question, if she'd only gotten married a few months later. That it was patently discriminatory to force her to swear to the oath of allegiance at all, since native-born American men never had to do the same to maintain their own place in the body politic.[333]

Precisely because these arguments embraced more than her own particular petition for citizenship, Shelley's case—had she been successful—might have paved the way for many more pacifist expatriates to become repatriated as well. Instead, she failed utterly to persuade, time and

[332] Goodier, "The Price of Pacifism," 91.
[333] Bredbenner, *A Nationality of Her Own*, 184; Goodier, "The Price of Pacifism," 91-93.

time again. Several of the judges who heard her case—like one who dismissed her petition solely because she applied using her maiden name—would not even deign to address the evidence she brought to bear.[334] And so she was rebuffed: at her initial hearing in June 1931; at another naturalization court in February 1933; at the District Court for the Eastern District of Michigan in July 1937; at the Circuit Court of Appeals for the Sixth Circuit in October 1939; and at the District Court for the District of Columbia in April 1940.[335]

Nonetheless, Shelley did not give up. In fact, in the summer of 1940, she must have even felt a glimmer of optimism. In parallel with her court battle, and in tandem with other activists fighting for women's independent nationality rights, Shelley had also lobbied Congress to amend the Cable Act.[336] In 1936, Congress had enacted legislation which enabled a married expatriate who'd since become widowed or divorced to become repatriated "to the same extent as though her marriage to said alien had taken place on or after September 22, 1922" (i.e. when the Cable Act had ended marital expatriation); and in 1940, Congress had extended that same privilege to any woman who was still married but "who has resided continuously in the United States since the date of such marriage" (i.e. Rebecca Shelley).[337] To Shelley, these new laws—and their call to restore married women's citizenship "to the same extent" as though they'd never lost it in the

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[334] Goodier, "The Price of Pacifism," 93-94, 96-97.
[335] Bredbenner, *A Nationality of Her Own*, 184, 184n71, 185, 187n78, 187n79, 188, 188n81, 189; *Shelley v. Jordan*, 106 F.2d 1016, 1016-1017 (6th Cir. 1939); *Shelley v. United States*, 120 F.2d 734, 734-735 (D.C. Cir. 1941).
[336] Bredbenner, *A Nationality of Her Own*, 188-189. The Cable Act was amended several times throughout the 1930s, even prior to the specific legislation that Shelley sought. See, for example: *Married Women's Citizenship Act Amendments, 1930*, Public Law 71-508, *U.S. Statutes at Large* 46 (1930): 854; *Naturalization Act of 1906 Amendments*, Public Law 71-829, *U.S. Statutes at Large* 46 (1931): 1511-1512; and *Equal Nationality Act*, Public Law 73-250, *U.S. Statutes at Large* 48 (1934): 797-798.
[337] *Repatriation of Native-Born Women Act*, Public Law 74-793, *U.S. Statutes at Law* 49 (1936): 1917; *D'Alesandro Repatriation Act*, Public Law 76-704, *U.S. Statutes at Law* 54 (1940): 715.

first place—validated the most basic claim she'd been making for close to a decade: that if she'd been permitted to conscientiously object to war before, as a native-born citizen, she couldn't very well be prohibited from doing it now. What's more, the 1940 law's passage gave her grounds to bring yet another appeal—this time, to the U.S. Court of Appeals for the District of Columbia.[338]

Most of Shelley's friends and colleagues must have thought this a fool's errand. Well into the 1940s, by and large, feminists remained wary of pacifism—and, more precisely, of another Red Scare that might target feminist organizations on account of the pacifist members in their ranks.[339] Even Shelley's most devoted supporters (the "Rebecca Shelley Repatriation Committee of One Hundred") had long implored her to pursue a legislative fix instead of, rather than in addition to, a judicial one (since Congress was perceived to be more amenable to the cause of women's rights, as the Cable Act amendments bore out); or had implored her, instead, to steer clear of *United States v. Schwimmer* and to take on *Mackenzie v. Hare*, the Supreme Court decision that had once upheld the Expatriation Act (which would have only meant defending women's independent nationality rights, rather than the more controversial proposition that conscientious objectors possessed a right not to bear arms).[340] But that same caution also prevented even the most well-intentioned nationality rights reformers from fully grappling with the ways in which pacifist expatriates had been left behind by the Cable Act—and, even more to the point, from mobilizing all of them to coordinate and work together. Otherwise, they might have known—and Rebecca Shelley might have known, too—that in January 1941, in North Dakota, Mabel Boe took advantage of the same new opportunity to apply for repatriation.

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[338] Bredbenner, *A Nationality of Her Own*, 184-185, 186-187, 188-189.
[339] See, for example, Bredbenner, *A Nationality of Her Own*; Delegard, *Battling Miss Bolsheviki*; and Stansell, *The Feminist Promise*.
[340] Bredbenner, *A Nationality of Her Own*, 185-187, 189-192.

Unlike her first petition from 1929, which had required Boe to cross out irrelevant questions and write in pertinent information in between the lines, this petition was meant specifically for married expatriates like her. The top of the form was marked "APPLICATION TO TAKE OATH OF ALLEGIANCE TO THE UNITED STATES UNDER THE ACT OF JUNE 25, 1936, AS AMENDED"—meaning the new 1940 legislation—and it reprinted the text of that same legislation as well.[341] In response to its many questions, Boe answered that she was born in Iowa in 1891; got married to Jorgen Boe, "then an alien," on June 23, 1909; and that her marriage "ha[d] not been terminated" but that she'd "resided continuously in the United States" all that time. She also provided a copy of her marriage certificate and an "Affidavit relative to Birth" as proof."[342]

There is no evidence that the specific language that was so important to Shelley ("to the same extent") made any real difference in Boe's case, since those words were not included on the form she used. Likewise, there is no evidence that Boe used her naturalization hearing (if she even had an outright hearing) to articulate any of the far-reaching political and legal arguments that Shelley would have made. But while the amended legislation still required Boe to take the oath of allegiance—including its pledge to "defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"—a seemingly more agreeable (or perhaps just less inquisitive) district judge, Arthur Gronna, finally permitted her to do so.[343]

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[341] Mary M. Boe, Application to Take Oath of Allegiance to the United States Under the Act of June 25, 1936, as Amended, and Form of Such Oath (January 11, 1941), Burke County (Volume R-15, page 6), Naturalization Records, State Historical Society of North Dakota, Bismarck, ND [hereafter cited as Mary M. Boe, Application to Take Oath of Allegiance… (1941)].
[342] Mary M. Boe, Application to Take Oath of Allegiance… (1941).
[343] In 1941, John Lowe—who'd previously denied Boe's petition for naturalization—still sat on North Dakota's Fifth Judicial District Court (he retired in 1942). But another judge, Arthur Gronna—who served the Fifth Judicial District from 1933 until 1962—took on her case instead.

Mary Mabel Boe signed her name at the bottom of the form and became an American citizen, once again, for the first time in thirty-two years.[344]

Not so for Rebecca Shelley. She may have faced some additional procedural hurdles (because Boe was married to a naturalized American while Shelley was married to a German national), or she may have just had the bad luck to appear before three judges less amenable to her claims.[345] Either way, Boe's admission to citizenship produced no published opinion that Shelley could cite. And in *Shelley v. United States*, decided on June 9, 1941, the D.C. Circuit Court not only validated *Schwimmer* and its progeny, but also seemed to foreclose the possibility that a specifically gendered legal argument could ever unseat them.

It was in *Shelley*, for example, that the court offered up a novel, joint summary of *Macintosh* and *Bland*, erasing any distinctions between the two cases: "the Supreme Court held that the oath implied a promise to bear arms and that *a man or woman* who would not make that

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See "John C. Lowe," State of North Dakota Courts, https://web.archive.org/web/20230627152748/https://www.ndcourts.gov/john-c-lowe (accessed June 27, 2023); and "Arthur Jackson Gronna," State of North Dakota Courts, https://web.archive.org/web/20230630193637/https://www.ndcourts.gov/arthur-jackson-gronna (accessed June 30, 2023).

[344] Mary M. Boe, Application to Take Oath of Allegiance… (1941).

[345] According to Candice Lewis Bredbenner, the Nationality Act of 1940, passed just a few months after the other 1940 legislation that amended the Cable Act, made naturalization procedures more complicated for some expatriates. She writes, for example: "While those women who were no longer the spouses of non-citizens took an oath of allegiance to the United States to regain their citizenship, women still married to foreigners had to submit a petition for citizenship and a certificate stating that they had appeared before a naturalization examiner. They were also not exempt from taking the standard oath of loyalty." It's not clear to me, however, that Mabel Boe belonged in the former category—since her marriage had not been terminated—and, no matter what, Boe was not permitted to take the oath of allegiance by one judge in 1929 and was permitted to take that same oath by a different judge in 1941. See Bredbenner, *A Nationality of Her Own*, 192; *D'Alesandro Repatriation Act*, Public Law 76-704, *U.S. Statutes at Law* 54 (1940): 715; and *Nationality Act of 1940*, Public Law 76-853, *U.S. Statutes at Law* 54 (1940): 1137-1174.

promise could not be naturalized" [emphasis mine].[346] It was this same approach which enabled the court to transform legislation meant to ameliorate injustices suffered by female expatriates, specifically, into legislation that regarded women as no different from men, and one-time citizens as no different from any other resident aliens. Indeed, the opinion expressly construed the 1940 bill—which "exempted" married expatriates from much of the standard naturalization proceedings but still required them to swear to the oath of allegiance in order to "claim any rights as [citizens] of the United States"—as proof of deliberate "congressional intent" to prevent pacifist women from rejoining the body politic.[347] (That Congress had amended the Cable Act time and time again—and had never disclosed such an intent—seemed to make no difference.) In this way, the *Shelley* opinion elaborated upon the willingness-without-obligation doctrine anew: not only holding open the possibility that male and female citizens might very well possess an equal obligation to bear arms in the future, but also willfully ignoring that they'd always possessed unequal obligations—and unequal rights—in the past.

Notably, however, the *Shelley* decision did not negate Mabel Boe's repatriation. And, ultimately, it didn't put a stop to Rebecca Shelley's repatriation, either. In September 1944—three years after *Shelley v. United States* and thirteen long years after she filed her first petition—officials from the Bureau of Naturalization granted Shelley special dispensation to become naturalized with a modified oath of allegiance and without any vow to take up arms.[348]

[346] *Shelley v. United States*, 120 F.2d 734, 735 (D.C. Cir. 1941).
[347] *Shelley v. United States*, 120 F.2d 734, 735 (D.C. Cir. 1941).
[348] Bredbenner, *A Nationality of Her Own*, 192, 194.

It was ironic, perhaps, that the state officials—for reasons still unclear—finally gave in during the Second World War.[349] But the *Schwimmer* doctrine, which made petitioners make promises about the future, had always made more sense when war was in the offing instead of ongoing. Even more important, Shelley's repatriation—just like Boe's repatriation, and just like the naturalization of any other pacifist woman who managed to slip through the cracks of the interwar-period Bureau of Naturalization—made no discernible impact. It was the D.C. Circuit's decision to *deny* Shelley's petition which resulted in the published, citable opinion—and which remained in force even after Rebecca Shelley had already become repatriated.[350] Her actual admission to citizenship, by contrast, happened almost in secret and—despite her many attempts—helped no one else at all.

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[349] In "The Price of Pacifism," Susan Goodier attributes the change of heart to the fact that "In 1943, Congress passed a bill to 'repatriate native-born women residents of [the] U.S. who have heretofore lost their citizenship by marriage to aliens.'" The bill that Goodier cites, however—78 H.R. 1289—was in fact only introduced in the House and did not become law. Moreover, even if that bill had passed, it would have only removed the requirement to have "resided continuously in the United States." It would *not* have removed the requirement to take the oath of allegiance (which was why the D.C. Circuit Court rejected Shelley's petition for citizenship in *Shelley v. United States* in 1941). See Goodier, "The Price of Pacifism," 99; *D'Alesandro Repatriation Act*, Public Law 76-704, *U.S. Statutes at Law* 54 (1940): 715; and U.S. Congress, House, *A Bill To repatriate native-born women residents of the United States who have heretofore lost their citizenship by marriage to an alien*, H.R. 1289, 78th Cong., 1st sess., introduced in House January 19, 1943. In *A Nationality of Her Own*, Candice Lewis Bredbenner writes (on p. 192) that "In 1944 [Shelley] was finally permitted to take the oath of allegiance with the understanding that her pledge to defend the country did not include a promise to bear arms" and (on p. 194) that "Shelley…finally achieved repatriation through the intervention of Labor Department officials, not federal judges"—but Bredbenner does not explain how or why this occurred. It seems most likely that Shelley's repatriation did not follow from any broader policy changes, but that she instead finally found favor with some individually sympathetic federal officials.

[350] *Shelley v. United States*, 120 F.2d 734 (D.C. Cir. 1941), for example, was still cited as good law in *In re Nielsen*, 60 F. Supp. 240 (D.C. 1945)—in which the U.S. District Court for the District of Columbia denied the petition for citizenship of a male, Seventh-day Adventist, honorably discharged noncombatant soldier—on April 23, 1945, a year *after* Shelley had already been repatriated.

❖ Harta (Galpin) Losey

Harta Galpin was born in Minneapolis in 1886, the youngest of five.[351] Her father Herbert, born in New York, was a machinist and carpenter; her mother Flora, born in Pennsylvania, passed away sometime before Harta became a teenager.[352] She may have attended college, but she seems not to have graduated.[353] When she was twenty-one, she married Leon Bird Losey, a North Dakota native just a few months younger than she. A year later, in 1909, she gave birth to Gladys, their only child.[354]

Even with Gladys in tow, the Losey family moved around quite a bit. Leon often taught (and eventually became a dean) at Walla Walla College, a Seventh-day Adventist school in Washington state, but they also went abroad to serve as missionaries, in places both closer to

[351] Harta Galpin, 1900 census, Winnebago, Faribault County, Minnesota, T623, roll 763, page 9, ED 99, image 17, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Harta Galpin, 1900 census].
[352] Harta Galpin, 1900 census; Herbert Galpin, 1880 census, Winnebago City, Faribault County, Minnesota, T9, roll 619, page 127D, ED 63, image 10, *Ancestry.com* (accessed September 26, 2023); H. W. Galpin, 1885 census, Olmstead County, Minnesota State Population Census Schedules, 1865-1905, Minnesota Historical Society, St. Paul, MN, image 225, *Ancestry.com* (accessed September 26, 2023).
[353] Harta Losey, 1920 census, West College Place, Walla Walla County, Washington, T625, roll T625_1943, page 14A, ED 112, image 8, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Harta Losey, 1920 census]; Harta Losey, 1930 census, Muckleshoot, King County, Washington, Family History Library microfilm publication 2342224, page 3B, ED 333, image 6, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Harta Losey, 1930 census]; Harta L. Losey, 1940 census, West College Place, Walla Walla County, Washington, T627, roll m-t0627-04367, page 3B, ED 36-63, image 7, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Harta L. [*sic*] Losey, 1940 census].
[354] Harta Inez Losey, Petition for Naturalization (November 19, 1940), Naturalization Records of the U.S. District Court for the Eastern District of Washington (1890-1972), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 1342-1343, *Ancestry.com* (accessed September 26, 2023) [hereafter cited as Harta Inez Losey, Petition for Naturalization (1940)].

home (like Canada) and further afield (like India).[355] It was when the Loseys were in Canada, in 1913, that the Expatriation Act reared its head: when Leon—who, like Harta, was born in the United States—applied for and was granted Canadian citizenship. It mattered not at all that Harta hadn't married a foreign-born man, or that Leon's citizenship status only changed after they'd wed. As soon as Leon became a Canadian, Harta was no longer an American, either.[356]

In 1938, the Loseys returned to the United States for good.[357] Leon resumed teaching at Walla Walla and Harta resumed her position as a doting professor's wife.[358] On November 19, 1940—four months after Congress enacted the Cable Act amendment meant to re-admit still-married expatriates to U.S. citizenship "to the same extent" as though they'd never been expatriated at all—she filed a petition for naturalization in the Eastern District of Washington.[359] But the new legislation helped her no more than it helped Rebecca Shelley. In fact, it never even came up: not in the ten questions posed by Harta Losey's ordinary naturalization form; not in the

[355] *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941); Harta Losey, 1920 census; Harta Losey, 1930 census; Harta L. [*sic*] Losey, 1940 census; Harta Inez Losey, Petition for Naturalization (1940); Harta I. Losey, 1950 census, College Place, Walla Walla County, Washington, Population Schedules for the 1950 Census, National Archives Identifier: 310424254, roll 4537, page 34, ED 36-17, image 34, *Ancestry.com* (accessed September 20, 2023) [hereafter cited as Harta I. Losey, 1950 census]; "Leon Losey, Yucaipa," *The San Bernardino County Sun* (San Bernardino, CA), April 10, 1974, 19.
[356] *Citizenship and Expatriation Act of 1907*, Public Law 59-193, *U.S. Statutes at Large* 34 (1907): 1228-1229; Harta Inez Losey, Petition for Naturalization (1940).
[357] Harta Inez Losey, Petition for Naturalization (1940); *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941).
[358] Harta Losey, 1920 census; Harta Inez Losey, Petition for Naturalization (1940); "Leon Losey, Yucaipa," *The San Bernardino County Sun* (San Bernardino, CA), April 10, 1974, 19.
[359] Harta Inez Losey, Petition for Naturalization (1940); *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941).

answers she filled in in reply; and not even in the district court opinion, handed down by Judge Lewis Schwellenbach, dismissing her petition.[360]

That Judge Schwellenbach opted to publish his opinion, on May 26, 1941, was itself unusual—especially because he did not believe that Harta Losey was a particularly dangerous candidate for citizenship. To the contrary: as he wrote at the opinion's close, it was because he hoped that Losey's case might be "distinguishable" from *Schwimmer*, *Macintosh*, and *Bland* that he thus positioned her to "present the facts of her particular case"—eventually—"to the Supreme Court of the United States."[361] Notably, however, the judge's only source of regret was how decidedly innocuous Losey's personal and political commitments seemed to be.

As Schwellenbach wrote in the opinion, for example, Losey resisted identifying herself as a "pacifist" because she respected Congress' authority to usher the nation and its citizens into battle.[362] Likewise, she resisted identifying herself as a "conscientious objector" because she'd come to believe that that label more aptly applied to those—like the Jehovah's Witnesses who'd recently come before the Supreme Court—who "refuse to salute the flag and refuse to do

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[360] Harta Inez Losey, Petition for Naturalization (1940); *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941). Under Question 9 of Losey's petition, she noted that it was being "filed under Sec. 4, Act of September 22, 1922"—the provision of the Cable Act that required married expatriates to re-apply for naturalization—rather than under the 1940 legislation that amended the Cable Act (as in Mabel Boe's case). Likewise, she did not make use of the same form that Mabel Boe did (namely, an Application to Take Oath of Allegiance to the United States Under the Act of June 25, 1936, as Amended, and Form of Such Oath) when she applied for repatriation in 1941. Lewis Schwellenbach served as a judge on the U.S. District Court for the Eastern District of Washington from 1940 until 1945. See "Schwellenbach, Lewis Baxter," Federal Judicial Center, https://web.archive.org/web/20230704004921/https://www.fjc.gov/history/judges/schwellenbach-lewis-baxter (accessed July 4, 2023).

[361] *In re Losey*, 39 F.Supp. 37, 38 (E.D. Wash., N.D. 1941).

[362] *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941).

anything."[363] Instead, Losey called herself "a non-combatant"—effectively enlisting herself, preemptively, into wartime service—and declared that she would abide by any and all government mandates, would agree to be sent to the front lines, and would "participate in any sort of war work except the actual shooting of a weapon."[364]

All of this "deeply impressed" the district judge.[365] Nonetheless—and even though he believed *Schwimmer*, *Macintosh*, and *Bland* had been decided incorrectly—he would not grant Losey's petition for citizenship.[366] He never once acknowledged that her unwillingness to bear arms (and only to bear arms) accorded with her ineligibility for combatant service, or that her willingness to join the military went above and beyond her ineligibility for the draft. He did not recount the histories of the Expatriation Act and the Cable Act, or even identify them by name; did not acknowledge the Cable Act's most recent amendment, addressed specifically to women like Harta Losey; and did not otherwise address the many injustices she'd faced even before coming up against the formally equal—but distinctly gendered—*Schwimmer* doctrine.

What Schwellenbach alluded to instead was a piece of legislation that had little relevance to Losey's present situation. Towards the end of *In re Losey*, after summarizing the appellate court decision that (temporarily) granted Douglas Macintosh citizenship on account of the "various draft acts" that had allowed conscientious objectors to refuse combatant service,

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[363] *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941). The Jehovah's Witness case was *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), in which the Supreme Court ruled that public school students could be compelled to recite the Pledge of Allegiance and salute the American flag (contrary to the religious beliefs of Jehovah's Witnesses) because of the state's interest in "national cohesion." It would soon be overturned in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[364] *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941).
[365] *In re Losey*, 39 F.Supp. 37 (E.D. Wash., N.D. 1941).
[366] *In re Losey*, 39 F.Supp. 37, 38 (E.D. Wash., N.D. 1941).

Schwellenbach wrote: "To them may now be added the exemption provisions of the Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq."[367] It was a telling reference: the Selective Training and Service Act—which, eight months earlier, had sanctioned the first peacetime draft in American history—had indeed carved out the same exceptions for conscientious objectors. But it had also only required citizen men and resident alien men between the ages of twenty-one and forty-five—and no women of any citizenship status or any age—to register for the Selective Service.[368] Nonetheless, Schwellenbach merely made reference to the legislation, but did not make use of it: not by ruling that naturalization policy must follow actual military policy, and not by pointing out that American women had in fact—yet again—been barred from bearing arms.

Perhaps if Harta Losey had already been called to appear before her local draft board—and had been able to formally avail herself of the protections available to conscientious-objector registrants—Schwellenbach's ruling might have been different. As things stood, however, the judge's decision merely charted out a path for how other petitioners—resident alien men who would be made to sign up for noncombatant service in the Second World War—would challenge *Schwimmer* and its progeny instead.

❖ *Girouard v. United States* and the Pacifist Men Who *Could* Become American Citizens

If *In re Losey* and *Shelley v. United States*, decided in the spring of 1941, evidenced *Schwimmer*'s staying power, its authority did soon begin to wane—not because Harta Losey or

[367] *In re Losey*, 39 F.Supp. 37, 38 (E.D. Wash., N.D. 1941).
[368] *Selective Training and Service Act of 1940*, Public Law 76-783, *U.S. Statutes at Large* 54 (1940): 885-897.

Rebecca Shelley did all that much to dislodge the precedent (they empathically did not) but because, six months later, the U.S. finally entered the Second World War.

Even more than had waging the nation's first total war twenty-four years earlier, mobilizing for World War II fundamentally reshaped American life, vastly expanding the authority of the state and its demands upon ordinary citizens.[369] The unprecedented peacetime draft, for example, was followed by an unprecedented mass income tax.[370] A new Office of Price Administration strictly rationed some commodities and liberally subsidized others; the National War Labor Board periodically stabilized Americans' wages and salaries; and those ordinary workers, in turn, together bought billions of dollars' worth of war bonds and turned out millions of military trucks and hundreds of thousands more tanks, airplanes, and pieces of artillery.[371]

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[369] See, for example, James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2013).

[370] *Selective Training and Service Act of 1940*, Public Law 76-783, *U.S. Statutes at Large* 54 (1940): 885-897; *An Act To provide revenue, and for other purposes*, Public Law 77-53, *U.S. Statutes at Large* 56 (1942): 798-985.

[371] See, for example, Executive Order No. 8875 of August 28, 1941, Establishing the Supply Priorities and Allocations Board, The American Presidency Project, https://web.archive.org/web/20230709195730/https://www.presidency.ucsb.edu/documents/executive-order-8875-establishing-the-supply-priorities-and-allocations-board (accessed July 9, 2023); *Emergency Price Control Act of 1942*, Public Law 77-421, *U.S. Statutes at Large* 56 (1942): 23-37; *An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes*, Public Law 77-729, *U.S. Statutes at Large* 56 (1942): 765-768; Executive Order No. 9381 of September 25, 1943, Amendment of Executive Order No. 9250, Entitled "Providing for the Stabilizing of the National Economy," The American Presidency Project, https://web.archive.org/web/20230709200234/https://www.presidency.ucsb.edu/documents/executive-order-9381-amendment-executive-order-no-9250-entitled-providing-for-the (accessed July 9, 2023). See also James T. Sparrow, "'Buying Our Boys Back': The Mass Foundations of Fiscal Citizenship in World War II," *Journal of Policy History* 20, no. 2 (2008): 263-286; and Arthur Herman, *Freedom's Forge: How American Business Produced Victory in World War II* (New York: Penguin Random House, 2012).

American women, arguably even more than American men, embraced wholly unfamiliar roles and responsibilities. Millions of women, for example, joined the paid work force for the first time, replacing their husbands, brothers, and sons who'd been shipped off to battle—and thereby sustaining wartime industrial production.[372] For the first time, too, every branch of the U.S. military began to enlist women personnel. Between May 1942 and February 1943, Congress created four all-female divisions of the Army, Navy, Marine Corps, and Coast Guard—as well as a division of Women Airforce Service Pilots whose members technically remained civilians—and, throughout the course of the war, approximately 350,000 women joined up.[373]

Nonetheless, two facts remained unchanged: first, not one woman was conscripted into service; and second, every female soldier was, by definition, a non-combatant.[374] Thus, after two decades in which naturalization examiners and federal judges had insisted that American women could and very well might be compelled to take up arms in the next global conflict, the actual advent of the Second World War confirmed just the opposite.

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[372] This shift was most pronounced for married, middle-class, white women, many of whom had not been employed before the war. See, for example, Melissa A. McEuen, *Making War, Making Women: Femininity and Duty on the American Home Front, 1941-1945* (Athens: University of Georgia Press, 2011).

[373] Jeanne Holm, *Women in the Military: An Unfinished Revolution*, rev. ed. (Novato: Presidio Press, 1992), 100; Laurie Scrivener, "U.S. Military Women in World War II: The SPAR, WAC, WAVES, WASP, and Women Marines in U.S. Government Publications," *Journal of Government Information* 26, no. 4 (July-August 1999): 361-383.

[374] Combat exceptions were built into the legislation authorizing the all-female branches of the U.S. military. See, for example, *Women's Army Auxiliary Corps Act*, Public Law 77-554, *U.S. Statutes at Large* 56 (1942): 278-282; and *Women's Auxiliary Naval Reserve*, Public Law 77-689, *U.S. Statutes at Large* 56 (1942): 730-731. Late in the war, Congress contemplated a Nurses Selective Service Act that would have conscripted female registered nurses, specifically—solely as non-combatants—but the proposed bill lost momentum as V-E Day approached. See U.S. Congress, House, *Nurses Selective Service Act of 1945*, H.R. 2277, 79th Cong., 1st sess., introduced in House February 22, 1945; and Jill Elaine Hasday, "Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change," *Minnesota Law Review* 93, no. 1 (November 2008): 105-106n35.

Still, that wasn't what brought about *Schwimmer*'s demise. To the contrary: *Schwimmer* was overturned precisely because pacifist resident alien men *were* required to register for the draft and to officially exempt themselves—if they so desired—from regular combat duty.[375]

The first hint of what was to come arrived in January 1944 (the same year that Rebecca Shelley was also admitted to citizenship but almost in secret). The case involved two British immigrants: William Kinlock, a Seventh-day Adventist (like Harta Losey), and William McKillop, a member of the Church of the Brethren (like Mabel Boe).[376] In 1940, both men had been called to appear before their local draft boards and had "therein requested to be classified as 1AO, conscientious objector, for noncombat service."[377] In 1943, both men had been inducted into the same noncombat Army medical unit.[378] They'd reported for basic training at Fort Lewis and, from there, each had applied for naturalization in the Western District of Washington state.[379]

At their respective naturalization hearings, the assigned "representative of the Immigration Service" had argued that Kinlock and McKillop could not become citizens, because the mere fact of their noncombatant service proved them incapable of swearing to bear arms in defense of the United States.[380] Judge Charles Leavy, however, took the opposite tack: he argued

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[375] As previously mentioned, this did not happen uniformly. For example, in *In re Nielsen*, 60 F. Supp. 240 (D.C. 1945), the U.S. District Court for the District of Columbia denied the petition for citizenship of a male, Seventh-day Adventist, honorably discharged noncombatant soldier—because he refused to bear arms—on the basis of *Schwimmer*, *Macintosh*, *Bland*, and *United States v. Shelley*.

[376] Note: the case name was rendered as *In re Kinloch* [with an H], *In re McKillop*, 53 F. Supp. 521 (W.D. Wash., S.D. 1944), but even within the opinion itself, the first petitioner's last name was rendered as Kinlock [with a K], which appears to be correct.

[377] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521 (W.D. Wash., S.D. 1944).

[378] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 522 (W.D. Wash., S.D. 1944).

[379] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521 (W.D. Wash., S.D. 1944).

[380] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 522 (W.D. Wash., S.D. 1944).

that it was the two men's military records—and their adherence to military rules and regulations—which demonstrated their worthiness for citizenship.[381]

The judge did not insist that *Schwimmer*, *Macintosh*, and *Bland* should be thrown out, necessarily, but that the "divided" decisions had left room for new "facts" to be brought to bear.[382] To that end, he called upon Kinlock and McKillop's commanding officer—who testified, for example, that the men were in fact "prohibited" from carrying arms, not only according to their enlistment status but also according to the longstanding provisions of the "Geneva Conference." Nonetheless, the officer explained, Kinlock and McKillop had undergone the same "basic training" as all other soldiers and were themselves "qualified for combat service." Moreover, as medics stationed at the front lines, they were subjected to the same "hazards," and required to demonstrate the same "high degree of valor and courage," as every other G.I. they helped to protect.[383]

In addition to this testimony, the judge relied upon two laws passed in the lead-up to the Second World War. The first—as portended by Harta Losey's exclusion from citizenship three years earlier—was the Selective Training and Service Act of 1940, which had enabled male citizens and male resident aliens alike to register for noncombatant service—and had also enabled those noncombatant servicemen to "have the rights and privileges of a soldier, both during the period of service and after honorable discharge."[384] The second was the Nationality

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[381] Charles Leavy served on the U.S. District Court for the Western District of Washington from 1942 until his death in 1952. Before that, he served as a member of the House of Representatives for six years (1937-1942). See "Leavy, Charles Henry," Federal Judicial Center, https://web.archive.org/web/20230709222358/https://www.fjc.gov/node/1383726 (accessed July 9, 2023).
[382] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 522 (W.D. Wash., S.D. 1944).
[383] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 522 (W.D. Wash., S.D. 1944).
[384] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 523 (W.D. Wash., S.D. 1944).

Act of 1940, which had identified one of those rights and privileges: namely, a much-expedited naturalization process made available only to resident aliens—including conscientious objectors, at least as Judge Leavy understood it—who formally served in the U.S. military.[385]

Thus, even though Kinlock and McKillop would not be able to adhere to the oath of allegiance imposed by *Schwimmer* and its progeny, the judge granted them citizenship anyway.[386] He might have done the same for a pacifist resident alien woman, but it was more difficult to imagine, given the particular evidence he brought to bear. Such a woman, for example, would not have been compelled to serve in the military, not even in a noncombat role. Even if she'd volunteered—as a nurse, for example—she would not have been certified or trained for combat duty. And even if she'd volunteered—sometime after 1942, when women were first permitted to enlist in the new all-female branches of the U.S. military—she would not have been the object of congressional legislation passed years before that in 1940.

It was perhaps even more difficult to imagine a pacifist woman in the place of the male petitioner whose case ultimately made it to the Supreme Court—and thus brought about the overturning of *Schwimmer* and its progeny—in April 1946.[387]

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[385] As Judge Leavy acknowledged, the Nationality Act specifically exempted "any conscientious objector who performed no military duty whatever or who refused to wear the uniform" from this expedited path to citizenship—but Leavy understood that narrow exception to mean that any conscientious objectors who *did* perform military duties and who *did* wear the uniforms (like Kinlock and McKillop) should be included. See *Nationality Act of 1940*, Public Law 76-853, *U.S. Statutes at Law* 54 (1940): 1137-1174; and *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 523 (W.D. Wash., S.D. 1944).

[386] *In re Kinloch*, *In re McKillop*, 53 F. Supp. 521, 523-524 (W.D. Wash., S.D. 1944).

[387] In *Girouard*, the Supreme Court not only revised the *Schwimmer* doctrine but also explicitly overturned *Schwimmer*, *Macintosh*, and *Bland*. See *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The case was *Girouard v. United States* and the petitioner was James Girouard, a Seventh-day Adventist born in Canada in 1902.[388] He'd immigrated to the United States in 1923 and submitted his first papers, in a Boston, Massachusetts district court, in 1940.[389] In 1943, after America had already entered the Second World War II, he'd filed his second papers and, in response to Question 22 of the standard naturalization questionnaire ("If necessary, are you willing to take up arms in defense of this country?"), he'd answered, "'No (Non-combatant) Seventh Day Adventist.'"[390] Around that same time, he'd also appeared before Local Draft Board No. 161—and, in response to the draft board's own questionnaire, had "not claim[ed]…exemption from all military service, but only from combatant military duty."[391] Girouard, though—unlike William Kinlock and William McKillop—had never actually been called to report for duty. Thus, when the Supreme Court decided to countenance his petition for naturalization, it was not because he'd actually "served as a non-combatant" but because that's what he'd been "*willing to do*" [emphasis mine].[392] Simply by registering for the draft, in other words—something that was required only of resident alien men and *not* of resident alien women—James Girouard had proved his loyalty and thus his fitness for citizenship.

To be sure, it wasn't just the fact of Girouard's registration which gave rise to the Court's new attitude. The majority opinion was written by Justice William O. Douglas and joined by four others—Justices Hugo L. Black, Harold H. Burton, Frank Murphy, Wiley Rutledge—none of

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[388] *United States v. Girouard*, 149 F.2d 760, 761 (1st Cir. 1945); *Girouard v. United States*, 328 U.S. 61, 62 (1946).
[389] *United States v. Girouard*, 149 F.2d 760, 761 (1st Cir. 1945).
[390] *Girouard v. United States*, 328 U.S. 61, 62 (1946).
[391] *United States v. Girouard*, 149 F.2d 760, 761 (1st Cir. 1945); *Girouard v. United States*, 328 U.S. 61, 62 (1946).
[392] *Girouard v. United States*, 328 U.S. 61, 67-68 (1946).

whom had been on the Court in 1929 and 1931, when *Schwimmer*, *Macintosh*, and *Bland* had been decided.[393] The *Girouard* majority expressed admiration for Justice Holmes's dissent in *Schwimmer* and for Justice Hughes's in *Macintosh* and especially for their more permissive readings of the oath of allegiance—which did not, as the Court now reaffirmed, in fact "require that [aliens] promise to bear arms."[394]

Alongside this reinterpretation of the Naturalization Act of 1906, the *Girouard* majority also offered up new corroborating evidence: the Nationality Act of 1940 (which had not amended the oath to include a pledge to take up arms); the Selective Training and Service Act of 1940 (which had permitted conscientious objectors to perform noncombatant service—and had permitted them to enlist in the army by taking an almost-identical oath); and the 1942 Second War Powers Act (which had created expedited paths to citizenship for U.S. military veterans, including non-combatants).[395] Additionally, the majority expressly adhered to several of the

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[393] The only member of the Court who had also been a member when *Schwimmer*, *Macintosh*, and *Bland* were decided was now-Chief-Justice Harlan F. Stone. He'd joined the majority in *Schwimmer* (arguing that Rosika Schwimmer should have been denied citizenship) but had dissented in *Macintosh* and *Bland* (arguing that Douglas Macintosh and Marie Bland should have been granted citizenship). Nonetheless, he now wrote the dissent in *Girouard*, primarily because he disagreed with the majority's interpretation of the Nationality Act of 1940 and because, in the years since the Court had decided those three earlier cases, Congress had repeatedly failed to pass legislation—namely, the legislation discussed in Sections IV and V of this chapter—that would have affirmatively permitted conscientious objectors to become naturalized citizens. Stone's dissent concluded: "The amendments and their legislative history give no hint of any purpose of Congress to relax, at least for persons who had rendered no military service, the requirements of the oath of allegiance and proof of attachment to the Constitution as this Court had interpreted them…It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power." See *Girouard v. United States*, 328 U.S. 61, 70-79 (1946). While reading his dissent from the bench, Stone suffered a cerebral hemorrhage and died only hours later. See Bruce Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003), 243.

[394] *Girouard v. United States*, 328 U.S. 61, 63-64 (1946).

[395] *Girouard v. United States*, 328 U.S. 61, 65-70 (1946). See also *Nationality Act of 1940*, Public Law 76-853, *U.S. Statutes at Law* 54 (1940): 1137-1174; *Selective Training and Service*

Court's other recent precedents (including *United States v. Ballard* and *Board of Education v. Barnette*), which had expanded protections for freedom of religion and freedom of thought during the war.[396] Perhaps most important, though, Douglas and the other members of the *Girouard* majority reversed course—eight months after V-J Day—because they seemed to more clearly understand what it took to wage and win a "[t]otal war in its modern form."[397] Certainly much more than arms-bearing alone.

In addition to the "nuclear physicists who developed the atomic bomb," Douglas extolled "the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains"—all of whom, he argued, had helped America vanquish its foes, and a great many of whom had risked their lives or even died for their country.[398] He also praised the "patriot[ism]" of conscientious-objector non-combatants, in particular—insisting that their religious objections to shedding blood made them no different from those who, for reasons of physical unfitness, were "assign[ed] to duties far behind the fighting front," and lauding their "unselfish" and undeniable contributions to U.S. victory."[399]

These passages evinced a totally new attitude—simultaneously more capacious and more realistic than anything found in *Schwimmer*, *Macintosh*, or *Bland*—towards both arms-bearing and towards those who refused its call. What made the passages especially remarkable, however, was that James Girouard himself had seemingly performed none of these vital, noncombatant

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Act of 1940, Public Law 76-783, *U.S. Statutes at Large* 54 (1940): 885-897; and *Second War Powers Act, 1942*, Public Law 77-507, *U.S. Statutes at Large* 56 (1942): 176-187.

[396] *Girouard v. United States*, 328 U.S. 61, 63-64, 68-69 (1946). See also *United States v. Ballard*, 322 U.S. 78 (1944); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), both cited here.

[397] *Girouard v. United States*, 328 U.S. 61, 62, 64 (1946).

[398] *Girouard v. United States*, 328 U.S. 61, 64 (1946).

[399] *Girouard v. United States*, 328 U.S. 61, 64-65 (1946).

services—and that the opinion made no effort to make it seem as though he had.[400] Indeed, all that connected James Girouard to the engineers and the doctors and the chaplains who'd served in the U.S. military was the fact that he'd signed up—because he'd been compelled to sign up—to do the same.

Seventeen years earlier, it hadn't helped Rosika Schwimmer to swear that she would lay down her life to save another soldier. Two years after that, it hadn't helped Marie Bland to pledge that she would (once again) become a battlefield nurse to care for the wounded. But that was entirely the point. Simply by filling out a draft card with his local draft board, James Girouard had proved his willingness—more effectively, or more believably, and in a way that Schwimmer and Bland fundamentally could not have—to perform noncombatant service in time of war. Even more, he'd fulfilled an obligation—not to take up arms, admittedly, but to register for military service—which the Court now regarded as equally important. This, too, however, was a male-only obligation: one that women living in the United States—whether newly-arrived immigrants, since-naturalized citizens, or lifelong American nationals—still did not possess.

In the end, this was one of the *Schwimmer* doctrine's greatest ironies. In 1929, in *United States v. Schwimmer*, the Supreme Court had established that resident alien women needed to be willing—without ever being obligated—to bear arms in defense of the United States. Two years later, in *United States v. Bland* and *United States v. Macintosh*, the Court had eliminated the importance of gender difference—and of gendered obligation—entirely. But in *Girouard*, the

[400] James Girouard may very well have taken on some sort of defense industry job during the war. According to the First Circuit's opinion at *United States v. Girouard*, 149 F.2d 760, 761 (1st Cir. 1945), he was an "engineer." But the Supreme Court majority opinion never said as much explicitly and did not otherwise make Girouard's personal history—beyond the fact of his registration for the draft—part of its decision.

Court suddenly made obligation salient again. And in so doing, it rewarded a pacifist man, specifically—and made sure never to account for the specific burdens it had imposed upon pacifist women.

❖ After *Girouard*

For all that *Girouard* helped to paper over *Schwimmer*'s distinctly gendered legacy, it also came too late to help the doctrine's most prominent progenitors. In the wake of the Supreme Court's decision, Rosika Schwimmer finally reconnected with Carrie Chapman Catt, who encouraged her to petition again for naturalization—but, despite Catt's best (belated) efforts, Schwimmer died in August 1948 without ever reapplying.[401] Douglas Macintosh also passed away in the summer of 1948, after several years of ill health.[402] Decades later, in 1981, a family friend petitioned Congress to grant Macintosh posthumous, "honorary" American citizenship, but it never came to fruition.[403] Marie Bland seems to have died even earlier, perhaps in 1943 or 1944.[404] According to the 1940 federal census, she was still living on the Upper East Side of Manhattan, still a "companion" to Annie Smith and Smith's adult children—and still an un-naturalized resident alien.[405]

Even before *Girouard*, of course, other pacifist women had been more fortunate, albeit without bringing about any kind of broader, doctrinal change. Martha Graber, for example, had

[401] Flowers, *To Defend the Constitution*, 319-323.
[402] Flowers, *To Defend the Constitution*, 323-325.
[403] Flowers, *To Defend the Constitution*, 325-327.
[404] Flowers, *To Defend the Constitution*, 327-328.
[405] Mary [*sic*] A. Bland, 1940 census, New York, New York County, New York, T627, roll m-t0627-02655, page 8B, ED 31-1334, image 16, *Ancestry.com* (accessed September 20, 2023).

been naturalized in 1930, Mabel Boe in 1941, and Rebecca Shelley in 1944.[406] And in 1949, three years after the Court overturned *Schwimmer* and nine years after she filed her first petition for citizenship, Harta Losey was finally repatriated as well.[407]

It was only in the 1950s, though, in the first full decade of the Cold War, that the requirements for American citizenship changed more uniformly—and not on account of the courts (or any enterprising naturalization examiners) but on account of the legislature.

First, in September 1950, Congress passed what became known as the McCarran Internal Security Act (after its sponsor, Nevada Senator Pat McCarran). It was an omnibus bill, which primarily targeted suspected communists, forcing them to register their "front" organizations with the federal government, subjecting them to the oversight of a new Subversive Activities Control Board, and making them liable to detention and deportation "in a time of internal security emergency."[408] President Harry Truman protested vehemently—calling the proposed bill the "greatest danger to freedom of speech, press, and assembly, since the Sedition Laws of 1798" and insisting that it would embolden, rather than frustrate, communists around the globe—but Congress overruled his veto.[409] And in this way, a revised oath of allegiance—revised for the first time since 1906—also took hold.

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[406] "Nurse Wins Battle for Citizenship," *The Lima Morning Star and Republican-Gazette* (Lima, OH), October 1, 1930, 1; Mary M. Boe, Application to Take Oath of Allegiance… (1941); Bredbenner, *A Nationality of Her Own*, 192, 194.
[407] Harta Inee [*sic*] Losey, Petition for Naturalization (January 17, 1949), Naturalization Records of the U.S. District Court for the Eastern District of Washington (1890-1972), Records of District Courts of the United States, Record Group 21 (National Archives at Washington, D.C.), images 551-552, *Ancestry.com* (accessed September 26, 2023); Harta I. Losey, 1950 census.
[408] *Internal Security Act of 1950*, Public Law 81-831, *U.S. Statutes at Large* 64 (1950): 987-1031.
[409] "Text of President's Message Vetoing the Communist-Control Bill," *New York Times*, September 23, 1950, 6; "Truman to Delay Enforcing Law to List Defense Plants," *New York Times*, September 29, 1950, 1, 17.

Under the Internal Security Act, petitioners for naturalization were still required to "support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same." As had *not* been the case when *Schwimmer*, *Macintosh*, and *Bland* were decided, however, petitioners were also now made to explicitly promise "I will bear arms on behalf of the United States"—or else made to promise to "perform noncombatant service in the Armed Forces of the United States" instead. They could also, for the first time, be exempted from taking the oath entirely—though only if they could prove (to the "satisfaction" of their assigned naturalization officials) that they had legitimate "reason[s] of religious training and belief" to disavow both arms-bearing and noncombatant military service as well.[410]

Two years later, in June, Congress enacted the Immigration and Nationality Act of 1952—also known as the McCarran-Walter Act—so named for its primary sponsors, Pat McCarran and Pennsylvania Representative Francis Walter. Once again, it was an omnibus bill, which this time primarily eliminated outright racial restrictions from U.S. immigration policy, while still keeping in place the system of national origins quotas that had existed since 1924.[411] Once again, the legislation passed over a veto from President Truman.[412] And once again, it revised the oath of allegiance, adding a third potential promise: "(A) to bear arms on behalf of the United States"; "(B) to perform noncombatant service in the Armed Forces of the United

[410] *Internal Security Act of 1950*, Public Law 81-831, *U.S. Statutes at Large* 64 (1950): 987-1031. Children who could not understand the oath of allegiance could be exempted as well.
[411] *Immigration and Nationality Act*, Public Law 82-414, *U.S. Statutes at Large* 66 (1952): 163-282.
[412] Anthony Leviero, "President Vetoes Immigration Bill as Discriminatory," *New York Times*, June 26, 1952, 1; C. P. Trussell, "Immigration Bill Repassed by House Over Truman Veto," *New York Times*, June 27, 1952, 1; C. P. Trussell, "Congress Enacts Immigration Bill Over Truman Veto," *New York Times*, June 28, 1952, 1.

States"; and "(C) to perform work of national importance under civilian direction." It also retained the earlier law's exemption for religious conscientious objectors, but clarified that "essentially political, sociological or philosophical views or a merely personal moral code" would not suffice. To avoid the oath of allegiance, petitioners needed to believe in "a Supreme Being."[413]

It was under these new guidelines that Margaret Webb, now living in Pomona, California, reapplied for naturalization in 1955. At the bottom of the first page of her petition, Webb admitted that she had been denied once before, for "Refusal to bear arms." She did not refuse to take the oath of allegiance, just as she had not refused—but had only been prevented from doing so—in 1929. But at the bottom of the next page, in bright red pen, she diligently reported her willingness—or lack thereof—to abide by its every component part:

> that I will bear arms on behalf of the United States when required by the law **(no)**; or
> that I will perform noncombatant service in the Armed Forces of the United States when required by the law **(yes)**; or
> that I will perform work of national importance under civilian direction when required by the law **(yes)**.[414]

She did not need to answer "yes" to all three clauses. She did not need to answer "yes" to even two of them. In fact, she probably didn't even need to expressly pick and choose.[415] On May 27, 1955—twenty-seven years after her also-pacifist, also-immigrant husband was admitted to

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[413] *Immigration and Nationality Act*, Public Law 82-414, *U.S. Statutes at Large* 66 (1952): 163-282.
[414] Margaret Hubbs Dorland Webb, Petition for Naturalization (1955).
[415] Frieda Aberle, for example, was also admitted to citizenship in 1955—with the same naturalization form and same tripartite oath of allegiance, but without indicating which clauses she would and would not abide by. See Frieda Aberle, Petition for Naturalization (filed February 18, 1955, granted March 22, 1955), Petitions for Naturalization, U.S. District for the Second (Wichita) Division of the District of Kansas (March 17, 1909-September 25, 1991), Records of District Courts of the United States, Record Group 21 (National Archives at Kansas City), images 792-793, *Ancestry.com* (accessed September 26, 2023)

citizenship and twenty-six years after she was excluded from citizenship instead—a Los Angeles district court granted her petition.[416]

But if Margaret Webb's conspicuous picking and choosing was not strictly necessary, it also helped illustrate how the amended naturalization procedures worked to undo the distinctly gendered paradoxes of the *Schwimmer* doctrine (and in a way that the Supreme Court's decision in *Girouard v. United States* had not). The oath's last clause alone—that I will perform work of national importance under civilian direction when required by the law—had no antecedent in *Girouard*, which was concerned solely with noncombatant service (whether actually performed or merely promised) within the U.S. military. This clause did not *only* embrace pacifist women, but it took them into account—no matter that they, unlike their husbands or brothers or sons, might never be called to enlist in any capacity at all.

Even more, it was the repeated caveat "when required by the law"—which necessarily allowed for the multiple, possible futures in which Margaret Webb could decide how best to demonstrate her allegiance—which made all the difference. In *United States v. Schwimmer*, the Supreme Court had made women's (and only women's) willingness to bear arms precede their obligation to do so. In *United States v. Bland*, in tandem with *United States v. Macintosh*, the Court had made women's (and only women's) non-obligation to bear arms entirely irrelevant. But as of 1952, by its very structure, the oath of allegiance acknowledged that petitioners might possess disparate obligations of citizenship—and that their willingness to fulfill those obligations, when and *only when* required by the law, would inevitably follow suit.

[416] Margaret D. Webb, 1930 census; Margaret Hubbs Dorland Webb, Petition for Naturalization (1955).

CHAPTER 2
"Simply Because They're Married to Servicemen":
Reid I (1956), *Reid II* (1957), and the Postwar Right to Trial by Jury

On any day between June 1953 and June 1955, visitors to the Federal Reformatory for Women at Alderson, West Virginia would have found two women—Dorothy Krueger Smith and Clarice Covert—who had been imprisoned there under strikingly similar circumstances.[1]

Dorothy's husband Aubrey (or "Smittie," as he was more often known) had been a colonel assigned to U.S. Army Far East Command in Tokyo.[2] Clarice's husband Eddie had also been a military officer—a master sergeant—stationed at a U.S. Air Force base in Oxfordshire.[3] Both men had fought in the Second World War and had subsequently stayed in (in Smittie's case) or rejoined (in Eddie's) the armed forces, turning military service into an enduring career.[4] When they'd each been posted overseas, Smittie to a still-occupied Japan and Eddie to a still-allied England, they'd brought their families along—and Dorothy and Clarice, each with two

[1] Transcript of Record at 2, *Kinsella v. Krueger*, 351 U.S. 470 (1956), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0102363945/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=7da8eb96&pg=1 (accessed October 2, 2023) [hereafter cited as Transcript of Record, *Kinsella v. Krueger*, 351 U.S. 470 (1956)]; Transcript of Record at 2, *Reid v. Covert*, 351 U.S. 487 (1956), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0102364978/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=a7f1bd5e&pg=1 (accessed October 2, 2023) [hereafter cited as Transcript of Record, *Reid v. Covert*, 351 U.S. 487 (1956)].
[2] Transcript of Record at 1, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Brittany Warren, "The Case of the Murdering Wives: *Reid v. Covert* and the Complicated Question of Civilians and Courts-Martial," *Military Law Review* 212 (2012): 149.
[3] Transcript of Record at 1, *Reid v. Covert*, 351 U.S. 487 (1956).
[4] Transcript of Record at 18, *Reid v. Covert*, 351 U.S. 487 (1956); Warren, "The Case of the Murdering Wives," 149-150.

children in tow, had formally become military dependents, transported and housed and generally supported at the government's expense.[5]

Life on base, however, had suited neither woman. Their marriages, already in trouble, had become steadily more miserable.[6] Smittie and Eddie had both developed gambling problems.[7] Dorothy and Clarice had both struggled with their own worsening mental health—and been helped very little by the military physicians who'd alternately dismissed their concerns and over-prescribed them sleeping pills and sedatives.[8] Eventually, most likely suicidal—and almost certainly intoxicated—they had each reached a desperate and violent moment of crisis.[9] Just after midnight on October 4, 1952, Dorothy had stabbed Smittie with a kitchen knife.[10] Five months later, on the night of March 10, 1953, Clarice had attacked Eddie with a hand axe.[11] Both men had succumbed to their wounds—and both women had been convicted of premeditated murder and sentenced to life in prison.[12]

Unlike most of the other women confined at Alderson, however, Dorothy Krueger Smith and Clarice Covert had not been found guilty by juries of their peers. Although multiple provisions of the Constitution (Article III, § 2, the Fifth Amendment, and the Sixth Amendment)

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[5] Transcript of Record at 1, 24, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Transcript of Record at 1, 19, *Reid v. Covert*, 351 U.S. 487 (1956).
[6] Warren, "The Case of the Murdering Wives," 145-147, 149-151.
[7] Transcript of Record at 15-16, 18-19, 21, *Reid v. Covert*, 351 U.S. 487 (1956); Warren, "The Case of the Murdering Wives," 145-146, 150.
[8] Transcript of Record at 28-32, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Transcript of Record at 16-24, *Reid v. Covert*, 351 U.S. 487 (1956).
[9] Transcript of Record at 24-31, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Transcript of Record at 16-17, 20, 22-24 *Reid v. Covert*, 351 U.S. 487 (1956).
[10] Transcript of Record at 1-2, 23, 25, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[11] Transcript of Record at 1, 13-14, *Reid v. Covert*, 351 U.S. 487 (1956).
[12] Transcript of Record at 1-3, 26-27, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Transcript of Record at 1-2, 13-14, *Reid v. Covert*, 351 U.S. 487 (1956).

together guarantee that all criminal defendants receive "a speedy and public trial, by an impartial jury"—at least in theory if not always in practice—they also allow for one major caveat: "except in cases arising in the land or naval forces."[13] Today, in no small part *because of* Smith and Covert's travails, courts generally understand that phrase to mean "cases involving U.S. armed forces personnel."[14] But in the early 1950s, the lines between soldiers and civilians—or at least between servicemembers and their dependents—had seemed somehow less clear-cut. In fact, Article 2(11) of the Uniform Code of Military Justice—enacted, along with the rest of the UCMJ, in 1950—had explicitly incorporated within military jurisdiction "all persons serving with, employed by, or *accompanying* the armed forces without the continental limits of the United States" [emphasis mine].[15] Consequently, after killing their military-officer husbands, Covert and Smith had been charged under the UCMJ and then tried and found guilty by military courts-martial.[16]

This was no trifling matter. Whereas jury trials were meant to protect the rights of the accused (and to encourage civic participation from members of the jury), courts-martial were

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[13] U.S. Constitution, Article III, § 2; U.S. Constitution, amend. 5; U.S. Constitution, amend. 6. See also Albert Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *University of Chicago Law Review* 61, no. 3 (Summer 1994): 867-928.
[14] See, for example, Warren, "The Case of the Murdering Wives," 184-193.
[15] *Uniform Code of Military Justice*, Public Law 81-506, *U.S. Statutes at Large* 64 (1950): 107-149. On the Uniform Code of Military Justice, see, for example, Eugene R. Fidell, *Military Justice: A Very Short Introduction* (New York: Oxford University Press, 2016); and Elizabeth Lutes Hillman, *Defending America: Military Culture and the Cold War Court-Martial* (Princeton: Princeton University Press, 2005).
[16] Smith and Covert were each charged with premeditated murder, in violation of Article 118(1) of the UCMJ, and subsequently tried by general courts-martial under the authority of Article 2(11) of the UCMJ. See *Uniform Code of Military Justice*, Public Law 81-506, *U.S. Statutes at Large* 64 (1950): 107-149. See also Transcript of Record at 2, *Kinsella v. Krueger*, 351 U.S. 470 (1956); and Transcript of Record at 1-2, *Reid v. Covert*, 351 U.S. 487 (1956).

plainly designed to ensure efficiency, order, and discipline among soldiers in the field.[17] As a result, for example, there was no military system of bail.[18] Military guilty verdicts were only sometimes subject to appeal.[19] Instead of being overseen by lifetime judges (at least nominally) insulated from outside political pressures, courts-martial were adjudicated by enlisted service personnel, all distinctly vulnerable to what scholars have termed "command influence."[20] Unit commanders, in fact, determined the composition of each and every court-martial panel—which meant, in Dorothy Smith and Clarice Covert's cases, that their fates had been determined by the commanding officers of the husbands they'd killed.[21]

Nonetheless, even though Smith and Covert had both appealed their sentences several times by 1955, they'd rarely questioned their own amenability to military law. Their protests had focused more on evidence and evidence-gathering—had Dorothy been temporarily insane when she'd killed her husband? had the experts who'd testified to Clarice's mental soundness been properly assessed?—and less on the allowable scope of the UCMJ's Article 2(11).[22] But those protests, too, had met with little success.

It was only in the late fall and winter of 1955 that Clarice Covert and Dorothy Smith began to craft a new legal strategy—and, at long last, in tandem with one another.

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[17] Alschuler and Deiss, "A Brief History of the Criminal Jury in the United States," 869-870, 876-877; Fidell, *Military Justice*, 2, 82.
[18] Fidell, *Military Justice*, 5.
[19] Fidell, *Military Justice*, 54-56.
[20] Fidell, *Military Justice*, 49-50, 54-55, 68-69, 72.
[21] Fidell, *Military Justice*, 55, 72. It should be noted that the creation of the UCMJ marked a major milestone in the post-World-War-II "civilianization" of American military justice—and still, these many, fundamental differences remained. See also Fidell, *Military Justice*, 22-24.
[22] Transcript of Record at 2, 23-46, 47-51, 52-94, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Transcript of Record at 2, 12-95, 97-121, *Reid v. Covert*, 351 U.S. 487 (1956); Frederick Bernays Wiener quoted in Paul R. Baier, *Written in Water: Biography of Frederick Bernays Wiener* (Northport, NY: Twelve Tables Press, 2020), 383.

On November 7, in a wholly unrelated case (*United States ex rel. Toth v. Quarles*), the U.S. Supreme Court abruptly ruled that court-martial jurisdiction covered only those "persons who are actually members or part of the armed forces," and not those—like the petitioner, an Air Force veteran—who had since been discharged from the service.[23] Days later, Clarice's attorney Fritz Wiener filed a petition for habeas corpus on her behalf, contending that the *Toth* precedent should apply not only to "civilian ex-soldiers" but also to civilian dependents like Clarice.[24] On November 22, a District of Columbia district judge granted her petition—a ruling which the Department of Justice promptly appealed.[25] In December, Dorothy's father secured Wiener's services as well, and the attorney tested out the *Toth* argument again.[26] This time, the stratagem failed (before a less sympathetic West Virginia district judge), which made it Wiener's turn to appeal.[27] From there, he agreed to consolidate the two cases—and to challenge the constitutionality of Article 2(11) before the highest court in the land.[28]

But if Wiener imagined, even for a moment, that the same Court that had decided *Toth* would inevitably rule in his favor, it quickly became clear that the "Case of the Murdering Wives" presented an entirely different proposition.[29] The ex-airman Toth had had clear ties to the

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[23] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955).
[24] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955); Transcript of Record at 1-4, *Reid v. Covert*, 351 U.S. 487 (1956); Frederick Bernays Wiener, "Persuading the Supreme Court to Reverse Itself: Reid v. Covert," *Litigation* 14, no. 4 (Summer 1988): 6-7.
[25] Transcript of Record at 134-136, *Reid v. Covert*, 351 U.S. 487 (1956); Wiener, "Persuading the Supreme Court to Reverse Itself," 6-7; Wiener quoted in Baier, *Written in Water,* 382-383.
[26] Transcript of Record at 1-4, 10-11, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Wiener, "Persuading the Supreme Court to Reverse Itself," 6-7.
[27] Transcript of Record at 12-20, *Kinsella v. Krueger*, 351 U.S. 470 (1956); Wiener quoted in Baier, *Written in Water*, 383-384.
[28] Wiener, "Persuading the Supreme Court to Reverse Itself," 7; Wiener quoted in Baier, *Written in Water*, 384-385; Warren, "The Case of the Murdering Wives," 160.
[29] Wiener later wrote that "behind the Court's velvet curtain, both [Smith and Covert] were consistently referred to by its members, not only in conversation but also in writing, as 'the

service, and they'd been terminated just as clearly. Clarice Covert and Dorothy Smith had never enlisted—but they'd never been discharged either.

At root, the litigation revolved around one basic question: could service wives be tried by court-martial "simply because they're married to servicemen and they're living with them overseas?"[30] The federal government was certain that they could. Wiener was equally certain that they could not. But the two parties also sparred over so much more. Indeed, answering this supposedly straightforward question also seemed to entail working out precisely how (or even whether) the principles of military law ought to respond to ever-shifting geopolitical realities, and to the ever-evolving tactics and technologies of twentieth-century warfare. It seemed to involve specifying how military dependents were expected to contribute to military morale and military readiness—and how those objectives might suffer (or not) if certain service wives, like Smith and Covert, committed crimes overseas instead. And it seemed to require determining exactly how much or how little the two women's dependency really mattered—both as an element of Army and Air Force policy (they had been the designated dependents of their officer husbands) and as a demonstrable, financial reality (they had depended upon the military for most of their daily needs on base). For, in fact, countenancing Covert and Smith's courts-martial meant accepting that these two statuses not only overlapped but were wholly indistinguishable—and that marriage necessarily and irrevocably altered a married woman's legal identity. Objecting to their courts-martial, on the other hand, meant insisting that women—even married

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murdering wives.'" See Wiener, "Persuading the Supreme Court to Reverse Itself," 6. According to Brittany Warren, the litigation itself became known as "The Case of the Murdering Wives" as well. See Warren, "The Case of the Murdering Wives," 133.

[30] Oral Reargument, February 27, 1957, *Reid v. Covert*, 354 U.S. 1 (1957), Oyez, https://www.oyez.org/cases/1955/701 (accessed September 27, 2023).

women—never stopped being independent citizens, entitled to their own individual, constitutional rights.

Scholars have largely overlooked this complexity, focusing instead on the case's basic consequences for military law (and for military law alone).[31] But the matters at hand were so involved—and so vital—that Smith and Covert's shared appeal was actually adjudicated twice.

On June 11, 1956, in *Kinsella v. Krueger* and *Reid v. Covert* (cases given separate docket numbers but argued and decided jointly)—which together became known as *Reid I*—five justices decided to uphold the women's convictions.[32] Then, only 364 days later, in what became known as *Reid II*, six justices decided to overturn them.[33] As Fritz Wiener later boasted, it marked "the first and only time" that a Supreme Court majority "reached a different result in the identical litigation…without a controlling change in the composition of the Court."[34]

The reasons why the *Reid II* Court ruled in Smith and Covert's favor, in the end, were even more revealing. The plurality opinion, delivered by Justice Hugo Black, did not find that either woman was innocent by reason of insanity or on grounds of self-defense, or that either had killed her husband inadvertently or without premeditation. It did not find that their court-martial panels had been improperly constituted, or that the panels had improperly weighed the relevant

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[31] For a brief overview of the relevant historiography, see Warren, "The Case of the Murdering Wives," 133-134. See also, for example, Fidell, *Military Justice*, 31-32; and Hillman, *Defending America*, 90-91.
[32] *Kinsella v. Krueger*, 351 U.S. 470, 480 (1956); *Reid v. Covert*, 351 U.S. 487, 492 (1956).
[33] *Reid v. Covert*, 354 U.S. 1, 41 (1957).
[34] Wiener, "Persuading the Supreme Court to Reverse Itself," 10. Between June 1956 and June 1957, the Court's composition *did* change—Justice Sherman Minton retired in October 1956 and Justice Stanley Reed retired in February 1957—but even if they had stayed on the Court, Smith and Covert's convictions would most likely have been overturned by a 5-4 majority (as opposed to a 6-2 majority) in *Reid II*. (More on this below.)

evidence. Instead, Justice Black declared, "Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities."[35]

Black's explanation was two-fold. First and foremost, although Smith and Covert had married into the "land and naval Forces," they'd never joined up themselves—and even their overseas postings and their reliance on government services did not alter that plain fact.[36] Second, and no less important, although Article 2(11) seemed to authorize the military trials of those "accompanying the armed forces without the continental limits of the United States" in peacetime as well as in wartime, that was itself unconstitutional—and itself a threat to "this Nation's tradition of keeping military power subservient to civilian authority."[37] The *Reid* plurality also overturned Smith and Covert's convictions, in other words, because they had committed their crimes in 1952 Japan and in 1953 England—in places and times of peace, rather than "in the field" or during "active hostilities."[38] Or, to put it another way: the *Reid* plurality also removed Smith and Covert from court-martial jurisdiction because that was the only way to make clear that 1952 Japan and 1953 England *had been* places and times of peace—and to rein in the postwar military's control accordingly.

Indeed, although few historians have recognized as much, this was perhaps what made the so-called Case of the Murdering Wives most extraordinary: that in a decade in which the U.S. armed forces established a larger global footprint than it ever had before, the Supreme Court

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[35] *Reid v. Covert*, 354 U.S. 1, 5 (1957).
[36] *Reid v. Covert*, 354 U.S. 1, 19-23 (1957).
[37] *Reid v. Covert*, 354 U.S. 1, 23-29, 39-41 (1957). Article 2(11) did not expressly apply in both wartime and peacetime. But whereas Article 2(10) of the UCMJ, for example, stated that "In time of war, all persons serving with or accompanying an armed force in the field" were "subject to this code," Article 2(11) did not include that limiting phrase "In time of war." See *Uniform Code of Military Justice*, Public Law 81-506, *U.S. Statutes at Large* 64 (1950): 107-149.
[38] *Reid v. Covert*, 354 U.S. 1, 4, 15-16, 19-20, 23, 33-35 (1957).

narrowed the scope of military jurisdiction—and cordoned off the very limits of allowable military action—by defining both against the privileges and prerogatives of civilian service wives. In so doing, the Court not only freed Dorothy Krueger Smith and Clarice Covert from their lifetime prison sentences but made them into unlikely emblems of the constitutional order—and made defending married women's enduring, individual rights into a necessary condition of a healthy democracy.

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Up until the mid-twentieth century, ordinary American soldiers had often joked that military family policy—such as it was—could be summed up by the adage, "If the Army wanted you to have a wife, they would have issued you one."[39] Legislation passed in 1847, for example, had barred married men from enlisting (though not from becoming officers); and legislation passed in 1901 had discouraged now-married soldiers from joining up again.[40] As late as the First World War, although twenty-four million men had registered for the draft, those who were already married had been permitted to defer their service.[41] The advent of the Second World War, however, brought this long era to a close. The armed forces could no longer afford to exclude so many would-be combatants from its ranks. Congress and the Roosevelt administration created new programs which catered to servicemen with dependents, in

[39] Donna Alvah, *Unofficial Ambassadors: American Military Families Overseas and the Cold War, 1946-1965* (New York: New York University Press, 2007), 62.
[40] Sondra Albano, "Military Recognition of Family Concerns: Revolutionary War to 1993," *Armed Forces & Society* 20, no. 2 (1994): 285-286.
[41] Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008), 56; Betty Sowers Alt and Bonnie Domrose Stone, *Campfollowing: A History of the Military Wife* (Westport, CT: Praeger, 1991), 76.

particular.[42] And national leaders more broadly began to position domestic tranquility—and the security of one's own nuclear family—as the primary object of American victory in Europe and Asia.[43]

Not much changed when the war ended. V-J Day, in the words of one historian, precipitated "demobilizing but not necessarily demilitarizing."[44] In fact, it was only in the so-called postwar period that Congress initiated long-term procedures for registration and conscription and authorized a permanent fighting force.[45] Throughout the 1940s and '50s, moreover, as the global Cold War took off in earnest, Americans continued to idealize the nuclear family—now rendered as the seat of American democracy and, conversely, as the gaping absence at the heart of Soviet totalitarianism.[46] Accordingly, the military carried on recruiting family men like Eddie Covert and Aubrey "Smittie" Smith—and expressly encouraged them to bring their wives and children along with them overseas.[47] By 1960, as enumerated by one

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[42] See, for example, *Servicemen's Dependents Allowance Act of 1942*, Public Law 77-625, *U.S. Statutes at Large* 56 (1942): 381-387. See also Albano, "Military Recognition of Family Concerns, 287-289.
[43] Laura McEnaney, *Civil Defense Begins at Home: Militarization Meets Everyday Life in the Fifties* (Princeton: Princeton University Press, 2000), 70.
[44] Laura McEnaney, *Postwar: Waging Peace in Chicago* (Philadelphia: University of Pennsylvania Press, 2018), 10. See also Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012), especially Chapters 2 and 3.
[45] *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644.
[46] See, for example, Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988); and Michelle M. Nickerson, *Mothers of Conservatism: Women and the Postwar Right* (Princeton: Princeton University Press, 2012).
[47] Under the Selective Service Act of 1948, "persons who have wives or children, or wives and children, with whom they maintain a bona fide family relationship in their home" were still permitted to defer their mandatory military service. See *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644.

historian, "over 600,000 armed forces personnel and 462,000 members of military families" lived on and around U.S. military bases in every part of the world.[48]

On these overseas bases, soldiers' wives became part of military communities—and miliary organizational structures—in ways they'd never been before. Whether in Japan, or England, or anywhere else, these women lived in military housing; shopped at military commissaries and post exchanges; joined military-sponsored social clubs; and received medical care at military hospitals, from military physicians. Service wives, and especially officers' wives like Dorothy Krueger Smith and Clarice Covert, devoured etiquette guides like *The Army Wife* (printed six times between 1941 and 1966) which exhorted them to improve morale—and thus the military's capacity to fight—by beautifying their husbands' homes, managing their social calendars, and raising their well-behaved children.[49] These same skills, the wives were told, could also help endear the U.S. military to its host countries, by demonstrating that Americans could be hospitable, happy, and kindhearted neighbors, as well as military aggressors.[50]

There were, of course, obvious downsides to this official regard. The various etiquette guides, for example, also warned officers' wives that if they *failed* to follow protocol or to enhance morale, they might prevent their husbands from moving up to the next rank.[51] (And, indeed, on the night Dorothy Smith stabbed her husband, she confessed that she'd thought to "kill him first and then kill herself" after being told that "he was sending her 'home'"—on her own—"because she had been a detriment to his career and prevented him from being

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[48] Alvah, *Unofficial Ambassadors*, 2.
[49] Alt and Stone, *Campfollowing*, 114-116; Jennifer Mittelstadt, *The Rise of the Military Welfare State* (Cambridge: Harvard University Press, 2015), 121, 125-126; Karen Houppert, *Home Fires Burning: Married to the Military—for Better or Worse* (New York: Ballantine Books, 2005), 56.
[50] See Alvah, *Unofficial Ambassadors*, especially the Introduction and Chapters 2 and 3.
[51] Alt and Stone, *Campfollowing*, 114-116; Mittelstadt, *Military Welfare State*, 121, 125-126.

promoted.")[52] By the same token, if service wives were encouraged to foster military readiness and international goodwill, they were also advised that they could just as easily imperil those same efforts—and with drastic consequences for America's ability to preside over a precarious, global peace. In fact, it was in no small part because of these imagined disasters (at least according to the government's briefs in *Reid I* and *Reid II*) that accompanying wives like Clarice Covert and Dorothy Smith were bound by military law and triable by military courts.

But if the armed forces had seeming good reason to prosecute, Smith and Covert's courts-martial were nonetheless extraordinary—and not only in the sense that the two women had never themselves enlisted. Unlike many other privileges and prerogatives which came along with American citizenship—like the right to vote, for example—the right to trial by jury had never been afforded to men alone.[53] Even in the eighteenth and nineteenth centuries, when American law had followed the principles of coverture—which entitled married men to absorb their wives' property, labor, and out-and-out legal identity—married women had still been made to stand trial, instantly and all alone, for their own capital crimes (if not their more minor criminal offenses). Additionally, even under coverture, married women had regained their legal independence as soon as their husbands died—not to mention if they'd been personally responsible for those selfsame deaths.[54]

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[52] Transcript of Record at 27, *Kinsella v. Krueger*, 351 U.S. 470 (1956).

[53] By contrast, women were not obligated to serve on juries—at least not in every state—until the Supreme Court ruled it unconstitutional to "giv[e] women an absolute exemption from jury duty based solely on their sex" in *Hoyt v. Florida*, 358 U.S. 57 (1961). See also Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), especially Chapter 4.

[54] Under coverture, men had assumed responsibility for their wives' minor criminal offenses, but not for their capital crimes—and if a woman had murdered her husband, it had in fact been regarded as tantamount to petty treason. See Kerber, *No Constitutional Right to Be Ladies*, 13; Frances E. Dolan, "Battered Women, Petty Traitors, and the Legacy of Coverture," *Feminist*

Not so for Dorothy Smith or Clarice Covert. Killing their husbands neither ended their dependency nor severed their ties to the military itself. Quite the opposite, in fact. Because they'd once enjoyed military entitlements (like on-base housing and medical care) as married women, they were denied jury trials and made to endure courts-martial—and all their relative inequities—as "self-made widows" as well.[55] Even more glaring, perhaps, was that enacting the opposite scenario—a dependent husband, once shuttled overseas with his servicemember wife and their young children, subsequently court-martialed for premeditated murder or any other violation of the Uniform Code of Military Justice—would have been all but impossible. For while women were made permanent members of the U.S. military under the Women's Armed Services Integration Act of 1948, the same legislation (and a subsequent executive order) prohibited married women from enlisting and also made pregnant servicewomen vulnerable to automatic discharges.[56] Thus, Article 2(11) of the UCMJ—which incorporated within court-martial jurisdiction all those "accompanying the armed forces without the continental limits of the United States"—not only subjected civilians to the harsher standards of military justice but also imposed distinctive burdens on civilian women, in particular.

Studies 29, no. 2 (Summer 2003): 256, 261-262; and Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *The Yale Law Journal* 105, no. 8 (June 1996): 2122-2123.

[55] The phrase "self-made widows" was Fritz Wiener's own. See Wiener quoted in Baier, *Written in Water*, 376.

[56] *Women's Armed Services Integration Act of 1948*, Public Law 80-625, *U.S. Statutes at Large* 62 (1948): 356-375; Executive Order No. 10240 of April 27, 1951, Regulations Governing the Separation from the Service of Certain Women Serving in the Regular Army, Navy, Marine Corps, or Air Force, The American Presidency Project, http://web.archive.org/web/20230811195025/https://www.presidency.ucsb.edu/documents/executive-order-10240-regulations-governing-the-separation-from-the-service-certain-women (accessed August 11, 2023). See also Beth L. Bailey, *America's Army: Making the All-Volunteer Force* (Cambridge: Belknap Press of Harvard University Press, 2009), 140-141.

Nonetheless, throughout their respective court-martial trials—and their multiple military court appeals—Covert and Smith alluded only occasionally to these disparities, and always without success.

Dorothy Smith, for example, was first found guilty of premeditated murder by a general court-martial convened in Tokyo in January 1953.[57] Several months later, when Smith was already imprisoned at the Federal Reformatory for Women at Alderson, West Virginia, her assigned counsel appealed the conviction by contending (in part) that Smith *had* been subject to the UCMJ while her husband was still alive, but that his death—albeit at his wife's own hands—had instantly "terminated jurisdiction of Army courts-martial over her."[58] The argument evinced a coherent (if somewhat morbid) logic, which also hearkened back to the principles of coverture enumerated above. Yet the Army Board of Review was entirely unmoved.

While the military judges tentatively accepted that Smith's "status as a spouse or dependent ceased to exist upon her husband's death," they insisted that she nevertheless remained "a person 'accompanying' the armed forces of the United States," and therefore remained subject to military jurisdiction.[59] At the same time, they compared Smith's "terminate[d] marital status" to the firing or resignation of an armed forces' civilian employee—neither of which, they claimed, ended military jurisdiction, either.[60] In this way, the judges simultaneously glossed over the details of Smith's dependent status (it didn't matter that—or even how—it had come to an end) and made her marriage all but all-important (for merely

[57] Transcript of Record at 2, 22, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[58] Transcript of Record at 2-3, 33, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[59] Transcript of Record at 35, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[60] Transcript of Record at 35-36, *Kinsella v. Krueger*, 351 U.S. 470 (1956).

marrying Smittie had established Dorothy's own at-will allegiance to the U.S. military, such as an employee might have). Either way, though, Smith was out of luck.

Unbothered by Smith's jurisdictional challenge—and, even more so, convinced that she was mentally responsible at the moment she stabbed her husband—this first Board of Review reaffirmed her conviction in May 1953.[61] So did another Army Board of Review convened several months later, and so did the U.S. Court of Military Appeals the following year.[62]

Before Clarice Covert's initial trial, meanwhile, her assigned counsel did not challenge the court-martial's jurisdiction outright, but instead requested to have one or more "dependent wives of officers, airmen, or noncommissioned officers" included on her court-martial panel.[63] Even this request, however, was denied.[64] The "convening authority" clarified that only enlisted military personnel (as opposed to dependent wives) could adjudicate military cases and, furthermore, that Covert—precisely because she was not a member of the military herself—was not permitted to specify any "preference in the composition of the court-martial."[65] That these rules appeared to make Covert's prosecution doubly inappropriate—or, at the very least, that they made her court-martial panel resemble a "jury of one's peers" even less than the typical servicemember's—was seemingly of little to no concern. On May 29, 1953, she was found guilty

[61] Transcript of Record at 23-46, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[62] The same jurisdictional questions raised at the Army Board of Review were also raised—and quickly dismissed—at Dorothy Smith's Court of Military Appeals trial. There, notably, one judge dissented, finding Smith not guilty—though (just as in Clarice Covert's case below) not because he disagreed about the allowable scope of Article 2(11) of the UCMJ, but because he disagreed about Dorothy Smith's mental responsibility at the moment she stabbed her husband. See Transcript of Record at 47-51, 52-94, *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[63] Transcript of Record at 30, 32-33, *Reid v. Covert*, 351 U.S. 487 (1956).
[64] Transcript of Record at 32-33, *Reid v. Covert*, 351 U.S. 487 (1956).
[65] Transcript of Record at 32-33, *Reid v. Covert*, 351 U.S. 487 (1956).

of premeditated murder and transferred from the U.S. Air Force base at Upper Heyford, England to the Federal Reformatory at Alderson the following month.[66]

It was while Covert was preparing to appeal her conviction to an Air Force Board of Review, in early 1954, that Frederick Bernays "Fritz" Wiener first joined her case.[67] He came highly recommended by a Covert family friend—and for good reason.[68] A graduate of Harvard Law School (where he'd been mentored by and begun a lifelong correspondence with future Supreme Court Justice Felix Frankfurter), he'd already enjoyed a successful military career (mostly in the Office of the Judge Advocate General, before, during, and after the Second World War) as well as another long career in the federal government (in both the Public Works Administration and the Department of Justice).[69] By 1954, he'd argued twenty-five cases before the U.S. Supreme Court, twenty-two of them for the federal government—including *Girouard v. United States* (1946), which the government had lost, resulting in *United States v. Schwimmer* (1929) getting overturned—and three more in private practice.[70] He'd also become a widely recognized expert in *Effective Appellate Advocacy* (the title of a textbook he'd published in 1950) and in military law (the subject of at least four monographs he'd written throughout the previous decade—including one on the newly implemented UCMJ).[71]

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[66] Transcript of Record at 2, *Reid v. Covert*, 351 U.S. 487 (1956).
[67] Transcript of Record at 12, *Reid v. Covert*, 351 U.S. 487 (1956); Wiener quoted in Baier, *Written in Water*, 376-378.
[68] Wiener quoted in Baier, *Written in Water*, 376-377.
[69] See, for example, Baier, *Written in Water*, 46, 53-65, 103-107, 109-117, 151-221, 381, 101-103, 117, 121-122, 151, 233-234.
[70] Baier, *Written in Water*, 233-234. On *United States v. Schwimmer*, 279 U.S. 644 (1929) and *Girouard v. United States*, 328 U.S. 61 (1946), see Chapter 1 of this dissertation.
[71] Frederick Bernays Wiener, *Effective Appellate Advocacy: How to Brief and Argue a Case on Appeal, Including Examples of Winning Briefs and Oral Arguments* (New York: Prentice-Hall, Inc., 1950); Frederick Bernays Wiener, *A Practical Manual of Martial Law* (Harrisburg: Military Service Publishing Co., 1940); Frederick Bernays Wiener, *Military Justice for the Field Soldier*

Despite Wiener's wealth of experience, however, he had no more success challenging the military's jurisdiction over accompanying wives—or at least not right away. At the Air Force Board of Review, for example, he argued that by denying Covert's request for a court-martial panel which included dependent wives, the Air Force had also denied her "liberty and perhaps life, without due process of law," in violation of the Sixth Amendment.[72] But he did not object to the overlarge scope of Article 2(11) within the formal list of "errors" he submitted to the Board of Review; and the Board of Review, in turn, ultimately confirmed that the Air Force had been right to court-martial Covert, had been right to exclude other dependent wives from the process, and had been right to find her guilty.[73] In fact, the one judge advocate who dissented from the Board of Review's opinion—ruling to overturn Covert's conviction instead—did so not because he doubted the constitutionality of Article 2(11), but because he found Covert to be "a quiet, meek, motherly type of woman" and decided that she'd been "legally insane" when she killed her husband.[74]

Wiener's appeal to the U.S. Court of Military Appeals, filed the following year, took its cues from that lone dissenter.[75] He focused almost entirely on Covert's temporary insanity, which experts had weighed in on her state of mind, and how their testimony had been rounded up and assessed.[76] This strategy turned out well: on June 24, 1955, the Court of Military Appeals

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(Washington: The Infantry Journal, 1944); Frederick Bernays Wiener, *The New Articles of War* (Washington: Infantry Journal Press, 1948); Frederick Bernays Wiener, *The Uniform Code of Military Justice: Explanation, Comparative Text, and Commentary* (Washington: Combat Forces Press, 1950).

[72] Transcript of Record at 30, *Reid v. Covert*, 351 U.S. 487 (1956).

[73] Transcript of Record at 6-7, 12-61, *Reid v. Covert*, 351 U.S. 487 (1956), especially at 29-33.

[74] Transcript of Record at 62-95, *Reid v. Covert*, 351 U.S. 487 (1956).

[75] Transcript of Record at 2, 97-121, *Reid v. Covert*, 351 U.S. 487 (1956).

[76] Transcript of Record at 97-121, *Reid v. Covert*, 351 U.S. 487 (1956).

came to agree that the evidence regarding Covert's mental responsibility had been improperly evaluated and ruled to reverse her conviction.[77] But this strategy also backfired: the judges declined to set Covert free and instead ordered a "retrial"—which the Secretary of the Air Force determined should be conducted by military court-martial yet again.[78] In this way, Covert's temporary reprieve—which was truly only temporary, since she was moved from Alderson straight to the District of Columbia Jail to await her rehearing—did not undermine the military's jurisdictional claims but in fact enlarged them.[79] For while Article 2(11) authorized the courts-martial of those accompanying the armed forces "*without* the continental limits of the United States" [emphasis mine], Covert's second court-martial trial, scheduled for November 28, was set to be held at Bolling Air Force Base in Washington, D.C.[80]

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The prospect of Clarice Covert's court-martial at Bolling Air Force Base— "'literally in the shadow of the Capitol dome'"—refocused Wiener's priorities.[81] He began planning to challenge the military's jurisdiction outright, and through the civil courts, specifically.[82] At least at first, however, his outlook was less than rosy. In June 1955, when Covert was transferred to the D.C. Jail, it still seemed likely that the civil courts—up to and including the U.S. Supreme Court—would be no more sympathetic than the military courts she'd encountered thus far.

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[77] Transcript of Record at 2, 97-121, *Reid v. Covert*, 351 U.S. 487 (1956).
[78] Transcript of Record at 2, 110, *Reid v. Covert*, 351 U.S. 487 (1956).
[79] Transcript of Record at 1-3, 8-9, 123, *Reid v. Covert*, 351 U.S. 487 (1956).
[80] Transcript of Record at 2, 8-9, 122, *Reid v. Covert*, 351 U.S. 487 (1956); Wiener quoted in Baier, *Written in Water*, 380.
[81] Wiener quoted in Baier, *Written in Water*, 381.
[82] Wiener quoted in Baier, *Written in Water*, 380-381.

For, in fact, Dorothy Krueger Smith and Clarice Covert were not the first dependent wives to have killed—or to have been found guilty of killing—their servicemember husbands overseas. On October 20, 1949, a twenty-two-year-old "housewife" and mother of two named Yvette Madsen, living in Frankfurt, Germany—in the American Zone of Occupation—with her husband, Air Force Lieutenant Andrew Madsen, had shot and killed him after he "'laughed at her'" at a "drinking party."[83] The Uniform Code of Military Justice—including its Article 2(11)—had not yet been in effect. But as an American citizen in U.S.-occupied territory—and, specifically, as a "civilian dependent wife of a member of the United States Armed Forces"—Madsen had nonetheless been arrested by military police and charged with murder by a "United States Military Government Court."[84] She'd subsequently been tried and convicted by the U.S. Court of the Allied High Commission for Germany, Fourth Judicial District (where she'd pled temporary insanity to no avail); had her conviction reaffirmed by a Court of Appeals in the same Zone-of-Occupation court system; and been sentenced to fifteen years in prison at the Federal Reformatory for Women at Alderson, West Virginia.[85]

Although they'd all ended up at Alderson, there were several significant differences between Madsen's case and Covert's and Smith's. Madsen had not been charged under U.S. military law, but under the German Criminal Code.[86] She'd not been tried by court-martial, but

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[83] *Madsen v. Kinsella*, 343 U.S. 341, 343 (1952); "Wife Charged With Murder of Husband," *The Union City Times-Gazette* (Union City, IN), October 24, 1949, 4; "Yvette Madsen, Convicted of Airman's Death, Gets 15 Years," *Stockton Daily Evening Record* (Stockton, CA), March 18, 1950, 1.
[84] *Madsen v. Kinsella*, 343 U.S. 341, 343-344 (1952).
[85] *Madsen v. Kinsella*, 343 U.S. 341, 344-345; "Yvette Madsen, Convicted of Airman's Death, Gets 15 Years," *Stockton Daily Evening Record* (Stockton, CA), March 18, 1950, 1.
[86] *Madsen v. Kinsella*, 343 U.S. 341, 342-344, (1952).

by various military commissions.[87] As such, she'd had her case judged by three civilians (at her first trial) and then by five civilians (at her second), as would not have been possible with a court-martial panel.[88] Furthermore, as the Supreme Court explained when it upheld Madsen's sentence in April 1952, she'd been prosecuted in what was still, in effect, enemy territory—and where the "'common law of war,'" as enforced by the Commander-in-Chief, the State Department, and occupying forces on the ground, still prevailed.[89]

Nonetheless, the Court's opinion in *Madsen v. Kinsella* gave little reason to think that Smith and Covert's convictions—even carried out, as they were, in no-longer-occupied Japan and in never-occupied England—would not be upheld just as easily. For example, in defending the constitutionality of military commissions, the Court also argued that they could be kept running long after the "cessation of hostilities," all but eliminating any hardline distinction between war and peace.[90] The opinion likewise contended that had Madsen *not* been tried by military commission, she could have been tried by "a regularly convened United States general court-martial" instead.[91] In fact, the Court took the presumed constitutionality of civilian dependents' courts-martial as its starting point, and only then applied the same reasoning to different kinds of military courts.[92] Indeed, the Supreme Court's decision in *Madsen*—handed down less than six months before Dorothy Smith killed Smittie and less than a year before Clarice Covert killed Eddie—made abundantly clear that it wasn't only military courts which

[87] *Madsen v. Kinsella*, 343 U.S. 341, 342-345 (1952).
[88] The various civilians were all appointed by or under the authority of the "Military Governor of the Area." See *Madsen v. Kinsella*, 343 U.S. 341, 344-345 (1952).
[89] *Madsen v. Kinsella*, 343 U.S. 341, 354-355, 357-358 (1952).
[90] *Madsen v. Kinsella*, 343 U.S. 341, 348-349 (1952).
[91] *Madsen v. Kinsella*, 343 U.S. 341, 345 (1952).
[92] *Madsen v. Kinsella*, 343 U.S. 341, 345-362 (1952).

believed that one need not be part of the armed forces, nor even stationed at the front lines, to be subject to military jurisdiction.

On November 7, 1955, however—exactly three weeks before Clarice Covert was set to be re-tried by court-martial at Bolling Air Force Base—the Supreme Court suddenly began to change its tune. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, the Court ruled that Robert Toth, a one-time member of the Air Force who'd since been honorably discharged, could not now be court-martialed for a murder he'd committed years before—even though he'd then been in the service.[93]

The 6-3 majority opinion, delivered by Justice Hugo Black, was altogether more critical of military justice. The opinion explained that courts-martial had one basic, narrow purpose—as "a prompt, ready-at-hand means of compelling obedience and order"—and, accordingly, that they lacked most of the procedural safeguards and guarantees of fairness which civilian jury trials provided.[94] They were best suited for adjudicating "purely military" crimes, like desertion, he explained—and ill-suited for most everything else.[95] More precisely, Black insisted, courts-martial were fundamentally inapposite for military veterans, who may have been "wholly separated from the service for months, years or perhaps decades."[96] On the contrary, "civilian ex-soldiers"—just as much as any other civilians—were meant to be tried by juries of "laymen" and "plain people," who would bring "a variety of different experiences, feelings, intuitions and habits" to bear on their interpretation of the law and their application of justice.[97] To decide

[93] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13-15 (1955).
[94] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 22 (1955).
[95] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955).
[96] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).
[97] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14, 18-19, 22 (1955).

otherwise, Black declared, would be to remove the United States from among those "[f]ree countries of the world" committed to preserving civil government—and to circumscribing military authority—whenever and wherever possible.[98]

The Court's decision in *Toth* took just about everyone by surprise—Fritz Wiener foremost among them.[99] As he wrote years later, *Toth* "completely knocked out the doctrinal basis on which peacetime military jurisdiction over accompanying overseas civilians had been rested from its inception."[100] The Court narrowed the military's judicial authority "to persons who [were] actually members or part of the armed forces"—and declared that those who were "actually civilians," on the other hand, could not be court-martialed.[101]

Wiener, who'd been waiting until Covert's rehearing actually began to challenge the Air Force's jurisdiction anew, now rushed to file a petition for habeas corpus on her behalf.[102] On November 22, a District of Columbia district judge granted the petition, explicitly relying upon the Court's decision from two weeks prior.[103] "In short," the judge wrote, "the Supreme Court says—a civilian is entitled to a civilian trial."[104]

The ruling did not, on its own, stave off Covert's rehearing, but it allowed her to be released on bail from the District of Columbia Jail—and thereupon set *Reid I* into motion.[105] The Justice Department submitted a Notice of Appeal to the Supreme Court, objecting to Covert's

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[98] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14, 22 (1955).
[99] In fact, Wiener had "conferred with [the Solicitor General] on the Toth case." See Wiener quoted in Baier, *Written in Water*, 381, 385.
[100] Wiener quoted in Baier, *Written in Water*, 382.
[101] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15, 22 (1955).
[102] Wiener quoted in Baier, *Written in Water*, 381.
[103] Transcript of Record at 134, *Reid v. Covert*, 351 U.S. 487 (1956).
[104] Transcript of Record at 132, *Reid v. Covert*, 351 U.S. 487 (1956).
[105] Transcript of Record at 134, *Reid v. Covert*, 351 U.S. 487 (1956).

release, in late December.[106] That same month, Dorothy Smith's father (himself a former Army General) managed to secure Wiener's services for his own daughter, and promptly persuaded Wiener to file a second petition for habeas corpus on her behalf.[107] In January, the West Virginia district court judge assigned to Smith's case, unconvinced that *Toth* had made civilian dependents any less amenable to court-martial jurisdiction, refused her petition—but that only made it Wiener's turn to appeal.[108] And, after the two women's cases reached the Supreme Court just months apart, Wiener agreed to consolidate them into one.[109]

This new phase of the proceedings, Wiener knew, would bear little resemblance to Smith and Covert's earlier, military trials, which had revolved so thoroughly around questions of mental responsibility—and it would resemble *Toth* only marginally more so. Article 2(11) of the Uniform Code of Military Justice—suddenly the sole focus of the litigation—applied only to Covert and Smith.[110] They were not civilian ex-soldiers whose connection to the armed forces had been conclusively "severed" by virtue of their honorable discharges, but civilian dependents whose ties to the military had only ever been secondhand.[111] *Reid* was, at heart, a women's rights case—and, although Wiener had never argued one before (and never would again), he knew that if he hoped to succeed, he would need to grapple with the structural and material consequences

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[106] Transcript of Record at 135-136, *Reid v. Covert*, 351 U.S. 487 (1956).
[107] Transcript of Record at 1-4; Wiener, "Persuading the Supreme Court to Reverse Itself," 6-7; Warren, "The Case of the Murdering Wives," 148, 155-156.
[108] In fact, Smith's father (General Walter Krueger) appealed to the Fourth Circuit and Nina Kinsella (the warden of the Federal Reformatory at Alderson) circumvented that process to appeal directly to the Supreme Court. See Transcript of Record at 12-19, 20, *Kinsella v. Krueger*, 351 U.S. 470 (1956); and Warren, "The Case of the Murdering Wives," 160.
[109] Wiener, "Persuading the Supreme Court to Reverse Itself," 7; Warren, "The Case of the Murdering Wives," 160-161.
[110] Transcript of Record at 135-136, *Reid v. Covert*, 351 U.S. 487 (1956).
[111] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955).

of marriage and dependency, as well as with the past, present, and future of America and its military.[112]

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These tasks were not Wiener's alone. Quite the opposite: the government's brief also incorporated wide-ranging theories of history, politics, and gendered social relations—but to prove the legitimacy and necessity of Smith and Covert's courts-martial.[113]

The brief began with a broad defense of Article 2(11) of the UCMJ—which, the government claimed, could be upheld by the War Power (Article I, § 8, Clause 11); or the Treaty Making Power (Article II, § 2, Clause 2); or Congress' Power to Govern and Regulate Land and Naval Forces (Article I, § 8, Clause 14), itself enlarged by the Necessary and Proper Clause (Article I, § 8, Clause 18).[114] This was not an altogether unusual strategy—parties appearing before the Supreme Court often try out different tacks to see what sticks—but it also reflected and effectively conveyed the government's sense of emergency. Amidst "a world situation far short of perfect 'peace,'" the brief insisted, any number of justifications could reasonably be relied upon—and any one of them would suffice.[115]

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[112] For a list of Wiener's cases, see Baier, *Written in Water*, 233-234.
[113] The government brief was prepared by various U.S. attorneys, including Solicitor General Simon E. Sobeloff, who was nominated (by President Dwight Eisenhower) to a seat on the Fourth Circuit later that year, in the months between *Reid I* and *Reid II*. See "Solicitor General: Simon E. Sobeloff," Office of the Solicitor General, United States Department of Justice, https://web.archive.org/web/20231012185907/https://www.justice.gov/osg/bio/simon-e-sobeloff (accessed October 12, 2023).
[114] Brief for the Appellant at 8, 48, *Reid v. Covert*, 351 U.S. 487 (1956), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0101369893/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=038aa720&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Appellant, *Reid v. Covert*, 351 U.S. 487 (1956)].
[115] Brief for the Appellant at 37, *Reid v. Covert*, 351 U.S. 487 (1956).

In expounding upon the security threats facing the United States, the brief occasionally pointed to the particular "circumstances after World War II": to war in Korea (still under way when Smith and Covert had killed their husbands), to "continuing tensions of war and threatened war" across Europe, and to the military's overall assessment that "bases around the world" were required for preserving international peace.[116] But even more striking was the government's repeated insistence that postwar conditions were not nearly as novel as they appeared. Instead, the government argued, the nature of armed conflict had changed irrevocably in the *early* twentieth century, with the outbreak of the First World War.

Crucially, this narrative allowed the government to call attention to an earlier heritage of military jurisdiction over civilians—namely, that it was the revised Articles of War of 1916, and not the UCMJ, which had first made persons "accompanying" the armed forces overseas subject to military law.[117] It was in 1916, the brief claimed, that Congress had expanded the court-martial, because it was then that Congress had first "recognized…that the United States was no longer an isolated nation insulated from Europe and Asia by ocean barriers."[118] It was then that Congress had begun to grasp that technological advances had transformed the realities of combat as well as the entire notion of "defense," and that only preemptive "preparations for war" could reliably "insure peace."[119] By asserting the continuity of these "twentieth-century problems," the brief established a pattern tying the scope of military jurisdiction to the scope of military action, and thereby made Smith and Covert's courts-martial seem simultaneously less radical and more

[116] Brief for the Appellant at 10, 43, 45 *Reid v. Covert*, 351 U.S. 487 (1956).
[117] Brief for the Appellant at 34, *Reid v. Covert*, 351 U.S. 487 (1956).
[118] Brief for the Appellant at 38, *Reid v. Covert*, 351 U.S. 487 (1956).
[119] Brief for the Appellant at 44, 47, *Reid v. Covert*, 351 U.S. 487 (1956).

imperative.[120] In addition, it made the "world" of the nineteenth century—a world of clear distinctions between war and peace, and between soldiers and civilians—seem even more distant.

Of course, the government's brief could not entirely ignore earlier American history—but where it used twentieth-century events to demonstrate continuity, it turned to the eighteenth century as a foundation for analogy and adaptation. When the Constitution was ratified in 1788, the government maintained, the prevailing Articles of War had permitted *some* non-soldiers, including "retainers to a camp," to be tried by military courts.[121] And if the framers had thus countenanced the court-martial of "certain classes of civilians intimately related to the armed forces," it argued, then those classes could now be expanded in light of "the compelling necessities of our time."[122] Eighteenth-century "retainers to a camp" and twentieth-century service wives were, in effect, one and the same: equally "close" to the military and equally liable to military law.[123]

Indeed, to the Justice Department, court-martialing dependent wives was no more and no less than a natural consequence of the fact that they "commingled with military personnel and enjoy[ed] the privileges of military facilities."[124] The government's brief repeatedly enumerated the details of Smith and Covert's dependency—travel abroad "via military transport at government expense," housing in "public quarters," access to "the facilities of the commissary and post exchange"—giving substance to the lived experience underlying Article 2(11)'s

[120] Brief for the Appellant at 28, 44, *Reid v. Covert*, 351 U.S. 487 (1956).
[121] Brief for the Appellant at 34, 37, *Reid v. Covert*, 351 U.S. 487 (1956).
[122] Brief for the Appellant at 9, 34, *Reid v. Covert*, 351 U.S. 487 (1956).
[123] Brief for the Appellant at 9-10, *Reid v. Covert*, 351 U.S. 487 (1956).
[124] Brief for the Appellant at 38, *Reid v. Covert*, 351 U.S. 487 (1956).

breadth, and illustrating that the wives' presence overseas "serve[d] an obviously sound military purpose."[125] For if dependent wives did not "sustain the morale of troops stationed in many and remote corners of the earth"—raising their husbands' spirits and making more frequent and longer lasting enlistments possible—then why would the government have spent so much money to provide them with so many services?[126]

As the brief carefully noted, however, there were downsides to this state of affairs: the more women that joined their servicemember husbands overseas, the more potential threats to "military discipline" that roamed the world.[127] It wasn't that civilians were inherently more criminal than military personnel, exactly, but that they were just as likely to break the law—and absent the court-martial, the armed forces had no means of deterrence. This not only imperiled the military's capacity to function, the brief insisted, but also risked damaging its "reputation" in the eyes of the world.[128] Foreign officials, the government claimed, did not and could not distinguish between the civilian and military personnel they'd likewise allowed upon their shores. And if "misconduct" ran rampant, they would no longer consent to accommodate American bases of operation.[129] Thus, according to the Department of Justice, Article 2(11) was not only a harsh corollary of government largesse but itself an "instrument" of global peacekeeping.[130]

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[125] Brief for the Appellant at 2, 4, 29, 31, *Reid v. Covert*, 351 U.S. 487 (1956).
[126] Brief for the Appellant at 29, *Reid v. Covert*, 351 U.S. 487 (1956).
[127] Brief for the Appellant at 29, 37-38, *Reid v. Covert*, 351 U.S. 487 (1956).
[128] Brief for the Appellant at 35, *Reid v. Covert*, 351 U.S. 487 (1956).
[129] Brief for the Appellant at 30-32, *Reid v. Covert*, 351 U.S. 487 (1956).
[130] Brief for the Appellant at 29, 56, *Reid v. Covert*, 351 U.S. 487 (1956).

In his opposing brief, Fritz Wiener not only rejected Article 2(11)'s constitutionality but also aimed to rebut all of the political and historical evidence that the Department of Justice had marshaled to support it. First and foremost, Wiener offered up a much narrower interpretation of the Articles of War that had been in place when the Constitution was adopted: to be subject to court-martial, he insisted, one had needed to (1) possess a "functional connection" to the armed forces, (2) while accompanying them "in the field," (3) in "time of war."[131] Moreover, he asserted, these criteria had not been revised in the approximately 175 years since—not during the "many undeclared Indian wars" of the nineteenth century, and not in the course of this century's "two global wars."[132] In all that time, he argued, and despite the revisions made in the 1916 Articles of War and the 1950 UCMJ—until Smith and Covert's cases—no civilians had ever been court-martialed in time of peace in non-occupied territory.[133]

In framing Smith and Covert's exceptional status in this way, Wiener's goal was two-fold. First, he endeavored to demonstrate that although the methods and the laws of warfare had changed substantially since 1788, there still existed a "vital distinction between war and peace"—which, until now, the military had not violated—but which the Department of Justice, to its own detriment, had forgotten.[134] Second, he raised an ineluctable question: if even the exigencies of the First and Second World Wars had not been sufficient to occasion the court-

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[131] Brief for the Appellee at 8-9, 43, *Reid v. Covert*, 351 U.S. 487 (1956), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0101856812/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=b8edbaf9&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Appellee, *Reid v. Covert*, 351 U.S. 487 (1956)].
[132] Brief for the Appellee 8, 44-45, 47, 61-62, *Reid v. Covert*, 351 U.S. 487 (1956).
[133] Brief for the Appellee at 48, *Reid v. Covert*, 351 U.S. 487 (1956). Yvette Madsen, whose sentence was upheld in *Madsen v. Kinsella*, 343 U.S. 341 (1952)—see above—had been tried by military commission (though not by court-martial) a few years earlier in *occupied* territory.
[134] Brief for the Appellee at 38, 44, *Reid v. Covert*, 351 U.S. 487 (1956).

martial of dependent wives, how could the peacetime conditions of Covert and Smith's assignments in England and Japan possibly justify the same?[135] After 175 years of consistent practice, it was difficult to suddenly lay claim to "any very pressing necessity."[136]

Throughout the rest of the brief, Wiener took further aim at these so-called necessities, flagging absurdities and internal inconsistencies. For example, he contended that there was no reason to think that service wives posed any more "danger to American reputation" than the wife of a diplomat or "the accompanying mother-in-law of a United States Information Agency executive," neither of whom were amenable to court-martial jurisdiction.[137] The misbehaving teen-age son of a serviceman" could likewise not be court-martialed, even though he was just as financially dependent on the armed forces—and, as someone accompanying the military overseas, theoretically just as much "within the terms of Article 2(11)"—as his mother was.[138] For that matter, Wiener emphasized, military wives stationed within the United States were likewise categorized as dependents, and received all the same "military emoluments and amenities" as military wives deployed overseas, but—Clarice Covert's potential retrial by court-martial in Washington, D.C. aside—they still possessed the right to trial by jury.[139]

Just as Wiener dismissed Covert and Smith's dependency as grounds for their military trials, he also minimized their potential impact on military order and discipline. The "problem of controlling civilian dependents," he contended, had been grossly "inflated" by the government.[140] The "actual figures" bore out a more palatable truth: of all the cases that had

[135] Brief for the Appellee at 8, 61, *Reid v. Covert*, 351 U.S. 487 (1956).
[136] Brief for the Appellee at 102-103, *Reid v. Covert*, 351 U.S. 487 (1956).
[137] Brief for the Appellee at 89, *Reid v. Covert*, 351 U.S. 487 (1956).
[138] Brief for the Appellee at 89-90, *Reid v. Covert*, 351 U.S. 487 (1956).
[139] Brief for the Appellee at 8-9, 67, *Reid v. Covert*, 351 U.S. 487 (1956).
[140] Brief for the Appellee at 90, *Reid v. Covert*, 351 U.S. 487 (1956).

recently reached the Court of Military Appeals, only thirty-seven, or 0.04%, had involved "accompanying civilians"; and, of those, only six had committed crimes serious enough to merit federal prison sentences—two of whom had been Covert and Smith themselves.[141] Thus, Wiener maintained, there was no compelling need to expose civilian wives to military jurisdiction—and it would in fact be eminently "practicable" to transport this small number of potential defendants back to the United States to stand trial in a constitutional fashion.[142]

But if Article 2(11) was thus unreasonable and unwarranted, according to Wiener, it also epitomized a far more essential harm. The severity of courts-martial—their decisions rendered not by a jury of one's peers, but by servicemen subject to "command influence" and a "pressure to convict"; their "substantial dilution of Fourth, Fifth, and Sixth Amendment protections"; their denial of bail—all of it was intentional, the product of a justice system designed to "govern armies of strong men."[143] As Wiener's brief reminded the Court four separate times, however, dependent wives were "unarmed."[144]

It was in articulating this element of his argument, in particular—which flew in the face of the fact that Smith and Covert had each fatally stabbed their husbands—that Wiener most emphasized their womanhood. Here, Smith and Covert became not just civilians but unarmed women—and their husbands not just soldiers but strong men. And, while the vast majority of the brief was dedicated to constitutional questions, it was also in this context that Wiener most clearly solicited sympathy for his clients, reminding the justices that they had been "distraught

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[141] Brief for the Appellee at 88, 91, *Reid v. Covert*, 351 U.S. 487 (1956).
[142] Brief for the Appellee at 90, 103-104, *Reid v. Covert*, 351 U.S. 487 (1956). This was the standard procedure for those American citizens arrested at sea or in "uninhabited territory."
[143] Brief for the Appellee at 12-13, 113, *Reid v. Covert*, 351 U.S. 487 (1956).
[144] Brief for the Appellee at 13, 63, 116, 121, *Reid v. Covert*, 351 U.S. 487 (1956).

and emotionally disturbed" at the time of their husbands' deaths, and that their sentences had thus been "shocking" and "savage."[145]

By juxtaposing these two ideas, Wiener was able to leverage a traditional notion of gender difference to support his more audacious proposition that married women retained their individual rights even after marriage. Moreover, he was able to dismiss the specter of (frightening and aberrant) female violence that Smith and Covert's crimes necessarily raised. Just as Covert and Smith had no real culpability for their husbands' deaths, he assured the justices, they had no rightful place on a battlefield, in a chain of command, or in a military court of law. Consequently, Article 2(11) was more than just unprecedented and untenable—it was "utter[ly] inappropriat[e]."[146]

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For all that the opposing briefs diverged, then, they evinced a similar certainty that defending or repudiating Article 2(11) required reckoning with the meaning of marriage and dependency, as well as with hundreds of years of military history and still-ongoing international affairs. What was most striking about the justices who upheld Smith and Covert's convictions in *Reid I*, however, was how stubbornly they resisted political or historical context—and how eagerly they avoided confronting the central question of whether or not civilian wives formed an integral part of the armed forces.

To be sure, these members of the *Reid I* majority—Justices Tom Clark, Stanley Reed, Harold Burton, Sherman Minton, and John Marshall Harlan II—were swayed by the government's version of events. Their opinion accepted as fact that national and international

[145] Brief for the Appellee at 13, 119, *Reid v. Covert*, 351 U.S. 487 (1956).
[146] Brief for the Appellee at 13, 121, *Reid v. Covert*, 351 U.S. 487 (1956).

security demanded that the military "maintain American forces in some sixty-three countries"; that "allowing these men to be accompanied by their families" was equally imperative; and that these families lived in "mixed" communities in which both soldiers' and civilians' social lives and daily experiences revolved around the military.[147] They likewise trusted that Article 2(11) was crucial to maintaining discipline overseas and even seized upon the language of a U.S. Court of Military Appeals decision—which the Justice Department had included only in an Appendix—to assert that the same military commander in charge of dependents' "care and safety" should also be able to oversee and discipline their behavior, and that "effective law enforcement" required servicemen and their wives to receive "equal treatment under the law."[148]

By and large, however, it was as if military necessity was utterly irrelevant to the matter at hand. The *Reid I* majority admitted that courts-martial were "not required to provide all the protections of constitutional courts"—but, it insisted, neither were any other "legislative courts" installed by Congress "outside the territorial limits of the United States proper."[149] The opinion notably relied on nineteenth- and early twentieth-century precedents (rather than anything more recent) in order to rule that *no* American citizens, overseas for any reason, were entitled to

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[147] *Kinsella v. Krueger*, 351 U.S. 470, 476-477, 479 (1956). The exact "sixty-three countries" figure was taken from the opinion handed down in *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956), included in a government brief Appendix. Brief for the Petitioner at 87, *Kinsella v. Krueger*, 351 U.S. 470 (1956), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0101856719/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=75ef3f93&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Petitioner, *Kinsella v. Krueger*, 351 U.S. 470 (1956)].

[148] *Kinsella v. Krueger*, 351 U.S. 470, 477 (1956). As above, the language of "equal treatment" did not appear in the body of the government's briefs, but only in the *United States v. Burney* opinion included in Appendix B of the *Krueger* brief. See Brief for the Petitioner at 75-77, *Kinsella v. Krueger*, 351 U.S. 470 (1956).

[149] *Kinsella v. Krueger*, 351 U.S. 470, 474, 475 (1956).

receive a trial in a federal court.[150] On the contrary, Congress had empowered the justice system in U.S. territories, like Hawaii and Puerto Rico, to operate without jury trials—and had authorized consular courts to prosecute Americans who had committed crimes in Japan, China, and other Asian countries without convening juries, either.[151] According to the *Reid I* majority, trials by court-martial—purely as a matter of "constitutionality," if not of procedure—were no different.[152]

The majority opinion made no further attempt to link America's imperial past to its superpower present, nor did it acknowledge that the cases it had cited had nothing at all to say about national security. In fact, the various precedents it cited—including *American Insurance Company v. Canter* (1828), *In re Ross* (1891) and *Balzac v. Porto Rico* (1922)—were appealing sources of authority precisely because they had no immediate relevance.[153] At the justices' conference, Justice Minton had suggested that "The consular courts [were] the way out"—and the majority put that idea into practice here.[154] If the Court could uphold Covert and Smith's convictions by sustaining overseas legislative tribunals *in general*, then it had "no need to examine the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces'" (or Article I, § 8, Clause 14)—and no need to determine if dependent wives constituted those forces alongside their husbands.[155]

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[150] *Kinsella v. Krueger*, 351 U.S. 470, 474-475 (1956).
[151] *Kinsella v. Krueger*, 351 U.S. 470, 475-476 (1956).
[152] *Kinsella v. Krueger*, 351 U.S. 470, 478 (1956).
[153] *Kinsella v. Krueger*, 351 U.S. 470, 475-476, 478-479 (1956). These nineteenth- and early twentieth-century precedents were *American Insurance Company v. Canter*, 26 U.S. 511 (1828); *In re Ross*, 140 U.S. 453 (1891); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).
[154] "Conference of May 4, 1956," in Del Dickson, ed., *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (New York: Oxford University Press, 2001), 553.
[155] *Kinsella v. Krueger*, 351 U.S. 470, 476 (1956).

This evasion was beyond the pale for Justice Felix Frankfurter, who took the unusual step of filing a reservation with the Court. Not yet willing to exonerate Smith and Covert, he nonetheless inveighed against the majority: if his fellow justices refused to review Congress' Clause 14 power, it could only mean that they were "not prepared to support the constitutional basis" for the women's convictions—for it was this clause alone which enabled Smith and Covert to be "tried as though they were members of the Armed Forces."[156] Ironically, Frankfurter averred, by turning to cases like *In re Ross* instead, the majority had also overlooked consular courts' own "historical context": namely, an international system which had allowed the United States to demand "capitulations…often by force, from the Ottoman Empire and other Eastern nations because they were deemed inferior by the West."[157] *In re Ross*, Frankfurter declared, was "an episode of the dead past"—and it deserved to stay there.[158] Pressed for time at the end of the Court's term, however, he also declined to assess the Justice Department's and Wiener's competing accounts of military jurisdiction in the past and the present—and likewise declined to overturn Smith and Covert's convictions.

Even the Court's outright dissenting voices—Justices Earl Warren, William O. Douglas, and Hugo Black—confined their opinion to a short two pages. The dissenters quickly made clear, however, that *Reid*'s outcome portended a broader harm than the continued imprisonment of two particular women. They worried about the inevitable "consequences far-reaching upon the lives of civilians," and about the future trials of "wives, mothers and children" who—like Smith and Covert—now stood to be tried by court-martial, despite the fact that they "have no connection

[156] *Kinsella v. Krueger*, 351 U.S. 470, 481 (1956).
[157] *Kinsella v. Krueger*, 351 U.S. 470, 482-483, 484 (1956).
[158] *Kinsella v. Krueger*, 351 U.S. 470, 482 (1956).

whatever with the Armed Forces except their kinship to military personnel and their presence abroad."[159] But the dissenters, too, pleaded for "more time" to collaborate and formulate a longer opinion.[160]

Thus the stage was set for Wiener to file a petition for rehearing, aimed at overcoming Frankfurter's indecisiveness, persuading Harlan to become "the swing man," and offering all the justices another year to deliberate over the critical matters at hand.[161]

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By the time the Supreme Court granted Fritz Wiener's petition for rehearing, on November 5, 1956, its own makeup had already begun to change.[162] Justice Minton, one of the five members of the *Reid I* majority, had retired in October; Justice Reed, another of the five, would retire a few months later (before a new round of oral arguments began in February 1957). But even by November, before either man was replaced, the Court's instructions—which invited Wiener and various attorneys from the Department of Justice to devote greater attention to the "specific practical necessities" and "historical evidence" pertaining to the matters at hand—evidenced a change of heart.[163] Indeed, already by November, a majority of the justices seemed to find *Reid I*'s sweeping conclusions unconvincing—and seemed to welcome instead legal

[159] *Kinsella v. Krueger*, 351 U.S. 470, 485, 486 (1956).
[160] *Kinsella v. Krueger*, 351 U.S. 470, 486 (1956).
[161] Wiener, "Persuading the Supreme Court to Reverse Itself," 8-9.
[162] Transcript of Record at 95, *Reid v. Covert*, 354 U.S. 1 (1957), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0102367978/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=49e1ea0c&pg=1 (accessed October 2, 2023) [hereafter cited as Transcript of Record, *Reid v. Covert*, 354 U.S. 1 (1957)].
[163] Transcript of Record at 95, *Reid v. Covert*, 354 U.S. 1 (1957).

arguments which made use of historical and political context, and which attended carefully to the particular circumstances of Smith and Covert's overseas postings, crimes, and convictions.[164]

Nonetheless, the broad strokes of the government's and Wiener's claims remained much the same in *Reid II*. The Justice Department continued to dwell on discipline and dependency, while Wiener continued to emphasize Covert and Smith's unchanging civilian status and their fundamental, individual rights. As a result, however, each side's small revisions only stood out more clearly.

At oral arguments, for example, the U.S. Solicitor General presented the justices with eight copies of Walter Hart Blumenthal's "little book," *Women Camp Followers of the American Revolution*.[165] This slim volume, he contended, confirmed that women camp followers, who would "follo[w] or han[g] onto a camp or army without being in military service," had been subject to military law when the founders had fought for American independence and adopted

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[164] Justice Reed, still a member of the Court in October, ruled to "deny the petition for rehearing." Justice William J. Brennan, Jr., who had already joined the Court in Minton's place, "took no part in the consideration or decision of this application or order" (see Transcript of Record at 2, *Reid v. Covert*, 354 U.S. 1 (1957)). Justice Brennan took part in deciding *Reid II*, but Justice Charles Whittaker, who joined the Court in March 1957, did not (see *Reid v. Covert*, 354 U.S. 1, 41 (1957)). Overall, the changing composition of the Court cannot account for its reversal: even if all the justices had remained the same in *Reid II* (as in *Reid I*), the convictions would likely have been overturned 5-4; even if Justice Brennan had not joined the plurality (see below), the convictions would have been overturned 5-2 (rather than 6-2); and even if Justice Brennan and/or Justice Whittaker had joined the dissent, the convictions would still have been overturned 6-3, 5-3, or 5-4.

[165] Oral Reargument, February 27, 1957, *Reid v. Covert*, 354 U.S. 1 (1957), Oyez, https://www.oyez.org/cases/1955/701 (accessed September 27, 2023). See also Walter Hart Blumenthal, *Women Camp Followers of the American Revolution* (Philadelphia: G. S. MacManus Co., 1952). J. Lee Rankin was promoted, from Assistant Attorney General to U.S. Solicitor General, in between *Reid I* and *Reid II*. He had previously argued the government's case in *Brown v. Board of Education* in 1954. See "Solicitor General: J. Lee Rankin," Office of the Solicitor General, United States Department of Justice, https://web.archive.org/web/20231012185230/https://www.justice.gov/osg/bio/j-lee-rankin (accessed October 12, 2023).

the Constitution.[166] Accordingly, he argued, Smith and Covert's courts-martial were justifiable not only—as the government had suggested in *Reid I*—by historical analogy (from "retainers to a camp" to today's military dependents), but also by verifiable past practice.

More than mere showmanship, this tactic also augured a larger shift in the government's approach to historical evidence. Throughout its written brief, the government examined early American history and political culture in greater depth and, instead of merely asserting similarities between the past and the present, also insisted more strongly that the framers had designed the Constitution to be inherently adaptable.[167] In particular, the brief argued, the framers had endowed Congress with the power to govern and regulate the land and naval forces (that is, Clause 14) because they'd recognized that the "power to provide for the defense had to be flexible to meet unforeseen circumstances."[168] In this way, the brief both accounted for the framers' well-known anti-militarism and deployed it to the government's own ends—for surely the framers had chosen congressional oversight, instead of an unconditional restriction on military authority, precisely because they'd anticipated a future of essentially unpredictable armed conflicts.[169]

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[166] Oral Reargument, February 27, 1957, *Reid v. Covert*, 354 U.S. 1 (1957), Oyez, https://www.oyez.org/cases/1955/701 (accessed September 27, 2023).
[167] In particular, the brief included much-expanded sections on the Necessary and Proper Clause and on Alexander Hamilton's *The Federalist* 23. See, for example, Supplemental Brief for the Appellant/Petitioner at 5-6, 15, 69-70, 72-73, *Reid v. Covert*, 354 U.S. 1 (1957), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0101372501/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=440586db&pg=1 (accessed October 2, 2023) [hereafter cited as Supplemental Brief for the Appellant/Petitioner, *Reid v. Covert*, 354 U.S. 1 (1957)].
[168] Supplemental Brief for the Appellant/Petitioner at 64, *Reid v. Covert*, 354 U.S. 1 (1957).
[169] Supplemental Brief for the Appellant/Petitioner at 66-68, *Reid v. Covert*, 354 U.S. 1 (1957).

If the irrefutable logic of military necessity was thus built into the Constitution, however, it also required corroboration. In *Reid II*, the government regularly deployed a new phrase—"the free world"—to more clearly evoke America's obligations as a global superpower.[170] Similarly, the brief no longer presented troops' "morale" or "discipline" as objectives in and of themselves, but as explicit prerequisites for "combat readiness."[171] Most notably, the brief now included an Appendix of letters from overseas commanders outlining a series of worst-case scenarios (wives refusing to evacuate in the event of active hostilities, for instance, or wives discovering and divulging classified information) that would arise should their jurisdiction over accompanying civilians be revoked.[172] This literal appeal to military authority was crucial, as the government relied upon the commanders' "actual experience in the field" to draw a line from Covert and Smith's courts-martial to the United States' capacity to oversee a precarious postwar peace.[173]

In much the same spirit—and in line with the language of the *Reid I* decision—the government's *Reid II* brief also invested the figure of the individual military commander with greater significance. It was as if the previous year's arguments were run through a filter: now, soldiers and civilians were effectively identical—because they comprised "one unit *for which the military commander is responsible* [emphasis mine]"; they shared facilities and resources—because the military commander, specifically, "provid[ed] for the security, health, welfare, schooling, religious activities, and physical safety" of both groups; and if they collectively remained acceptable to foreign governments, it was because the military commander alone

[170] Supplemental Brief for the Appellant/Petitioner at 23, 35, *Reid v. Covert*, 354 U.S. 1 (1957).
[171] Supplemental Brief for the Appellant/Petitioner at 28, 30, *Reid v. Covert*, 354 U.S. 1 (1957).
[172] Supplemental Brief for the Appellant/Petitioner at 97-129, *Reid v. Covert*, 354 U.S. 1 (1957), especially at 100, 105.
[173] Supplemental Brief for the Appellant/Petitioner at 7, *Reid v. Covert*, 354 U.S. 1 (1957).

ensured that they conveyed "the best possible impression."[174] The military commander thus not only exercised but also embodied military authority, his personal "control" a direct consequence of his immense, individual "responsibility."[175] He became protector and provider, almost a surrogate patriarch—the personification of the government's tendency to equate service wives' dependent legal status with their literal dependence on military support.

That's not to say, however, that the Justice Department now focused entirely on service wives' embeddedness in military communities and hierarchies, at the expense of any particular attention to their marriages or the distinctly domestic spaces they inhabited. In fact, somewhat ironically, this was most apparent in the government's new claim (again drawing on the language of the *Reid I* opinion) that a military commander was required to ensure that everyone on base—soldiers and civilians alike—received equal treatment under the law.[176] The brief did not challenge sex discrimination per se—but that was by design, for military wives' dependence was meant to override any unfair privileges or exemptions they might have otherwise accrued as members of the fairer sex.[177] It was specifically because a soldier was his wife's "sponsor," and because they lived "in the same house," that the government insisted they should be tried under the same system of law.[178]

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[174] Supplemental Brief for the Appellant/Petitioner at 6, 10, 28, *Reid v. Covert*, 354 U.S. 1 (1957).
[175] Supplemental Brief for the Appellant/Petitioner at 8, *Reid v. Covert*, 354 U.S. 1 (1957).
[176] Supplemental Brief for the Appellant/Petitioner at 28-30, *Reid v. Covert*, 354 U.S. 1 (1957).
[177] The Supreme Court would not rule that sex discrimination violated the equal protection clause of the Constitution until fourteen years later, in *Reed v. Reed*, 404 U.S. 71 (1971). As for the privileges and exemptions women might have otherwise accrued—including, for example, women's historically unequal obligation to serve on juries and to take up arms—see Kerber, *No Constitutional Right to Be Ladies*, especially Chapters 1, 4, and 5.
[178] Supplemental Brief for the Appellant/Petitioner at 29, 30, *Reid v. Covert*, 354 U.S. 1 (1957).

Tellingly, this same perspective also ran through a new, long passage on the status of a hypothetical woman who first enlisted in the Women's Army Corps; was then honorably discharged; began working for the military as a civilian employee; subsequently married a serviceman; and, finally, quit her job "to work full time at being a dependent."[179] This was the only time, across *Reid I* and *Reid II*, that the Department of Justice acknowledged the existence of female servicemembers. But, in the *Reid II* brief's telling, servicewomen's stories inevitably ended in marriage and housewifery as well. Thus, their amenability to military jurisdiction remained the same at each successive stage: because, as the brief asserted, they were at all times equally part of the armed forces—and, more revealingly, because they could, at any moment, marry and become a soldier's dependent. It was only this sort of gendered logic which could sustain Article 2(11) and justify Smith and Covert's courts-martial.

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For his part, Fritz Wiener would later account for his defeat in *Reid I* and his unprecedented success in *Reid II* by pointing to his superior performance at the second round of oral arguments, for which he'd had several additional months to prepare and to "eliminate every trace of [his] earlier bitterness and sarcasm."[180] But it was in his written brief, in fact, that Wiener made some more remarkable revisions, evincing a new conception of American military history and offering a new interpretation of women's proper place within the armed forces.

Consider, for example, Wiener's primary line of attack against the Court's decision in *Reid I*, which he now deemed "a sharp and unwarranted break with American history."[181] He

[179] Supplemental Brief for the Appellant/Petitioner at 38-39, *Reid v. Covert*, 354 U.S. 1 (1957).
[180] Wiener, "Persuading the Supreme Court to Reverse Itself," 7, 9.
[181] Supplemental Brief for the Appellee/Respondent at 120, *Reid v. Covert*, 354 U.S. 1 (1957), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*,

remained adamant that Covert and Smith were not part of the armed forces; that they were not beholden to the UCMJ; and that "[o]ne hundred and seventy-five years" of historical and legal precedent should have placed them conclusively outside the grasp of military courts.[182] But he now incorporated *Reid I* itself into this historical narrative—and thus also began to acknowledge a more complex history of expanding and contracting military jurisdiction across the nineteenth and earlier twentieth centuries. For the first time, for example, Wiener now identified instances—what he called "aberrations"—in which the military's judicial authority had indeed been enlarged, including the government by "military commission" devised by General Winfield Scott during the Mexican-American War; the military trials and executions of the "Lincoln Conspirators" immediately after the Civil War; and several prosecutions of civilians (though never civilian wives) throughout both world wars.[183] According to Wiener, however, these aberrations had always been reversed, quickly and definitively, by Supreme Court edict or legislative fix.[184] In this way, he turned *Reid I*'s unsound conclusion into an asset: this decision, too, could be overturned—and the justices could thereby powerfully reaffirm the Court's commitment to protecting Americans' civil liberties. Wiener made it seem almost inevitable.

Alongside this more complicated (but ultimately comforting) account of the military's perennial subordination to civilian authority, Wiener also included a new, and rather thorough,

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https://link.gale.com/apps/doc/DW0102235807/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=f7f52582&pg=1 (accessed October 2, 2023) [hereafter cited as Supplemental Brief for the Appellee/Respondent, *Reid v. Covert*, 354 U.S. 1 (1957)].

[182] Supplemental Brief for the Appellee/Respondent at 30, 108-109, 116, *Reid v. Covert*, 354 U.S. 1 (1957).

[183] Supplemental Brief for the Appellee/Respondent at 36, 98-99, 122-125, *Reid v. Covert*, 354 U.S. 1 (1957).

[184] Supplemental Brief for the Appellee/Respondent at 11, 36, 99, 124-125, *Reid v. Covert*, 354 U.S. 1 (1957).

history of "advances" in military technology, from Civil War generals' reliance on railroads and visual signaling; to the First World War's introduction of tanks, chemical weapons, and air force combat; to the atomic bombs designed and deployed during World War II. "Today," he wrote, "we live in an age of guided missiles and Pentomic divisions," planned for nuclear defense. It was a rare acknowledgment from Wiener that present-day peace was necessarily partial—and, by implication, that atomic weapons had obliterated any notion of clearly defined battlefields. He conceded, in calculated fashion, that the Constitution did not "restric[t] warfare to the use of either the weapons or the personnel that achieved American independence in 1775-1783." He denied, however, that this same reasoning could bring dependent wives within the scope of military jurisdiction.[185]

Wiener's allusion to military "personnel" was deliberate: it was in this context that he, not unlike the Justice Department, first made reference to the women now serving in the U.S. military. Since 1901, he explained, female nurses and subsequently female soldiers had enlisted in increasing numbers; and, since had Congress passed the Women's Services Integration Act in 1948, they had become permanent members of the Army, Air Force, Navy, and Marine Corps. "Plainly," Wiener declared, "these women are subject to military law even though the only embattled Amazon known to the Founders was Molly Pitcher at the Battle of Monmouth." But not so for Smith and Covert, who had never been "militarized."[186]

This dividing line—between the militarized and the non-militarized—replaced the earlier distinction that Wiener had drawn between "strong men" and "unarmed women."[187] He never

[185] Supplemental Brief for the Appellee/Respondent at 47-48, *Reid v. Covert*, 354 U.S. 1 (1957).
[186] Supplemental Brief for the Appellee/Respondent at 49-50, *Reid v. Covert*, 354 U.S. 1 (1957).
[187] Brief for the Appellee at 13, 63, 110-112, 116, 119-121, *Reid v. Covert*, 351 U.S. 487 (1956).

again used that language in *Reid II*. On the contrary (again, much like in the government's brief), Wiener now incorporated "sex" into a list of criteria that could not be used to determine a person's treatment under the law. "[T]he question of amenability to military law," he maintained, "rests not on weapons, not on sex, not on technological advances, but on status: Persons in the service are subject to military law, persons not in the service are not."[188] No matter how "much more destructive" war became, he argued, this much stayed the same: status was paramount—and inflexible.[189] And Clarice Covert and Dorothy Smith, in turn, were civilians—no matter whom they wed, or where they lived, or whether or not *other* women could legitimately be court-martialed.

Thus, where the government's brief had dreamed up a hypothetical woman who moved fluidly between multiple, equally intimate relationships with the armed services, Wiener carved out a well-defined boundary, unmoved by both marriage and "military considerations."[190] This was a more radical argument than the one he'd put forth in *Reid I*, for it neither allowed for a gendered social relation to mitigate the terms of Smith and Covert's citizenship nor relied upon notions of gender difference to substantiate their rights claims. In fact, by suggesting (rather implausibly) that the framers would have approved of the women now serving in the armed forces, Wiener even papered over—and thus discredited—their more likely conviction that

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[188] Supplemental Brief for the Appellee/Respondent at 49-50, *Reid v. Covert*, 354 U.S. 1 (1957).
[189] Supplemental Brief for the Appellee/Respondent at 48, *Reid v. Covert*, 354 U.S. 1 (1957).
[190] Supplemental Brief for the Appellee/Respondent at 116, *Reid v. Covert*, 354 U.S. 1 (1957). This was very much in keeping with the rest of the brief, in which Wiener used the words "boundary" or "boundaries" sixteen times and frequently accused the government of inappropriately "blurring" or "lump[ing]" disparate things together. See also Supplemental Brief for the Appellee/Respondent at 4, 11, 31, 35, 42, 50, 62, 63, 68, 72, 123, 125, 138, 158, *Reid v. Covert*, 354 U.S. 1 (1957).

women could never fully participate in the social contract because they were not expected to take up arms in defense of their country.[191]

At the same time, this argument—which disaggregated sex from dependency—also precluded Wiener from levying the sort of sex discrimination claim that feminist activists were already beginning to make in other contexts (namely: how could dependent wives ever enjoy equal protection if court-martial panels were made up almost entirely of men?).[192] That this remained a road not taken was unsurprising, however, for Covert and Smith's dependency was inextricable from their civilian status. As much as Wiener insisted that the circumstances of their marriage and the government support they received were immaterial, it was also their marital status—the basic fact that their "only nexus with the land and naval forces [was] their marriage to servicemen"—which proved they were ordinary citizens entitled to trials by jury.[193]

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Despite Wiener's new tactics, however, Justices Clark and Burton remained unpersuaded. The abiding members of the *Reid I* majority, they continued to believe their decision the previous June had been the correct one.[194] But while they persisted in defending the "long-recognized" (and notably pre-World War II) precedents they'd then relied upon, their new opinion also

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[191] On the framers' conviction that women's unequal obligation to bear arms excluded them from full participation in the social contract, see Kerber, *No Constitutional Right to Be Ladies*.
[192] As noted previously, the Supreme Court would not rule that sex discrimination violated equal protection until 1971. Around this time, however, activists were already beginning to challenge all-male juries on equal protection grounds. See, for example, the discussion of *Hoyt v. Florida*, 358 U.S. 57 (1961), in Kerber, *No Constitutional Right to Be Ladies*. It should also be noted that one (though only one) of the nine members of Dorothy Smith's general court-martial panel was a woman—a female officer in the Women's Army Corps. See Warren, "The Case of the Murdering Wives," 154.
[193] Supplemental Brief for the Appellee/Respondent at 133, *Reid v. Covert*, 354 U.S. 1 (1957).
[194] As noted above, Justices Reed and Minton—the other two members of the *Reid I* majority—had retired before *Reid II* was decided.

devoted increasing attention to the present-day circumstances which they believed accounted for Covert and Smith's convictions.[195]

In large measure, Clark and Burton recapitulated the government's reasoning. For example, they not only embraced the "joint executive and legislative determination" that servicemen must be sent abroad with their families but also, like the U.S. attorneys, held up the "tremendous expense" incurred by the government in enacting this policy as proof of its soundness.[196] Likewise, they too transformed the legal category of "dependent" into an adjective with its own decisive force, offering as evidence of the women's amenability to military law that they "are *dependent on* the military for food, housing, medical facilities, transportation, and protection" [emphasis mine].[197] Furthermore, they accepted as fact that America's allies and enemies alike would perceive Covert and Smith to be "as much 'a part' of the military installations as…their husbands," and that maintaining discrete legal standards and procedures for soldiers and their dependents would itself have a deleterious impact on "discipline, efficiency, and morale."[198]

Clark and Burton did not hide their reliance upon the government's positions or their cited military authorities. On the contrary, they quoted at length from the Court of Military Appeals decision included in a *Reid I* Appendix; made explicit reference to the commanding officers' letters reprinted in a *Reid II* Appendix; and proclaimed that they would not "substitute [their] views…for the views of those charged with the responsibility of the protection of such

[195] *Reid v. Covert*, 354 U.S. 1, 78, 79 (1957).
[196] *Reid v. Covert*, 354 U.S. 1, 83 (1957).
[197] *Reid v. Covert*, 354 U.S. 1, 83 (1957).
[198] *Reid v. Covert*, 354 U.S. 1, 83, 85, 86 (1957).

far-flung outposts of the free world."[199] Indeed, to Clark and Burton, the logic of military necessity was not only compelling but quite literally incontrovertible.

It is clear, moreover, that they believed as much because they understood America to be currently at war. At the justices' conference, Clark had declared that he'd "go so far as to say that the 'cold war' means that this is *not a peacetime case*" [emphasis mine]—and in their dissenting opinion, the two men reminded the Court that, when Dorothy Smith had killed her husband, "Japan was the logistics and aviation base for actual hostilities then being waged in Korea."[200] They exhibited greater deference to the military *because* they subscribed to a particular, popular notion that state power should eclipse civil rights and civil liberties in wartime (even though, crucially, neither the Cold War nor the war in Korea had ever been officially declared).[201]

In no small part, the plurality opinion—written by Justice Black and joined by Justices Warren and Douglas and the newly appointed Justice William J. Brennan, Jr.—affirmed this same perspective, albeit in support of an opposite conclusion. Smith and Covert's convictions by court-martial must be overturned, they contended, because the women had not been "in the field."[202] There had been no "active hostilities" in either of the countries where they'd committed their crimes and, while "conditions of world tension" indeed pertained, they did not (and could not) produce a worldwide zone of combat.[203] The justices acknowledged "present threats to

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[199] *Reid v. Covert*, 354 U.S. 1, 84-85, 86 (1957).
[200] *Reid v. Covert*, 354 U.S. 1, 82 (1957); "Conference of March 1, 1957," in Dickson, ed., *Supreme Court in Conference*, 554.
[201] On various uses and misuses of this idea, see Dudziak, *War Time*; and Mary L. Dudziak, "Making Law, Making War, Making America," in *The Cambridge History of Law in America, Volume III: The Twentieth Century and After (1920-)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 680-717.
[202] *Reid v. Covert*, 354 U.S. 1, 33-35 (1957).
[203] *Reid v. Covert*, 354 U.S. 1, 34 (1957).

peace"—but only to prove that peace still prevailed.[204] They upheld Smith and Covert's constitutional guarantees, at the expense of military and state power, because the United States was *not* at war.

In this way, the justices delimited military necessity—and military action—with clear boundaries that were geographic and temporal, and also deeply gendered. Indeed, that Smith and Covert were "wives of soldiers" was critical to the plurality's ruling, and in two distinct ways.[205] On the one hand, the justices declared that no aspect of Smith and Covert's married lives—not their overseas postings and not their reliance on government services—rendered them a part of the armed forces or amenable to military law.[206] At the same time, it was as dependents, specifically—with no inherent connection to the military and with no control over when or where they were stationed—that Smith and Covert were made into proxies for two broader classes of people: the "wives, children, and other dependents of servicemen" who, unlike some civilian employees, should never be considered part of the military; and the "citizens abroad" who should not lose their constitutional protections "just because [they] happe[n] to be in another land."[207]

Thus, as wives of soldiers, Smith and Covert simultaneously stood at the exact edge of the U.S. military's authority and at the top of a long, slippery slope. "[T]o hold that these wives could be tried by the military," wrote Justice Black, "would be a tempting precedent."[208] But to instead defend their rights to trial by jury would also help ward off further "encroachment[s] on the jurisdiction of the civil courts" and on the "Bill of Rights and other safeguards in the

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[204] *Reid v. Covert*, 354 U.S. 1, 35 (1957).
[205] *Reid v. Covert*, 354 U.S. 1, 3, 32 (1957).
[206] *Reid v. Covert*, 354 U.S. 1, 19-20, 22-23 (1957).
[207] *Reid v. Covert*, 354 U.S. 1, 5-6, 23 (1957).
[208] *Reid v. Covert*, 354 U.S. 1, 39 (1957).

Constitution."[209] Moreover, Black insisted, it would confirm the Court's commitment to "this Nation's tradition of keeping military power subservient to civilian authority"—a tradition that only seemed more vital as the military's global commitments continued to grow.[210]

These members of the plurality, then, ruled in Smith and Covert's favor not only because of the specific circumstances surrounding their convictions (in peacetime, in non-occupied territory), but also because their courts-martial revealed precisely how vast the U.S. military—and its definition of combat—had grown. It was by curtailing military jurisdiction—and by doing so in a way that conclusively excluded dependent service wives from the chain of command that governed the court-martial as well as from bona fide combat—that the Court could continue to preserve civil control over the armed forces more broadly.

The two concurrences issued by Justice Harlan and Justice Frankfurter—both of which overturned Smith and Covert's convictions but on narrower grounds—only further revealed how entangled ideas about war and about women's rights had become. Both justices declined to sign the plurality, each convinced that service wives were neither fully-military nor wholly-civilian, and that service wives posed unique and considerable disciplinary challenges on U.S. military bases overseas.[211] It was for this reason that both Harlan and Frankfurter insisted that service wives *could* be tried by court-martial under some circumstances, but not in cases like Covert and Smith's: namely, capital cases arising in time of peace.[212]

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[209] *Reid v. Covert*, 354 U.S. 1, 21, 39 (1957).
[210] *Reid v. Covert*, 354 U.S. 1, 40 (1957).
[211] *Reid v. Covert*, 354 U.S. 1, 42-43, 46-48, 71-73 (1957).
[212] *Reid v. Covert*, 354 U.S. 1, 45, 46-47, 64, 65, 72-73 (1957).

Indeed, although neither of the litigants had claimed any constitutional distinction between "major crimes and petty offenses," Harlan and Frankfurter both inserted one here.[213] For Harlan and Frankfurter, military necessity obtained but it could also be overcome—not if the offenders were civilian dependents, necessarily, but if their offenses were sufficiently grave.

Though it went unsaid, both concurrences seemed to echo the logic of coverture, allowing the armed forces to prosecute dependent wives for those minor offenses—and only those minor offenses—that had once been the legal responsibility of their husbands. Moreover, the concurrences all but ensured that additional, just-different-enough cases—involving non-capital offenses; and civilian employees, rather than civilian dependents; and later armed conflicts, like the similarly-undeclared war in Vietnam—would keep on ending up before the Court.[214] And yet it was on this faltering basis that the *Reid II* plurality was able to carry the day, and that Dorothy Krueger Smith and Clarice Covert were set free.

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Immediately after the Supreme Court's decision was announced, both women moved west: Dorothy to Texas and Clarice to Arizona. There, they reunited with their children—and, from then on, out from under the thumb of military authority and out of the glare of the public eye, they enjoyed rather ordinary, uneventful lives.[215] Neither woman was ever re-tried by a civilian court.

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[213] See Supplemental Brief for the Appellant/Petitioner at 16, *Reid v. Covert*, 354 U.S. 1 (1957); and Supplemental Brief for the Appellee/Respondent at 14, *Reid v. Covert*, 354 U.S. 1 (1957).
[214] For a succinct summary of these later cases, see Warren, "The Case of the Murdering Wives," 184-193.
[215] Warren, "The Case of the Murdering Wives," 182, 183.

Fritz Wiener, for his part, continued to write well-regarded works on "Courts-Martial and the Bill of Rights" and *Civilians Under Military Justice*, and went on to argue ten more cases before the U.S. Supreme Court—including three separate cases, all decided in 1960, which involved the courts-martial of civilian dependents and civilian employees attached to the armed forces overseas.[216] It was a mark of *Reid*'s immediate impact that in each of these cases—including *Kinsella v. Singleton*, which revolved around a dependent wife charged with committing a non-capital offense in tandem with her servicemember husband—the Court ruled to exclude the accused from peacetime military jurisdiction.[217]

That's not to say, of course, that the exact scope of the court-martial—in all times and in all places—has been entirely settled. To this day, particularly as the U.S. has continued to engage an ever-larger number of civilian contractors to wage war all around the globe, questions about the armed forces' jurisdiction over un-enlisted employees remain unresolved.[218] But the Supreme Court's decision in *Reid II*, in particular, nonetheless stands out: not only because it meaningfully circumscribed the military's authority, but because it imposed limits that ended precisely where married women's enduring, individual rights began.

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[216] Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice I," *Harvard Law Review* 72, no. 1 (November 1958): 1-49; Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice II," *Harvard Law Review* 72, no. 2 (December 1958): 266-304; Frederick Bernays Wiener, *Civilians Under Military Justice: The British Practice Since 1689, Especially in North America* (Chicago: University of Chicago Press, 1967). The three cases involving the courts-martial of accompanying civilians were *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); and *McElroy v. Guagliardo*, 361 U.S. 281 (1960). An eleventh case that Wiener was set to argue before the Supreme Court was dismissed on appeal. See Baier, *Written in Water*, 233-234; and Wiener quoted in Baier, *Written in Water*, 394.

[217] *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

[218] See Warren, "The Case of the Murdering Wives," 185-193.

That wasn't always how the Court operated. In *Reid II*, women's rights were ultimately defended in contrast to marital dependency—and at a necessary distance from the land and naval forces. In *Griswold v. Connecticut* (1965), however—the subject of the next chapter—organizers and attorneys from the Planned Parenthood League of Connecticut managed to protect women's access to contraception by harnessing normative domesticity to their own ends, and by illustrating wives' and mothers' vital significance to the American Cold War project.

CHAPTER 3
"A Policeman in Every Home?"
Griswold v. Connecticut (1965) and the Cold War Right to Marital Privacy

Griswold v. Connecticut marked "a new birth of freedom."[1] So wrote Planned Parenthood attorney Harriet F. Pilpel in the pages of the Fall 1966 issue of the *Ohio State Law Journal*. The appellants in that Supreme Court case—Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut (PPLC), and Dr. C. Lee Buxton, the PPLC's Medical Director—had been arrested after they "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception" at their since-shuttered New Haven birth control clinic.[2] But in June 1965, an opinion written by Justice William O. Douglas had reversed Griswold and Buxton's convictions, removed their $100 fines, and struck down a pair of Connecticut statutes, both passed in 1879, which criminalized the use of contraceptive devices and drugs.[3] To do so, the opinion had relied upon the constitutional right to privacy—a right never before affirmed by a majority of the Court—newly located in the due process clause of the Fourteenth Amendment and in "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments, which gave "life and substance" to their "specific guarantees" and "create[d] zones of privacy."[4] Aghast at the prospect of "allow[ing] the police to search the sacred precincts

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[1] Harriet F. Pilpel, "Birth Control and a New Birth of Freedom," reprinted from *Ohio State Law Journal* 27, no. 4 (1966): 679, Box 25, Folder J, Planned Parenthood of Conn. (New Haven), Records 1879- (MSS B62), Whitney Library, New Haven Museum, New Haven, CT [hereafter cited as PPLC Records].
[2] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).
[3] *Griswold v. Connecticut*, 381 U.S. 479, 480, 486 (1965).
[4] *Griswold v. Connecticut*, 381 U.S. 479, 481-485 (1965). Attorney Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis had first proposed the existence of a right to privacy—or a "right to be let alone"—in an 1890 law review article; and Brandeis, for example, had referenced his own ideas in the dissenting opinion he'd written in *Olmstead v. United States*, 277 U.S. 438 (1928). But until *Griswold*, the right to privacy had never been affirmed by a majority

of marital bedrooms for telltale signs of the use of contraceptives," the Court had condemned Connecticut's statutes as "repulsive to the notions of privacy surrounding the marriage relationship" and made family planning—and family planning specifically—into the law of the land.[5] Harriet Pilpel, who had been working with her colleagues at the PPLC to overturn the state's uniquely draconian contraception ban for over two decades, was exultant.[6]

To Pilpel, the transformative possibilities of this "new birth of freedom" seemed endless. Perhaps, she speculated, the Court's ruling in favor of Griswold and Buxton—professionals standing trial on their clients' behalf—would help bolster the rights of the poor, who often could not afford to bring constitutional challenges on their own.[7] Perhaps government officials would acknowledge an active responsibility to make birth control available to low-income women and families.[8] Maybe anti-abortion laws would be repealed as well, since the Court had now recognized that "population control [was] a matter of prime national and international importance," and had demonstrated its willingness "to adapt…nineteenth century morality statutes to twentieth century population and birth control realities."[9] Certainly, Pilpel proclaimed,

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of Supreme Court justices. See also Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 193-220.

[5] *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965).

[6] Though many states had passed anti-contraception statutes beginning in the 1870s (on the heels of the federal Comstock Act, enacted in 1873), Connecticut's had always been the most extreme, for they "ma[d]e it a crime to use a contraceptive," in addition to selling, displaying, or advertising the same. See Harriet F. Pilpel and Theodora Zavin, *Your Marriage and the Law*, Rev. ed. (New York: Collier Books, 1964), 165.

[7] Pilpel, "Birth Control and a New Birth of Freedom," 683, Box 25, Folder J, PPLC Records.

[8] Pilpel, "Birth Control and a New Birth of Freedom," 688, Box 25, Folder J, PPLC Records.

[9] Pilpel, "Birth Control and a New Birth of Freedom," 687-688, Box 25, Folder J, PPLC Records.

Griswold was a "reassuring story of democracy in action," responsible for both the invalidation of an outmoded piece of legislation and the creation of an auspicious new right to privacy.[10]

She also warned, however, that American democracy was under grave existential threat. It was this troubling state of affairs, in fact, that revealed privacy's signal virtue: "in our ever-present struggle against a 'big brother' society," Pilpel contended, *Griswold* and other decisions like it would become "a major weapon."[11] Later in the article, comparing the capacity of "electronic-snooping devices and mind-influencing drugs…to destroy all privacy" to atomic weaponry's power "to destroy all life on this planet," she expressed hope that the "emergence of a constitutional right of privacy, that right first given utterance in the birth control case, may indeed save us from an Orwellian 1984."[12] Especially heartening to Pilpel was the "Rebirth of the Ninth and Tenth Amendments" evidenced in *Griswold*'s majority opinion and in Justice Arthur J. Goldberg's concurrence.[13] "With totalitarian ideologies threatening to take over, and indeed taking over, large parts of the world," she averred, "there is something reassuring about the declared concept that there are rights that are retained by the people."[14] By establishing the right to privacy, Pilpel wrote—even though privacy did "not fit into the precise wording of the Bill of Rights"—the Court "took a giant step in the direction of adapting these guarantees of personal freedom to the world today."[15]

It seems clear that, to Pilpel, the "world today"—the world that *Griswold* reflected and the world it promised—was one saturated and defined by the military, ideological, and political

[10] Pilpel, "Birth Control and a New Birth of Freedom," 688, Box 25, Folder J, PPLC Records.
[11] Pilpel, "Birth Control and a New Birth of Freedom," 684, Box 25, Folder J, PPLC Records.
[12] Pilpel, "Birth Control and a New Birth of Freedom," 685, Box 25, Folder J, PPLC Records.
[13] Pilpel, "Birth Control and a New Birth of Freedom," 685, Box 25, Folder J, PPLC Records.
[14] Pilpel, "Birth Control and a New Birth of Freedom," 685, Box 25, Folder J, PPLC Records.
[15] Pilpel, "Birth Control and a New Birth of Freedom," 685, Box 25, Folder J, PPLC Records.

conflicts of the Cold War. And Pilpel was not alone. Her antitotalitarian language was common among lawmakers, jurists (including Douglas), and ordinary citizens who cast the private family home at the center of American freedom, in contradistinction to the omnipresent Soviet state. Pilpel's attention to the international stakes of contraception access was equally familiar, for the conventional wisdom among birth control activists and foreign policy experts dictated that overpopulation and rampant poverty would strengthen communist regimes around the world. In fact, though few scholars have recognized as much, attending to the political culture of the Cold War helps bring every facet of the Court's decision in *Griswold v. Connecticut* into focus: its defense of civil liberties and rights retained by the people; its endorsement of contraception as a boon to marriage; its assignment of privacy rights not to women but to the marital relationship; and, finally, its protection of privacy within the family home.

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While the incongruity of the constitutional right to privacy having been established in a Supreme Court case involving contraception, marriage, and the family—rather than one touching on criminal vagrancy, search and seizure, or, for that matter, state surveillance of suspected communist agents—has certainly not gone unnoticed, satisfying explanations have been few and far between. The social and political historians who have examined the ways in which Cold War imperatives shaped the mid-twentieth-century birth control movement, for example, have tended to eschew legal sources, offering *Griswold* as evidence of Americans' increasing support for "family planning" at home and "population control" abroad but without investigating the case itself in any greater depth.[16] The legal scholars who have aimed to assess the evolution and

[16] Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America*, 3rd ed. (Urbana: University of Illinois Press, 2002), 289; Donald T. Critchlow, *Intended*

impact of constitutional privacy doctrine, on the other hand, have tended to overlook the Cold War's effects.[17] In so doing, they have ably demonstrated why alternative lines of legal reasoning might have seemed even less appealing to the Court—an equal protection argument, for example, might have jeopardized the prevailing patriarchal social order, while an argument rooted in substantive due process might have risked reviving Lochnerism—but they have largely failed to explain why *privacy*, in particular, resonated with the Supreme Court (and with the appellants from the PPLC) in this specific case and in this precise moment in time.[18]

Legal historians' relative inattention to privacy's Cold War context may stem from two presumptions: one, that state power primarily expands, and civil rights and civil liberties primarily contract, in times of war; and two, that what might be called "anticommunist jurisprudence" came to a close on "Red Monday," the day in June 1957 when the Supreme Court delivered four rulings—*Watkins v. United States*, *Sweezy v. New Hampshire*, *Yates v. United States*, and *Service v. Dulles*—which drastically limited the state's capacity to target communist

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Consequences: Birth Control, Abortion, and the Federal Government in Modern America (New York: Oxford University Press, 1999), 120.

[17] In his book, for example, David Garrow offers an almost day-by-day account of every twentieth-century sexual privacy Supreme Court case, including *Griswold v. Connecticut*, and never once mentions the ongoing Cold War by name. He does note that PPLC attorney Fowler V. Harper was investigated by the Federal Bureau of Investigation for his suspected communist sympathies (sympathies which Harper steadfastly denied), but quickly reassures the reader that Harper remained "one of the most popular members of the [Yale] law school faculty." Garrow does not examine what influence, if any, the investigation may have had on Harper's legal philosophy, nor does he analyze the Cold War's impact on the politics of birth control or privacy. See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan Publishing Company, 1994), 147-152, 230.

[18] See, for example, Garrow, *Liberty and Sexuality*, 238, 245, 246, 252-253; and Melissa Murray, "Overlooking Equality on the Road to *Griswold*," *Yale Law Journal Forum* 124 (2014-2015): 324-331. Avoiding the specter of *Lochner* was indeed important to the PPLC and to the Supreme Court, as Justice Douglas made explicit in his majority opinion. See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

sympathizers (all, of course, without generating a constitutional right to privacy).[19] Both presumptions, however, are flawed. Historian Mary L. Dudziak, for example, has demonstrated that all throughout the twentieth century—a century in which the United States was almost always at war—ordinary Americans' rights were enlarged in moments of conflict as well as in (sporadic) moments of peace; and that throughout the very same years that the PPLC was fighting for legalized contraception, the Cold War also indelibly shaped the methods and successes of the Civil Rights Movement.[20] Furthermore, if Red Monday indeed marked an endpoint of the "official anti-communism" emblematized by Senator Joseph McCarthy and the House Un-American Activities Committee, a powerful strain of domestic anticommunism centered on the nuclear family, and on familial privacy, continued to dominate American politics well into the 1960s, when *Griswold* was decided.[21]

Historians of conservatism, in particular, have established anticommunism's paramount importance to the various free-market crusaders, antistatist libertarians, and Christian conservatives who then found common ground in their shared opposition to communism and in

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[19] The "Red Monday" cases were *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Yates v. United States*, 354 U.S. 298 (1957); and *Service v. Dulles*, 354 U.S. 363 (1957). On "Red Monday," see M. J. Heale, *American Anticommunism: Combating the Enemy Within, 1830-1970* (Baltimore: Johns Hopkins University Press, 1990), 195-196. The term "anticommunist jurisprudence" is my own.

[20] Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000); Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012). In a footnote in *War Time*, Dudziak insists that, while "Cold War foreign affairs…generate[d] a perceived need for expanded equality rights" for African Americans, it did *not* do so for women, because "U.S. propaganda on women emphasized domesticity" (see 192-193n40). This chapter, however, argues that the Cold War did influence the expansion of women's rights, in part because of how the PPLC was able to exploit that same concern for domesticity.

[21] On the periodization of "official anti-communism," see Larry Ceplair, *Anti-Communism in Twentieth-Century America: A Critical History* (Santa Barbara: Praeger, 2011).

their concomitant glorification of the private family home as a "sanctified space" secure from both the invisible hand of the market and the long arm of the federal government.[22] Idealized conceptions of privacy not only drove grassroots conservative organizing, however, but also wider forces of suburbanization and "domestic revival" in the early decades of the Cold War.[23] To be sure, the notion that the home was sacrosanct was by no means new—in either American politics or law—but it carried additional weight as Cold Warriors sought to prove the United States' superiority to totalitarian regimes purported to deny their citizens any semblance of a private existence.[24] Conversely, when ordinary Americans envisioned a communist takeover of their country, they worried less about collectivist farming or the rise of the proletariat than they did about (in the words of one historian) "the inevitable destruction of family life as communist leaders sent fathers to factories or the army, mothers to work outside the home, children to indoctrination schools, and babies to communal care centers."[25] The Cold War made the nuclear

[22] Michelle M. Nickerson, *Mothers of Conservatism: Women and the Postwar Right* (Princeton: Princeton University Press, 2012), 7. See also Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton: Princeton University Press, 2001); and Kim Phillips-Fein, "Conservatism: A State of the Field," *The Journal of American History* 98, no. 3 (December 2011): 728-729. On the importance of privacy to this same coalition in later decades, see Robert O. Self, *All in the Family: The Realignment of Democracy Since the 1960s* (New York: Hill and Wang, 2012).

[23] Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988), 10. See also Sarah E. Igo, *The Known Citizen: A History of Privacy in Modern America* (Cambridge: Harvard University Press, 2018), especially Chapter 3.

[24] On the idea of the sacrosanct home in American law, see Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy* (New Haven: Yale University Press, 2009). On the idea of the sacrosanct home in American politics, and its additional resonance in the mid-twentieth century, see Nickerson, *Mothers of Conservatism*; and Deborah Nelson, *Pursuing Privacy in Cold War America* (New York: Columbia University Press, 2002).

[25] Mary C. Brennan, *Wives, Mothers, and the Red Menace: Conservative Women and the Crusade Against Communism* (Boulder: University Press of Colorado, 2008), 3.

family and its private home into ideological weapons and, at the same time, into objects of intense anxiety.[26]

If *Griswold* scholars, then, have tended to understate anticommunism's enduring significance in 1965, they have also tended to miss how early, and how persistently, the Planned Parenthood League of Connecticut began developing its privacy claims.[27] A careful inspection of the PPLC's organizational records reveals that as early as 1953, the group drafted a "legislative bulletin" urging its members and donors to attend an upcoming public hearing of the state legislature's Public Health and Safety Committee (to be held on April 1, 1953) with the following call to arms:

> A Policeman in every home?
> If we can't repeal our Connecticut birth control law, enforce it.
> No one has tried to enforce our present ridiculous law. Even those who oppose any change know that to put teeth in it would require a policeman in every home. Let's put the responsibility for the health of our Connecticut mothers where it belongs…in the hands of her physician, not the policeman on the beat or the legislator in the Capital.
> Connecticut is a democracy. In a democracy the majority rules…and the majority has indicated that it wants our obsolete birth control law changed. Your legislator will listen

[26] In addition to the works already cited, see Laura McEnaney, *Civil Defense Begins at Home: Militarization Meets Everyday Life in the Fifties* (Princeton: Princeton University Press, 2000); and Elaine Tyler May, *Fortress America: How We Embraced Fear and Abandoned Democracy* (New York: Basic Books, 2017).

[27] See, for example, Nelson, *Pursuing Privacy*; Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102, no. 4 (February 1989): 737-807; and Richard Primus, "A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought," *The Yale Law Journal* 106, no. 2 (November 1996): 423-457. Rubenfeld and Primus analyze *Griswold* as an antitotalitarian decision without specifically engaging with the politics or culture of the Cold War, and they do not address the PPLC. To the best of my knowledge, Deborah Nelson's *Pursuing Privacy in Cold War America* is the only book-length work on the constitutional right to privacy and the Cold War. Nelson is not a historian, but a scholar of "law and literature" and, since she consults neither the PPLC's organizational records nor its legal briefs, she attributes *Griswold*'s outcome to prevailing cultural anxieties, and to a sudden "privacy crisis" in the mid-1960s, rather than to deliberate, longstanding strategy.

> if you speak. Write to him (especially your State Senator) and tell your friends to write. Attend the hearing in the Capitol.[28]

The prospect of a policeman in every home, the PPLC knew, was as abhorrent as it was absurd. And from that point on, the PPLC regularly raised the specter of a Soviet-style police state in its promotional materials, in its testimony in state legislative debates, and, eventually, in its legal briefs—first in *Poe v. Ullman* (1961), the PPLC's first attempt to convince the Supreme Court to invalidate Connecticut's contraception ban, and then again in *Griswold*. The PPLC's assertion of a legal right to privacy was in fact the culmination of a deliberate and aggressive years-long strategy to tie its local campaign for legalized birth control to broader issues of grave national and international import during the Cold War.

Privacy language was a versatile tool. In the 1953 newsletter above, for example, the PPLC imagined a policeman in every home in order to challenge Connecticut's regard for motherhood and the legitimacy of its participatory democracy. Elsewhere, the organization linked the protection of privacy to marital happiness and family stability, to America's national security, and to the world's fragile postwar peace. These rhetorical connections, forged over the course of more than a decade, became the cornerstone of a potent legal defense, one aimed less at managing the United States' reputation abroad (as was more common in Cold War civil rights cases) than at helping to safeguard American democracy against an array of cataclysmic futures: a third world war; communist victory in the Cold War, hastened by overpopulation and global hunger; and America's own descent into totalitarianism.[29] It was ultimately a successful strategy, in large part because the PPLC found such a receptive audience in William O. Douglas, whose

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[28] "Legislative Bulletin," 1953, Box 25, Folder L, PPLC Records. The copy preserved in the archive is a draft; in the above text, I have corrected its typographical errors.
[29] On the Cold War civil rights cases, see Dudziak, *Cold War Civil Rights*.

extensive writings on the Cold War revealed an even more wide-ranging set of domestic and foreign policy concerns—from McCarthyist government overreach, to diplomatic strategy in Asia, to, indeed, overpopulation—which he likewise brought to bear on his opinions in *Poe* and *Griswold*. And, in this way, in the midst of the Cold War, *Griswold v. Connecticut* was decided precisely where domesticity, population control, and privacy overlapped: in "the sacred precincts of marital bedrooms."

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If the Supreme Court's affirmation of marital privacy attested to the nation's idealization of marriage and the nuclear family, it was also almost unavoidable: for before *Griswold*, Planned Parenthood Federation of America (PPFA) affiliates—including the PPLC—only served married clients.[30] The PPLC never challenged this restriction throughout the 1940s, '50s, and '60s, even as part of its regular petitions to state legislators to revise or repeal Connecticut's contraception ban. In 1955, for example, the organization endorsed a resolution "(a.) Permitting any physician…to prescribe any methods of means for the temporary prevention of pregnancy in a *married woman*, when in the opinion of such physician, pregnancy would endanger the life or seriously impair the health of such a *married woman*, and (b.) permitting a *married person* to use the methods or means so prescribed" [emphasis mine].[31] Two years later, the PPLC exhorted members to "WRITE to <u>your</u> Senator and Representatives" in support of a Connecticut state bill—House Bill 572—"To permit hospitals and physicians to advise *married women* concerning

[30] Gordon, *Moral Property of Women*, 298.
[31] "Two Bills Introduced in 1955 Session of Assembly," *Connecticut Parenthood* (Winter 1955): 1, Box 26, Folder D, PPLC Records.

contraceptive devices and to prescribe the same [emphasis mine]."[32] Each of the legislative proposals only reinforced the widely held notion that birth control belonged within the nuclear family.

To this end, the PPLC also launched a variety of programs for Connecticut married couples, aimed only indirectly at legalizing contraception. In the fall of 1953, in partnership with the Yale University School of Medicine, the PPLC co-sponsored a "Marriage Counselling Service"—a "psychiatric service for dealing with marital problems" which, they boasted, "had previously not been available, except on a private basis."[33] Miriam Harper, the wife of Yale law professor and PPLC attorney Fowler V. Harper, was the first psychiatric social worker hired by the program, which ran for years; when Miriam led a "Symposium on Marriage" in New Haven, organized by the town's Unitarian Society and its local synagogue, Temple Mishkan Israel, the PPLC advertised its success in its quarterly newsletter, *Connecticut Parenthood*.[34] Six years later, in 1959, the PPLC inaugurated its own "premarital education project" for "Engaged couples who have been referred by the physician or their clergyman."[35] To be sure, the project presented a brazen challenge to the state's contraception ban, and the PPLC's press release asserted a First Amendment right to distribute "child spacing information…to the couples during the discussion if they asked for it."[36] This defiance, however, was also part and parcel of a larger

[32] "Legislation…1957," *Connecticut Parenthood* (Winter 1957): 1, Box 26, Folder D, PPLC Records.
[33] Charles W. Gardner, "Marriage Counselling Service," *Connecticut Parenthood* (Winter 1955): 3, Box 26, Folder D, PPLC Records.
[34] "Marriage Consultation Service," *Connecticut Parenthood* (Winter 1954): 2, Box 26, Folder D, PPLC Records; "New Haven holds Symposium on Marriage," *Connecticut Parenthood* (Spring 1954): 8, Box 26, Folder D, PPLC Records.
[35] "To: Society Editor," 1959, Box 26, Folder O, PPLC Records.
[36] "To: Society Editor," 1959, Box 26, Folder O, PPLC Records.

mission to "obtain valuable information regarding the onset and possible prevention of early marital conflicts" and to ease young couples' "physical and emotional adjustment to marriage [and] parenthood."[37] Through initiatives like these, the PPLC positioned itself as a vital local resource, while also expressing its organizational conviction that widely available contraceptive information and devices were essential to healthy marriages and to thriving communities.

Such insistence upon the significance of contraception to both individual families and to larger social systems was, according to historian Linda Gordon, Planned Parenthood's key innovation in the mid-twentieth century. Birth control activists of the 1940s, '50s, and '60s—in contrast to its more radical predecessors, in the 1920s and '30s, who regarded contraception access as an avenue to women's emancipation—instead positioned contraception as a matter of "family planning," a conceptual framework that "took the family, not the woman or the individual, as the unit for the application of reproductive control" and that linked "small-scale planned families" to "large-scale population planning."[38] During the Second World War, movement leaders began to tout birth control as a source of "national strength" amidst global conflict.[39] This formulation, which persisted into the postwar period, had two primary components: first, that child spacing bolstered married couples' financial fortunes and emotional wellbeing, providing necessary stability amidst political and social upheaval at home and abroad; and second, conversely, that overpopulation produced starvation which bred desperation and aggression, creating the necessary conditions for military conflict.[40] In the 1950s and '60s,

[37] "To: Society Editor," 1959, Box 26, Folder O, PPLC Records.
[38] Gordon, *Moral Property of Women*, 242, 243.
[39] Gordon, *Moral Property of Women*, 247.
[40] Gordon, *Moral Property of Women*, 247-249. On the ways in which contraception and family stability became central tenets of domestic containment ideology in the postwar period, see also May, *Homeward Bound*.

activists grew especially wary of skyrocketing birth rates in what they deemed "'population powder kegs,'" the Third World nations that seemed on the brink of either "revolution or 'going communist.'"[41] PPFA national leaders thus upheld voluntary contraception as an essential democratic freedom inimical to the totalitarian regimes of the Nazis and the Soviet Union, and as a practical means of securing American victory in the Cold War.[42]

In Connecticut, the PPLC drew upon every one of these themes in its extensive promotional materials, hoping to demonstrate the gravity of its local struggle. A close reading of the Winter 1955 issue of *Connecticut Parenthood* perhaps best illustrates this approach. In a column about the PPLC's "Overall Program," for example, Dr. Herbert Thoms, a longstanding PPLC member and Chairman-Emeritus of Yale's Department of Obstetrics and Gynecology, effusively praised the League's sponsorship of the medical school's marriage consultation service, infertility clinic, and other family-focused projects, first and foremost because the ventures so clearly attested to the organization's foundational precept: "PARENTHOOD WHICH IS PLANNED IS INTELLIGENT PARENTHOOD."[43] He declared, "We all realize how much this idea can mean in the emotional life of the home and therefore in the welfare of the nation."[44] To Thoms, this relationship was not only obvious but causal: family planning enabled marital stability, which enabled national wellbeing.

Another piece, entitled "Open the Door to Planned Parenthood," similarly showcased the consequential stakes of the PPLC's national and international vision. "Each year an increasing

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[41] Gordon, *Moral Property of Women*, 284.
[42] Gordon, *Moral Property of Women*, 247-248, 284.
[43] Herbert Thoms, "Overall Program," *Connecticut Parenthood* (Winter 1955): 3-4, Box 26, Folder D, PPLC Records.
[44] Herbert Thoms, "Overall Program," *Connecticut Parenthood* (Winter 1955): 4, Box 26, Folder D, PPLC Records.

number of dedicated men and women everywhere seek to make the Planned Parenthood credo 'every child everywhere should be a wanted child' a living reality in Connecticut, the United States, and the world," the unnamed author proclaimed.[45] "They recognize that the survival of democracy as we know it depends on the health, security and strength of individual families everywhere."[46] Here, once more, responsible parenthood improved family life, which in turn fortified national security. Connecticut's anti-contraception statutes, on the other hand, put democracy itself at risk: they compelled doctors and patients to violate their own moral principles; ignored the "pressure of an informed public opinion" in favor of repeal; and contributed to international "population pressures" that "imperil[ed] hopes for peace."[47] Legalizing birth control, then, would resolve all of these problems. The piece concluded with a fundraising plea highlighting this interconnectedness: "Support of the Planned Parenthood is a contribution to your community and all the families in it…as well as to desperate parents throughout the overpopulated and undernourished world."[48] The "generous" donations of Connecticut birth controllers were required to help the United States—and the world—evade catastrophe.[49]

Apocalyptic visions abounded in "population control" literature throughout the 1950s and '60s. Broadly speaking, two models predominated. In one, skyrocketing population growth and

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[45] "Open the Door to Planned Parenthood," *Connecticut Parenthood* (Winter 1955): 1, Box 26, Folder D, PPLC Records.
[46] "Open the Door to Planned Parenthood," *Connecticut Parenthood* (Winter 1955): 1, Box 26, Folder D, PPLC Records.
[47] "Open the Door to Planned Parenthood," *Connecticut Parenthood* (Winter 1955): 1, 4, Box 26, Folder D, PPLC Records.
[48] "Open the Door to Planned Parenthood," *Connecticut Parenthood* (Winter 1955): 4, Box 26, Folder D, PPLC Records.
[49] "Open the Door to Planned Parenthood," *Connecticut Parenthood* (Winter 1955): 4, Box 26, Folder D, PPLC Records.

corresponding food scarcity provoked a third world war; in the other, the same factors prompted the starving citizens of the Third World to welcome communist rule, irreversibly tipping the balance in the ongoing Cold War.[50] Throughout this period, as Americans grew more fearful of global overpopulation, they also increasingly approved of contraception at home, and the PPLC expertly turned Cold Warriors' anxieties to its own advantage.[51] The organization regularly hosted world population experts to speak at its annual meetings; diligently reported on Executive Director Estelle Griswold's experiences at various international Planned Parenthood conferences (including the one in 1957 that, *Connecticut Parenthood* boasted, representatives from "[e]ven those countries now behind the iron curtain" attended); and eagerly advertised population control publications in the PPLC newsletter, including "'The Population Bomb,' a pamphlet prepared by a group of business and professional men concerned with preserving world peace, arresting Communism and improving the lots of people in overpopulated countries."[52]

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[50] On the Cold War origins of population control, see Gordon, *Moral Property of Women*, 279-286; Elaine Tyler May, *America and the Pill: A History of Promise, Peril, and Liberation* (New York: Basic Books, 2010), especially Chapter 2; and John Sharpless, "World Population Growth, Family Planning, and American Foreign Policy," in *The Politics of Abortion and Birth Control in Historical Perspective*, ed. Donald T. Critchlow (University Park: Pennsylvania State University Press, 1996), 72-102.

[51] On global overpopulation and Americans' increasing support for birth control, see Gordon, *Moral Property of Women*, 279-286; Geoffrey R. Stone, *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century* (New York: Liveright Publishing Corporation, 2017), 352-352; and Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York: Oxford University Press, 2013), 118.

[52] "Connecticut Goes to Berlin!!," *Connecticut Parenthood* (Fall 1957): 1, Box 26, Folder D, PPLC Records; "NEW MATERIALS available from the State Office," *Connecticut Parenthood* (Summer 1957): 2, Box 26, Folder D, PPLC Records. For additional examples, see also "To: City Editor," 1963, Box 26, Folder P, PPLC Records; "To: Society Editor," 1963, Box 26, Folder P; "Population," *Connecticut Parenthood* (Fall 1955): 2, Box 26, Folder D, PPLC Records; and "New Materials," *Connecticut Parenthood* (Fall 1956): 2, Box 26, Folder D, PPLC Records, among others.

To this day, "The Population Bomb" remains the most well-known example of the "population explosion" genre, and it was perhaps the most forthright in its anticommunist ambitions. First published by the Hugh Moore Fund for International Peace in 1954 and regularly reissued throughout the next decade, it warned its readers, "'There will be 30 million more mouths to feed in the world four years from now—most of them hungry. Hunger brings turmoil—and turmoil, as we have learned, creates the atmosphere in which the communists seek to conquer the earth.'"[53] Even though selling these materials for 10, 25, or 30 cents could not have constituted a major source of revenue for the PPLC, it enabled the organization to convincingly stoke its constituents' desperate unease as it attempted to marshal opposition to Connecticut's birth control ban.

At times, the PPLC also put forth a third model of impending disaster, one that handily flipped Cold War logic on its head even as it anticipated an even more devastating communist victory. In the Fall 1954 issue of *Connecticut Parenthood*, for example, an unnamed PPLC author publicized the findings of a recent United Nations Economic and Social Council conference: the most "distressed areas" of the world, which included most countries in Latin America, Africa, and Southeast Asia and most of the world's people, were "predominately agrarian areas" with "high birth rates and high death rates"—and "[e]very time they take a step forward in public health, insect control or better farming," the PPLC reported, "their population soars. Each improvement lowers the death rate, most significantly that of infant girls who in a few years will produce more hungry mouths to feed."[54] If, ordinarily, a rising standard of living

[53] "The Population Bomb" quoted in Gordon, *Moral Property of Women*, 284.
[54] "Population Boom: A Map of Hunger," *Connecticut Parenthood* (Fall 1954): 3, Box 26, Folder D, PPLC Records.

was imagined to ensure capitalist victory in the Cold War, in this case, it only compounded the problem. If this state of affairs were to persist, according to the PPLC, the likeliest outcomes were the breakdown of the international system or, even worse, "a single world society so short in goods and resources that only rigid totalitarian controls of 'everybody and everything' could prevent a total collapse."[55] If families, whether in the Third World or in Connecticut, could not voluntarily use contraception, then this "ultimate crisis" could only be prevented by totalitarian measures—not only forced sterilization or compulsory family limitation, but an all-encompassing, worldwide dictatorship.[56]

If it was easy to envision the entire world succumbing to totalitarian rule if it failed to staunch global population growth, it was similarly easy for the PPLC to imagine—and to convey—that Connecticut would suffer the same fate if it continued to criminalize contraception. In its promotional literature, the PPLC was accustomed to contrasting voluntary birth control with its undemocratic alternatives, in both the imperfect present and an imagined, dystopian future. The organization was similarly prepared to draw attention to the threat of totalitarianism on a more intimate, but no less significant, scale—within the family home.

In the spring of 1955, just as it had in the spring of 1953, the PPLC urged its "full mailing list" of 20,000 to attend an upcoming hearing of the Connecticut legislature's Public Health and Safety Committee. This "Special Legislative Edition" of *Connecticut Parenthood* let its readers know that the legislature was, once again, contemplating two new bills which would undo the state's contraception ban. Once again, the PPLC called upon the "MEN and WOMEN of

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[55] "Population Boom: A Map of Hunger," *Connecticut Parenthood* (Fall 1954): 3, Box 26, Folder D, PPLC Records.
[56] "Population Boom: A Map of Hunger," *Connecticut Parenthood* (Fall 1954): 3, Box 26, Folder D, PPLC Records.

CONNECTICUT" to "Show Your Determination To Be Heard!!" by participating in local politics, and by urging lawmakers to abandon their nineteenth-century mores and join the "46 States [that] have liberal Maternal Health Laws" instead.[57] Once again, the PPLC warned that only "a policeman in every home" could possibly "enforce" the ban in its current form.[58] But, this time, the PPLC included a cartoon (see Image 1).

If the image seemed silly—three police officers literally hiding underneath three beds, notebooks and pens in hand, anxiously on the lookout for sexual intercourse and a diaphragm or vaginal jelly—the sentiment was a solemn one. And, at the legislative hearing, held on April 20, PPLC president Mary Parker Milmine made the cartoon's subtext text: "the present law was unforceable," she declared, "without a police state worthy of Stalin."[59]

This legislative challenge would fail (the PPLC blamed Connecticut's Catholic state senators), as would another campaign in 1957 and yet another in 1963.[60] But the menacing prospect of a totalitarian state dictating married couples' sexual behaviors and invading the sanctity of their homes would echo throughout the PPLC's legal briefs in *Poe v. Ullman* and *Griswold v. Connecticut*, alongside equally ominous visions of a world made up of unhappy parents and unwanted children, riven by conflict, and overflowing with the starving poor. All of

[57] "Special Legislative Edition," *Connecticut Parenthood* (Spring 1955): 1, Box 25, Folder L, PPLC Records.
[58] "Special Legislative Edition," *Connecticut Parenthood* (Spring 1955): 1, Box 25, Folder L, PPLC Records.
[59] "Legislative Hearing Report," *Connecticut Parenthood* (Spring 1955): 3, Box 26, Folder D, PPLC Records
[60] "It's Still Against the Law," *Connecticut Parenthood* (Fall 1955): 3, Box 26, Folder D, PPLC Records; "Legislation," *Connecticut Parenthood* (Summer 1957): 1, Box 26, Folder D, PPLC Records; "Executive Committee Meeting," May 2, 1963, Box 12, Folder F, PPLC Records.

these imagined futures emerged from the Cold War and, together, they were instrumental to the PPLC's constitutional triumph.

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Poe v. Ullman, the PPLC's first test case, reached the Supreme Court in March 1961. The American and Connecticut Civil Liberties Unions and the national Planned Parenthood Federation of America (PPFA) both submitted *amicus curiae* (or friend-of-the-court) briefs defending marital privacy and promoting population control, respectively.[61] It was the PPLC's legal brief, written by Yale law professor Fowler V. Harper on behalf of the appellants—"housewife" Jane Doe; "husband and wife" Paul and Pauline Poe; and Dr. C. Lee Buxton, their physician and Medical Director of the PPLC—which wove together these two themes.[62]

The PPLC brief's central claim, that Connecticut's anti-contraception statutes violated the Fourteenth Amendment, contained a number of constituent parts.[63] The laws, the brief argued, were unconstitutionally "arbitrary and capricious."[64] Unrestricted to their "presumed purpose" of "discourag[ing] promiscuity," they were simultaneously ineffective (contraception

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[61] Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae, *Poe v. Ullman*, 367 U.S. 497 (1961), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0101961576/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=3a513746&pg=1 (accessed October 2, 2023); Brief for the Planned Parenthood Federation of America as Amicus Curiae, *Poe v. Ullman*, 367 U.S. 497 (1961), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0104622797/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=7bea35de&pg=1 (accessed October 2, 2023).

[62] Brief for the Appellants at 5-6, *Poe v. Ullman*, 367 U.S. 497 (1961), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0102384573/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=b256eea5&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Appellants, *Poe v. Ullman*, 367 U.S. 497 (1961)].

[63] Brief for the Appellants at 4, *Poe v. Ullman*, 367 U.S. 497 (1961).

[64] Brief for the Appellants at 11, *Poe v. Ullman*, 367 U.S. 497 (1961).

could be obtained to prevent venereal disease) and discriminatory (they penalized married couples whose sexual congress should have been sanctioned by the state).[65] They irrationally prohibited the most effective means of preventing conception while permitting the least (such as the rhythm method); they forced Mrs. Doe and Mrs. Poe, whose previous pregnancies had resulted in tragedy, to become celibate or to risk their lives every time they slept with their husbands; they "deprived [Buxton] of a valuable property right in his profession"; and they caused myriad individual and social ills that "far outweigh any assumed advantages."[66]

This last point constituted the longest section of the brief, and it was there that the PPLC outlined the "harm to individual freedom and to the social order" precipitated by the state's contraception ban—including the ways in which it contributed to "an overpopulated world with all the dangers of famine, political unrest and war," to the births of "unwanted children [who] are unhappier than planned children and are more likely to become anti-social," and to egregious invasions of privacy.[67] The very structure of this section emphasized that these issues were inextricably intertwined—and offered the clearest evidence of the PPLC's long-established tactic of tying its Connecticut campaign to American national security and international peace, and of linking family planning and population control to marital privacy.

The contraception ban, the PPLC argued, inexcusably contributed to the prospect of international violence and destruction. The brief quoted psychiatrist Karl Menninger, who alleged that "unwanted" children, born when contraceptive drugs and devices were made unavailable, were more likely to evince racial prejudice and more likely to become violent than

[65] Brief for the Appellants at 8-10, *Poe v. Ullman*, 367 U.S. 497 (1961).
[66] Brief for the Appellants at 8-10, *Poe v. Ullman*, 367 U.S. 497 (1961).
[67] Brief for the Appellants at 8-10, *Poe v. Ullman*, 367 U.S. 497 (1961).

the planned children of responsible parents—and thereupon further asserted that overpopulation directly threatened America's "national defense and economic and social security."[68] Martial language dominated this section of the brief. Even in introducing the concept of demography, it alluded obliquely to the Cold War, suggesting that the discipline "may eventually be as significant for life and death on this planet as nuclear physics and atomic science."[69] One particularly stark passage directly blamed overpopulation for provoking the Second World War—and predicted a third if population growth continued to skyrocket, helped along by Connecticut's anti-contraception statutes:

> It is hardly necessary to cite instances from history when men hungry for food have been goaded into agitation, rebellion and foreign war. The population crisis in Japan twice within our generation has led that nation into foreign wars in at least one of which many young citizens of Connecticut lost their lives. A third may possibly be avoided in the future if the United States continues indefinitely to subsidize that nation or if the "vital balance" [of population and natural resources] can be attained and maintained.[70]

The very "survival of the human race," the PPLC stressed, was now at stake.[71] As a newly anointed global superpower, the United States could not countenance any policy that would "contribute ever so slightly to the extermination of humanity."[72] Allowing "one or more of its great states" to prohibit "voluntary family limitation" was not only unconstitutional, but a dereliction of its "responsibility of leadership" over the postwar order.[73]

This line of reasoning also informed the direction and tone of the PPLC's connected argument against compulsory abstinence—the only possible means of avoiding conception if

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[68] Brief for the Appellants at 34, 50, *Poe v. Ullman*, 367 U.S. 497 (1961).
[69] Brief for the Appellants at 45, *Poe v. Ullman*, 367 U.S. 497 (1961).
[70] Brief for the Appellants at 50, *Poe v. Ullman*, 367 U.S. 497 (1961).
[71] Brief for the Appellants at 20, *Poe v. Ullman*, 367 U.S. 497 (1961).
[72] Brief for the Appellants at 47, *Poe v. Ullman*, 367 U.S. 497 (1961).
[73] Brief for the Appellants at 52, *Poe v. Ullman*, 367 U.S. 497 (1961).

birth control were to remain illegal. Abstinence, the brief declared, was in fact not a viable alternative. It invariably created friction between the celibate husband and wife, "constitut[ing] a threat to family stability" and producing "divorce, broken families, 'part-time' parents [which] constitute a serious menace to the social order to the mental health of the nation."[74] In this way, the PPLC undercut the state's morality argument ("any law which jeopardizes family solidarity has a negligible claim to the promotion of public welfare") and simultaneously, neatly delineated the consequences of the anti-contraception statutes beyond Connecticut's borders.[75]

No less important, the PPLC argued, the birth control ban also harmed more people than just the appellants, since it effectively "regulated the private sex life of all married people" in Connecticut.[76] Though the PPLC made no attempt to assert the privacy rights of all people (married or unmarried, housed or homeless), this narrower vision was thoroughly in line with its mid-century notions of family planning and responsible parenthood and in line with its commitment to making contraception available only to married couples. But this emphasis on marriage was also audacious, enabling the PPLC to reinterpret age-old privacy concepts, such as the "notion that a man's home is his castle," to fit its particular aims.[77] The brief asked, for example, "If the legislature may prescribe, censor or regulate marital intercourse, what is there left of the 'castle'?"[78] Even more tellingly, the brief reframed former Supreme Court Justice Louis Brandeis's invocation of "the right to be let alone" in his famed *Olmstead v. United States*

[74] Brief for the Appellants at 9, 31, *Poe v. Ullman*, 367 U.S. 497 (1961).
[75] Brief for the Appellants at 31, *Poe v. Ullman*, 367 U.S. 497 (1961).
[76] Brief for the Appellants at 28, *Poe v. Ullman*, 367 U.S. 497 (1961).
[77] Brief for the Appellants at 28, *Poe v. Ullman*, 367 U.S. 497 (1961).
[78] Brief for the Appellants at 28-29, *Poe v. Ullman*, 367 U.S. 497 (1961).

dissent as the right of "spouses…to be let alone in the bedroom."[79] Genuine "freedom of the bedroom," the PPLC professed, required not only the affirmative freedom of married couples to reject abstinence and to engage in sexual intercourse but also freedom from government intrusion.[80] "When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife," the brief resolutely declared, "it is going too far."[81]

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The Supreme Court announced its decision in *Poe* in June 1961. A plurality of the justices declined to rule on the merits of the case, perhaps to avoid weighing in on a contentious political matter.[82] Since the appellants Jane Doe, Mr. and Mrs. Poe, and Dr. Buxton had not actually been arrested, these justices explained, they refused to "be umpire to debates concerning harmless, empty shadows."[83] But two members of the Court—John Marshall Harlan II and William O. Douglas—dissented. What's more, they not only declared that the appellants had standing to sue but insisted that the Connecticut birth control ban was unconstitutional—and specifically on privacy grounds.

Like the Court's plurality, Justice Harlan made clear that he doubted Connecticut's anti-contraception statutes would ever be enforced, admitting that "the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion into the home."[84] Nonetheless, he explained, the birth control ban constituted an unconstitutional infringement of

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[79] Brief for the Appellants at 28, *Poe v. Ullman*, 367 U.S. 497 (1961). See also *Olmstead v. United States*, 277 U.S. 438, 471-485 (1928).
[80] Brief for the Appellants at 28, *Poe v. Ullman*, 367 U.S. 497 (1961).
[81] Brief for the Appellants at 28, *Poe v. Ullman*, 367 U.S. 497 (1961).
[82] Murray, "Overlooking Equality on the Road to *Griswold*," 328n29.
[83] *Poe v. Ullman*, 367 U.S. 497, 508 (1961).
[84] *Poe v. Ullman*, 367 U.S. 497, 549 (1961).

familial privacy: for the Third and Fourth Amendments forbade state agents from entering one's home because—and only because—"[t]he home derives its preeminence as the seat of family life."[85]

Harlan's dissent did not license all sexual behavior. On the contrary, he remained adamant that participants in "adultery, homosexuality, fornication, and incest," no matter where they physically engaged in the acts, could never claim privacy rights under the Fourteenth Amendment.[86] Marriage, however, was "an institution which the State…always and in every age…has fostered and protected," Harlan declared.[87] And it was precisely because the state sanctioned marriage that there could be no government oversight of married couples' sexual intercourse or their use of contraception.[88]

If, for Harlan, marriage gave substance to the Third and Fourth Amendments, for Douglas, marriage was even more essential. It was in fact a fundamental freedom necessary to a "free society"—a phrase Douglas used a remarkable seven times in his eleven-page dissent.[89] Like Harlan, Douglas was appalled that the statutes "reaches into the intimacies of the marriage relationship."[90] Unlike Harlan, he was also outraged by the particular circumstances of their prospective, literal enforcement:

> If we imagine a regime of full enforcement of the law in the manner of an Anthony Comstock, we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on. It is said that this is not that case. And so it is not. But when the State makes 'use' a crime, and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. If it can make this law, it

[85] *Poe v. Ullman*, 367 U.S. 497, 549-551 (1961).
[86] *Poe v. Ullman*, 367 U.S. 497, 553 (1961).
[87] *Poe v. Ullman*, 367 U.S. 497, 553 (1961).
[88] *Poe v. Ullman*, 367 U.S. 497, 553 (1961).
[89] *Poe v. Ullman*, 367 U.S. 497, 514, 515, 516, 517, 518, 521(1961). Justice Douglas also used the phrase "civilized society" once, at 513.
[90] *Poe v. Ullman*, 367 U.S. 497, 519 (1961).

> can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.[91]

Here, as if it were copied straight from the pages of *Connecticut Parenthood*, the image of "a policeman in every home" reared its head once more. Douglas would conjure up the same scenario in his later, more famous opinion in *Griswold* ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?") but he devoted even more attention to it here.[92] He also contended that, although the police state that Douglas envisioned had not yet come to fruition, even its hypothetical appearance constituted "an invasion of the privacy that is implicit in a free society."[93] This was Douglas's final invocation of a "free society," and it was here that he made explicit its opposite: namely, totalitarianism.

Indeed, for Douglas, protecting marital and familial privacy seemed so vital precisely because totalitarian governments protected neither. Here, Douglas quoted at length from theologian Robert L. Calhoun's "Democracy and Natural Law," an article published in a recent issue of Notre Dame Law School's *Natural Law Forum*:

> One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual makeup of the human community.[94]

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[91] *Poe v. Ullman*, 367 U.S. 497, 519-521 (1961).
[92] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).
[93] *Poe v. Ullman*, 367 U.S. 497, 519-521 (1961).
[94] *Poe v. Ullman*, 367 U.S. 497, 521-522 (1961). See also Robert L. Calhoun, "Democracy and Natural Law," *Natural Law Forum* (1960): 31-69.

Connecticut's birth control ban, Douglas implied, made the family into an agency of the state—and was thus not only unconstitutional but fundamentally undemocratic as well. It was "congenial only to a totalitarian regime."[95] It had no place in the United States.

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Douglas delivered this scathing condemnation in June 1961, only two months after American forces encountered disaster at the Bay of Pigs and only two months before construction would begin on the Berlin Wall. If the anticommunist hysteria of the 1950s had faded, the Cold War had certainly not, and it seems impossible that the conflict was not on Douglas's mind as he sought to protect Connecticut and the nation from a totalitarian fate.

Ever since Douglas had visited the Soviet Union in 1955, he had published and lectured widely on his recommendations for American victory in the Cold War, delivering strongly-worded opinions on the United States' misguided foreign policy strategy in Asia ("we have propped up decrepit war lords, financed medieval kingdoms, and been the close ally not, of liberal leaders, but of the reactionary influences in Asian life"); the cataclysmic threat of nuclear fallout; the necessity of "[maintaining]…civil government in the event of atomic attack"; America's dire "missile lag"; and the urgent problem of global hunger ("We must gear our farm production to world needs, raising what the deficit nations such as India desire to eat").[96] It was

[95] *Poe v. Ullman*, 367 U.S. 497, 522 (1961).
[96] William O. Douglas, "America and Russia," 10-11, March 5, 1956, Sub-Series 7, Box 18, Folder 34, William O. Douglas Collection, 1920-1980, Whitman College and Northwest Archives, Walla Walla, WA; William O. Douglas, *The Right of the People* (Garden City, NY: Doubleday and Company, 1958), 78-79, 214-215; William O. Douglas, *America Challenged* (Princeton: Princeton University Press, 1960), 1, 58.

in this final context that Douglas, like so many others in the 1950s and '60s, agonized over the international "population trend."[97]

He worried that population growth in America had outpaced city and state officials' capacity to keep up with "the social and educational needs of the country," and that "medical discoveries and widespread advances in sanitation" had only worsened the plight of the global poor, whose numbers were now outpacing agricultural output.[98] And, by contrast, he heralded America's "farm surpluses" as the nation's "most important political asset"—an unparalleled diplomatic tool which could be used to showcase the advantages of capitalist industrial production and to curry favor with Third World nations that might otherwise lean communist.[99]

Throughout his many writings, however, Douglas also made clear that capitalist promises of material comfort would not be enough to win the Cold War. For example, in the very first sentences of *America Challenged*, published in 1960, he warned, "We Americans are at a fateful crossroads of history. We are smug and complacent as we enjoy the highest standard of living in the world. Yet we drift dangerously; and if present trends continue, we will be a second-rate power in the world."[100] A vision of freedom that only "embrace[d]…the right to seek opportunities for material things," Douglas argued, but not "to speak, to write, to think, to worship as one pleases, without intervention from the state…to be different from the crowd, to walk alone and unafraid…at times even to shake a fist at authority," was a woefully diminished one.[101] In fact, the relentless pursuit of material goods produced a dangerous, deleterious

[97] Douglas, *America Challenged*, 60.
[98] Douglas, *America Challenged*, 1, 60.
[99] Douglas, *America Challenged*, 58.
[100] Douglas, *America Challenged*, 1.
[101] Douglas, *America Challenged*, 28.

conformity. "Madison Avenue experts," he cautioned, "have dinned into everyone's ears the bright and happy future that will exist if each of us will only drink, eat, sleep, ride, exercise, and think in the prescribed way."[102] The result, already set in motion, was not only "a uniform society…with little or no spiritual or intellectual glow to it," but, damningly, "a new form of totalitarianism, and almost as debilitating as any other."[103]

Douglas's distaste for thoughtless orthodoxy likewise infused his disquisitions on the law, where his preoccupation with—and animosity toward—totalitarianism found its clearest expression. In 1957, for example, when Douglas delivered a series of lectures at Franklin and Marshall College on "the rights of the people against the state" (later published as *The Right of the People*), he touted their significance as, first and foremost, "what distinguish us from all totalitarian regimes."[104] The lectures were an impassioned defense of American civil liberties, equally animated by Douglas's deep-seated faith in democracy and by his profound fear that McCarthyism and the Second Red Scare had in fact prompted an irreversible "retrea[t] from our democratic ideals." Douglas explicitly denounced the House Un-American Activities Committee and its "excessively broad charter," and condemned "the fear of communism [that] has created an atmosphere which is antagonistic to a climate of tolerance for unorthodox and free communication of ideas."[105]

For all his glorification of "the nonconformist," however, Douglas was no supporter of communism.[106] On the contrary, he urged his countrymen to "rejuvenate America" by

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[102] Douglas, *America Challenged*, 16.
[103] Douglas, *America Challenged*, 16-17.
[104] Douglas, *The Right of the People*, 12.
[105] Douglas, *The Right of the People*, 93-94, 100.
[106] Douglas, *The Right of the People*, 83. Notably, Douglas's reverence for nonconformity also did not encompass tolerance for sexual identities or relationships outside of heterosexual

recommitting to their "ideals of justice, liberty, and equality" as, above all, a means of achieving a moral and ideological victory in the global Cold War. "The contest is on for the uncommitted people of the earth," he declared, and "[t]hese ideals express the one true advantage we have over communism in that contest."[107] Against this backdrop, Douglas framed the "right of privacy" as a paradigmatic right of the people against the state; as an exemplary penumbral right, "reflect[ing] human rights which, though not explicit [in the Constitution], are implied from the very nature of man as a child of God"; and as an essential instrument of soft power, capable of dampening communism's appeal abroad and helping to defeat totalitarian impulses at home.[108]

Crucially, Douglas's conception of privacy was not confined to the realm of the mind. The "right of privacy," he insisted, "extends to the right to be let alone in one's belief and in one's conscience, as well as in one's home."[109] Interpreted and applied correctly, it would dismantle loyalty programs and legislative investigations, safeguard academic freedom, return unorthodox thinkers to the State Department to repair America's foreign policy, and, perhaps most important, "keep the officers of the law out of one's bedroom."[110]

This striking turn of phrase, uttered by Douglas four years before the PPLC would bring just such a case to the Supreme Court, was one long in keeping with his own dismay at the

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marriage. In *The Right of the People*, for example, he decried government surveillance of ostensibly "obscene" materials not by defending unorthodox sexual practices or relationships, but by advocating for obscene literature and film as a boon to marriage and as a bulwark against adultery (see p. 78) and, though he catalogued and condemned the worst overreaches of the Second Red Scare, he never once mentioned the concurrent abuses of the Lavender Scare. This may help illuminate Douglas's willingness, if not enthusiasm, to restrict *Griswold*'s right to privacy to married couples. Certainly, after *Griswold*, he never suggested that the right to privacy might cover homosexual sex, even in one's own home.

[107] Douglas, *The Right of the People*, 12.
[108] Douglas, *The Right of the People*, 89-90.
[109] Douglas, *The Right of the People*, 90.
[110] Douglas, *The Right of the People*, 94-113, 116-121, 122-123, 149.

"extreme to which we have gone in aping the totalitarian system."[111] Already certain that McCarthyism and Madison Avenue had inculcated "mass-minded" thinking and totalitarian governance in the United States, Douglas could easily imagine the worst in Connecticut's near-future: "search warrants issued and officers appear[ing] in bedrooms to find out what went on."[112] He could also imagine the best: the sacred, private family home, a refuge from conformity, from the market, and from the state. *Poe* seemed to present Douglas with the perfect opportunity to secure and restore American democracy (and to help address overpopulation, too). The PPLC could not have found a more receptive audience—and Douglas's dissent only reinforced the group's conviction that its privacy strategy would bear fruit, and soon.

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Indeed, after *Poe* failed to produce the unambiguous constitutional victory that the PPLC craved, the organization only became more motivated—and immediately set a new test case into motion. Just one day after the Supreme Court announced its decision, PPLC president Lucia Parks and PPFA president Cass Canfield issued a joint press release announcing the League's intention to "take steps as rapidly as possible to offer, under medical supervision, all contraceptive techniques."[113] For if, as the Court's plurality had attested, Connecticut's birth control ban was merely "'dead words,'" then surely they were well within their rights to disregard it. "In the absence of a ruling affirming the constitutional right of married couples to practice contraception," the two presidents proclaimed, "we welcome the recognition by the

[111] Douglas, *The Right of the People*, 134-135.
[112] Douglas, *America Challenged*, 17; *Poe v. Ullman*, 367 U.S. 497, 520 (1961).
[113] "Planned Parenthood League of Connecticut to Offer Contraceptive Services": 1, June 20, 1961, Box 7, Folder A, PPLC Records.

Court that the law has in fact become a nullity."[114] Their press release quoted Harlan's dissent and alluded to Douglas's as well, insisting "that most citizens of Connecticut, and most Americans, would be revolted at the prospect of a great State battering down bedroom doors in an ignoble effort to document a case"—or the same harrowing prospect that the PPLC had been warning its constituents about for close to a decade.[115]

On November 1, 1961, the PPLC welcomed the first ten patients to its new birth control clinic at 79 Trumbull Street.[116] Nine days later, the New Haven Police Department issued arrest warrants for Medical Director C. Lee Buxton and Executive Director Estelle Griswold, charging that they "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article instrument, for the purpose of preventing conception" and that their married clients "did in fact use said drugs, medicinal articles, and instruments for the purpose of preventing conception."[117] At their first criminal hearing, held on November 24, Griswold and Buxton pled not guilty, citing their First Amendment right to free speech and their Fourteenth Amendment right to liberty—which, in their telling, included the right to privacy.[118] They lost that case, as well as two subsequent appeals.[119] But this came as no surprise. In fact, Estelle Griswold expressly welcomed the opportunity to argue the PPLC's case once more before the

[114] "Planned Parenthood League of Connecticut to Offer Contraceptive Services": 1, June 20, 1961, Box 7, Folder A, PPLC Records.
[115] "Planned Parenthood League of Connecticut to Offer Contraceptive Services": 1, June 20, 1961, Box 7, Folder A, PPLC Records.
[116] Garrow, *Liberty and Sexuality*, 200-201.
[117] Garrow, *Liberty and Sexuality*, 206-207.
[118] Garrow, *Liberty and Sexuality*, 210.
[119] Garrow, *Liberty and Sexuality*, 224.

highest court in the land, confident (at least outwardly) that "since there has been a true prosecution, the U.S. Supreme Court will declare the Connecticut law unconstitutional."[120]

By March 1965, when *Griswold v. Connecticut* reached the Supreme Court docket, there were several reasons for optimism. Since 1961, two of the justices who had signed on to the plurality's decision in *Poe* had left the bench—and it seemed likely that their replacements (Arthur J. Goldberg and Byron R. White) would be more amenable to PPLC's constitutional claims.[121] What's more, since its approval by the Food and Drug Administration in 1960, the oral contraceptive known as "the pill" had become regularly prescribed by physicians across the country.[122] Former presidents Dwight Eisenhower and Harry Truman had become honorary co-chairmen of the Planned Parenthood board.[123] In his 1965 State of the Union address, President Lyndon Johnson had officially pledged to "seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity in world resources," and he'd begun to make contraception access a central component of both his domestic War on Poverty

[120] Mrs. Richard W. Griswold to Helen I. Clarke, December 18, 1962, Box 7, Folder F, PPLC Records.
[121] Garrow, *Liberty and Sexuality,* 224.
[122] May, *America and the Pill*, 43.
[123] Donald T. Critchlow, "Birth Control, Population Control, and Family Planning: An Overview," in *The Politics of Abortion and Birth Control in Historical Perspective*, ed. Donald T. Critchlow (University Park: Pennsylvania State University Press, 1996), 10.

and the United States' annual aid to foreign countries.[124] In sum, public policy—and public opinion—were increasingly on the PPLC's side.[125]

In the *Griswold* legal briefs, the PPLC and its *amici*—a group of 141 gynecologists and obstetricians and, once again, both the American and Connecticut Civil Liberties Unions and the national PPFA—seemed emboldened by the changing social and political climate, as well as by the *Poe* dissents. The civil liberties unions claimed that legally available birth control was necessary to achieve married women's "emancipation"; that marriage endowed men and women with the "right to bear and raise a family" beyond the reach of the state; and, echoing Justice Douglas, that the PPLC's patients were entitled to have "legislators as well as policemen…stay out of their bedrooms."[126] The PPFA likewise adopted a new privacy argument, denouncing the anti-contraception statutes for "reach[ing] into the bed of every Connecticut couple" and, like Douglas, declaring them "inconsistent with personal freedom in a civilized society."[127] The

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[124] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union," January 4, 1965, The American Presidency Project, https://web.archive.org/web/20230911205641/https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-26 (accessed September 11, 2023); May, *America and the Pill*, 43; Sharpless, "World Population Growth," 72. The PPFA referenced Johnson specifically in its *Griswold* amicus brief. See Brief for the Planned Parenthood Federation of America as Amicus Curiae at 26, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0100478722/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=7a71df04&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Planned Parenthood Federation of America, *Griswold v. Connecticut*, 381 U.S. 479 (1965)].

[125] On public opinion in favor of expanding contraception access at home and abroad, see Gordon, *Moral Property of Women*, 289; and Critchlow, *Intended Consequences*, 120.

[126] Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae at 7-8, 9, 16, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0100564795/SCRB?u=chic_rbw&sid=bookmark-SCRB&xid=c5e4b50d&pg=1 (accessed October 2, 2023).

[127] Brief for the Planned Parenthood Federation of America as Amicus Curiae at 4, 12-14, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

PPLC, once again, connected the case to the ongoing Cold War most effectively, by driving home the national and international stakes of its local birth control campaign and—for the first time—by incorporating explicitly antitotalitarian language into its legal reasoning.

PPLC attorney Fowler V. Harper had passed away in January, but not before recommending his replacements: Catherine G. Roraback, an attorney who had been working with PPLC for years; and Thomas Emerson, a Yale Law School colleague of Harper's with his own history of battling government overreach (including a storied back-and-forth with Federal Bureau of Investigation Director J. Edgar Hoover published in the *Yale Law Journal*).[128] Just as Harper's had, Roraback and Emerson's brief grouped the individual and social harms of family instability, invasions of marital privacy, and global overpopulation under one heading: "Any Possible Beneficial Aspects Of The Statute Are So Totally Outweighed By Their Cruel and Drastic Infraction Of Individual Rights, Their Inconsistencies And Irrationalities In Actual Operation, And Their Patent Defects, That They Must Be Held Arbitrary And Capricious And Hence In Violation Of Due Process Of Law."[129]

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[128] For example, Emerson had argued *Sweezy v. New Hampshire*, 354 U.S. 24 (1957)—one of the "Red Monday" cases that restricted the government's capacity to investigate suspected subversive agents—before the Supreme Court eight years earlier. The back-and-forth with J. Edgar Hoover can be found in four parts: Thomas I. Emerson and David M. Helfeld, "Loyalty among Government Employees," *The Yale Law Journal* 58, no. 1 (December 1948): 1-143; J. Edgar Hoover, "A Comment on the Article 'Loyalty among Government Employees," *The Yale Law Journal* 58, no. 3 (February 1949): 401-411; Thomas I. Emerson and David M. Helfeld, "A Comment on the Article 'Loyalty among Government Employees': Reply by the Authors," *The Yale Law Journal* 58, no. 3 (February 1949): 412-421; and J. Edgar Hoover, "A Comment on the Article 'Loyalty among Government Employees': Rejoinder by Mr. Hoover," *The Yale Law Journal* 58, no. 3 (February 1949): 422-425. On Hoover, see also Beverly Gage, *G-Man: J. Edgar Hoover and the Making of the American Century* (New York: Penguin Random House, 2022).

[129] Brief for the Appellants at 61, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *The Making of Modern Law: U.S. Supreme Court Briefs, 1832-1978*, https://link.gale.com/apps/doc/DW0100564638/SCRB?u=chic_rbw&sid=bookmark-

This due process argument contained a number of component parts. First, it alleged that Connecticut's anti-contraception statutes violated married couples' "conjugal right [which] is itself fundamental."[130] Second, that abstinence—the only alternative to legal birth control—provoked "unhappiness, tensions between husband and wife, extra-marital relations, and divorce."[131] Third, that the laws unconstitutionally prohibited families from "planning…[their] entire way of life" and "regulated the most intimate relations of husband and wife," precipitating an "unparalleled invasion of privacy."[132] And, finally, that the statutes were shamefully outdated, (as preposterous as "laws against the teaching of evolution") and unconscionably restricted "experimentation in new techniques for the solution of human and social problems."[133]

The most pressing of these problems, according to the PPLC brief, was population growth—which, it explained, "must be ranked as equal in importance to the questions of disarmament and peace, automation, poverty, and civil rights," not least because "population control is a part, and a significant part, of each of these burning problems."[134] The contraception ban, the brief argued further, was patently obsolete, out of step with recent statements of policy by Presidents Kennedy and Johnson and other national leaders.[135] What's more, the prospect of a "population explosion" posed an "acute world-wide problem"—and its solution required that the Connecticut state legislature and the Supreme Court take into consideration "world opinion and

SCRB&xid=f67a94f2&pg=1 (accessed October 2, 2023) [hereafter cited as Brief for the Appellants, *Griswold v. Connecticut*, 381 U.S. 479 (1965)].

[130] Brief for the Appellants at 63, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[131] Brief for the Appellants at 64, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[132] Brief for the Appellants at 65, 67, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[133] Brief for the Appellants at 67, 69, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[134] Brief for the Appellants at 72, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[135] Brief for the Appellants at 73-74, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

world needs."[136] Should Connecticut continue to prohibit the "voluntary use of contraceptive devices," the PPLC implied, only more draconian measures would be able to forestall disaster.[137]

This same attention to the particular demands of contemporary society—and this same sense of emergency—pervaded the PPLC's separate, extensive privacy argument, which it grounded in novel interpretations of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.[138] The brief meticulously outlined the "legal development of the right of privacy, from earliest times to the present," delineating its two enduring elements: "(1) maintaining the sanctity of the home, and (2) preserving from outside intrusion the intimacies of the sexual relationship in marriage."[139] The contraception ban, the PPLC claimed, uniquely violated both, bringing "[t]he hand of the government…not only into the home but into the bedroom."[140] Its mere existence already infringed upon married couples' ostensibly private sexual behavior and child spacing decisions and, if it were ever strictly implemented, Connecticut would need "search warrants to discover 'instruments' of crime in the bathroom closet" and the "[t]estimony of close friends or servants" on the witness stand.[141] It was a lurid outcome that was both reprehensible and unavoidable, if the anti-contraception statutes were allowed to stand.

But if marital privacy enjoyed an age-old legal heritage, the PPLC nonetheless argued that it was more critical now than it had ever been before. Just as it argued that the birth control ban was at odds with contemporary scientific knowledge and Cold War geopolitical strategy, it likewise argued that the Court's reluctance to formally guarantee a constitutional right to privacy

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[136] Brief for the Appellants at 73-74, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[137] Brief for the Appellants at 74, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[138] Brief for the Appellants at 79-83, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[139] Brief for the Appellants at 85, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[140] Brief for the Appellants at 87, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[141] Brief for the Appellants at 87, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

was firmly out of step with "the demands of modern life."[142] The Court needed to intercede, the PPLC claimed, because modernity itself—if left unchecked—promised to erode, rather than to protect, personal freedom. All around, opportunities for "seeking seclusion" were becoming increasingly scarce; "geographical escape to the frontier" was becoming increasingly impossible; and "the forces of a technological age"—namely, "industrialization, urbanization, organization"—were "narrow[ing] the area of privacy and facilitate intrusions into it."[143] These forces were ordinarily taken for granted as tokens of capitalist superiority in the Cold War. But here, the PPLC positioned them as threats that the Supreme Court could help combat—not because Cold War aims were unimportant but, on the contrary, because establishing a right to privacy would help achieve them.

Indeed, the PPLC brief sought to make clear that, amidst a global struggle against communism, protecting privacy meant protecting American democracy. An "absolute state," the brief explained, exerted "[u]ltimate and pervasive control of the individual," while America's ideal "system of limited government," on the other hand, "safeguards a private sector, which belongs to the individual," and to the individual alone.[144] Connecticut's contraception ban, therefore, was not only a bad piece of legislation. By allowing the state entry into this "private sector," it endangered the very foundations of American government—for "the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."[145] The birth control ban was unconstitutional, then, because it was totalitarian.

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[142] Brief for the Appellants at 79, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[143] Brief for the Appellants at 79, 86, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[144] Brief for the Appellants at 79, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[145] Brief for the Appellants at 79, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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On April 5, 1965, William O. Douglas received his assignment, from Chief Justice Earl Warren, to write the Court's opinion.[146] He quickly—and, unusually, without the assistance of his clerks—outlined a decision overturning the Connecticut Supreme Court of Errors' ruling.[147] Justices Hugo Black and Potter Stewart promptly indicated that they would dissent; Justices Earl Warren, William J. Brennan, Jr., Byron White, Thomas C. Clark, John Marshall Harlan II, and Arthur J. Goldberg agreed with Douglas's conclusion, but remained divided as to which particular constitutional provisions would best serve their objective.[148] Ultimately, the result was a profusion of concurrences (one written by Goldberg, joined by Warren and Brennan; one written by Harlan; and one written by White) and a majority opinion establishing the constitutional right to privacy—which Douglas found in the "penumbras" of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments (all six of the amendments that, in its brief to the Supreme Court, the PPLC had suggested as sources of the right to privacy).[149]

This time it was Goldberg—who was not yet on the Court when *Poe* was decided—rather than Douglas, who drew an explicit contrast with totalitarianism in his concurring opinion:

> Surely the Government…could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet…no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children

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[146] Garrow, *Liberty and Sexuality*, 243.
[147] Garrow, *Liberty and Sexuality*, 245.
[148] Garrow, *Liberty and Sexuality*, 241-251.
[149] *Griswold v. Connecticut*, 381 U.S. 479, 481, 484 (1965); Brief for the Appellants at 79-83, *Griswold v. Connecticut*, 381 U.S. 479 (1965). It is difficult to ascertain exactly how coincidental (or not) it was that the PPLC's suggested amendments and the amendments in Douglas's opinion were the same. It seems notable that Douglas had previously proposed grounding the right to privacy in fewer amendments—namely, the First, Fourth, and Fifth—see Douglas, *The Right of the People*, 88. Garrow does not credit the PPLC with influencing Douglas's decision-making here, but rather only his negotiations with the other justices. See Garrow, *Liberty and Sexuality*, 241-253.

> and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view, it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet if, upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would seem to be valid.[150]

According to Goldberg, if Connecticut's birth control ban already stifled married couples' autonomous decision-making and imperiled their children, the ban's opposite ("totalitarian limitation of family size") would be even worse—even though that, too, was not explicitly outlawed by the text of the Constitution. With this rhetorical move, Goldberg assailed the internal logic of Stewart and Black's conservative dissents (they both wrote one and each joined the other's) and drove home the timely, consequential stakes of the Court's decision. Only guaranteeing the "marital right to bear children and raise a family," Goldberg averred, could enable the correct kind—and prevent the wrong kind—of population control.

This was not the only instance where Goldberg made clear that the right to privacy was a right to *marital* privacy. In fact, he insisted that it was Connecticut's other statutes proscribing sexual behavior (including laws against "adultery" and "fornication") which rendered the contraception ban unnecessary—since those statutes successfully, narrowly "safeguard[ed] marital fidelity" *without* "intruding upon the privacy of all married couples."[151]

Douglas, too, took pains to emphasize that the PPLC "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception" and that Griswold and Buxton had "standing to raise the constitutional rights of the married people with whom they

[150] *Griswold v. Connecticut*, 381 U.S. 479, 496-497 (1965).
[151] *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965).

had a professional relationship."[152] It was marriage which constituted "a relationship lying within the zone of privacy," and it was "police…search[ing] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" which portended the totalitarian police state Douglas most feared.[153] If, in *Griswold*, Douglas was less explicit in framing the right to privacy in contradistinction to totalitarianism—perhaps *because* he had already laid out that position at length in his *Poe* dissent four years earlier—he remained equally adamant that Connecticut's anti-contraception statutes primarily constituted an attack on marriage and, therefore, on core American institutions and values.

Indeed, Douglas contended that his novel constitutional innovation was in fact not novel at all, precisely because the "marriage relationship" rested upon "a right of privacy older than the Bill of Rights."[154] It was "older than our political parties" (where the Court had recently found a similarly implicit right of association) and "older than our school system" (where the Court had found a "right to educate one's children as one chooses").[155] "Marriage," Douglas rhapsodized,

> is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[156]

This noble purpose demanded constitutional protection—and not only because the institution of marriage was older than the United States itself, but also because it was integral to a particularly

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[152] *Griswold v. Connecticut*, 381 U.S. 479, 480, 481 (1965).
[153] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).
[154] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
[155] *Griswold v. Connecticut*, 381 U.S. 479, 482-483, 486 (1965). See also, for example, *Meyer v. State of Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Schware v. Board of Bar Examiners of NM*, 353 U.S. 232 (1957); and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), all of which Douglas cited in this *Griswold* opinion.
[156] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

American way of life. In the midst of the Cold War, Douglas identified marital privacy as the nation's most precious resource—and set out to safeguard American democracy by exiling phantom totalitarian agents from the "sacred precincts of marital bedrooms."[157]

It was an unqualified victory for the PPLC, and a powerful vindication of its years-long campaign to connect birth control to national security and antitotalitarianism, as well as to family stability and marital satisfaction. But this same strategy, and its formal sanction by the Court, also mapped the limits of the new privacy doctrine. Expectations of privacy, for example, remained out of reach for the myriad victims of the Lavender Scare, whose homosexuality was cause enough to be deemed "security risks" and summarily fired from federal employment; for the many recipients of Aid to Families with Dependent Children, mostly Black women, whose sexual encounters with potential "substitute fathers" were scrupulously monitored and policed as grounds for the termination of state benefits; and for the targets of the War on Crime, again mostly Black men and women, whose purported family dysfunction served to justify unprecedented state surveillance of both their homes and their inner-city neighborhoods.[158] The protections afforded by *Griswold* were not universally accessible or defensible, precisely because the Cold War nexus of marriage, family, and the home—which indelibly shaped the Court's opinion—was, by design, so restrictive.

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[157] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

[158] On the Lavender Scare, see David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004). On AFDC, see Alison Lefkovitz, "Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961-1972," *Journal of the History of Sexuality* 20, no. 3 (2011): 594-614. On the War on Crime, see Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016). None of these authors mention *Griswold* by name, and only Lefkovitz discusses privacy claims, at p. 604.

At the same time, that same nexus of marriage, family, and the home also made the PPLC's triumph incredibly—and inevitably—short-lived. Indeed, if the Supreme Court's decision in *Griswold* revealed how and why Cold Warriors of various stripes came to coalesce around the need for contraception—and around the protection of the nuclear family—that comity dissipated as soon as the Court moved to enlarge the *Griswold* precedent in the following decade.

In 1972, for example, in *Eisenstadt v. Baird*, the Court extended the right to privacy to unmarried couples using contraception as well.[159] In 1973, in *Roe v. Wade*, it extended the same right to women—including unmarried women—seeking abortions.[160] In these cases, it made little sense, even for the litigants appealing to the Supreme Court, to fixate on responsible parenthood or the family home—not when privacy was finally being exported outside its walls. And the Court's decision in *Roe*, in particular, outraged American conservatives: who, in the subsequent decades, came to identify abortion as a paramount threat to the American way of life—and thus marshalled the language of anticommunism and of "family values" not to safeguard the constitutional right to privacy but to fight it tooth and nail.[161]

For half a century, even as the battle over abortion rights became more frenzied and more violent, *Griswold* itself remained relatively uncontroversial. In 2022, however—while I was writing and revising this dissertation—the Supreme Court finally overturned *Roe*.[162] And, in his concurring opinion there, in *Dobbs v. Jackson Women's Health Organization*, Justice Clarence Thomas suggested that the Court "should reconsider" *Griswold*, too, along with all the other

[159] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[160] *Roe v. Wade*, 410 U.S. 113 (1973).
[161] See, for example, McGirr, *Suburban Warriors*; and Self, *All in the Family*, especially Chapter 5.
[162] *Dobbs v. Jackson Women's Health Organization, et al*., 142 S.Ct. 2228 (2022).

decades-old precedents that had been decided on privacy grounds.[163] It is beyond my purview as a historian to speculate what might happen in the coming years. But it seems clear that if distinctive, defining elements of Cold War political culture fostered the conditions of possibility for the constitutional right to privacy, they also anticipated privacy's enduring—and increasingly important—fault lines as well.

[163] *Dobbs v. Jackson Women's Health Organization, et al*., 142 S.Ct. 2228, 2301 (2022).

CHAPTER 4
"Whatever the Need…It Could Be Met by Volunteers":
Rostker v. Goldberg (1981) and the Servicewomen Who Wouldn't Be Drafted

It was in January 1980, at his final State of the Union address, that President Jimmy Carter first announced his intention to resurrect the Selective Service System. The Soviet Union had invaded Afghanistan almost exactly a month before. It had been a "radical and aggressive new step" on the Soviets' part, Carter warned, and quite possibly "the most serious threat to the peace since the Second World War." Still, his central policy proposal—a "revitalized" Selective Service—appeared to be a modest one, a measured return to a not-long-past state of affairs.[1]

For, between the late 1940s and the early 1970s, the Selective Service had had a claim on every young man in America. Under the perennially-renewed Military Selective Service Act, male citizens and male resident aliens between the ages of nineteen and twenty-six had been subject to military conscription, "liable"—if their draft numbers were called—"for training and service in the armed forces of the United States."[2] Between the ages of eighteen and twenty-

[1] Jimmy Carter, "State of the Union Address 1980," January 23, 1980, Jimmy Carter Presidential Library & Museum, http://web.archive.org/web/20230814145514/https://www.jimmycarterlibrary.gov/the-carters/selected-speeches/jimmy-carter-state-of-the-union-address-1980 (accessed August 14, 2023) [hereafter cited as Jimmy Carter, "State of the Union Address 1980"].

[2] The legislation was first enacted in 1948, as the *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644. Under Section 4 of that initial legislation, some resident alien men were permitted to apply for exemptions from registration and conscription—but were then barred from becoming citizens later on. Congress then continually passed new versions of this legislation until the early 1970s: see also, for example, *Selective Service Extension Act of 1950*, Public Law 81-599, *U.S. Statutes at Large* 64 (1950): 318-319; *Universal Military Training and Service Act*, Public Law 82-51, *U.S. Statutes at Large* 65 (1951): 75-89; *An Act To amend the Universal Military Training and Service Act, as amended, so as to provide for special registration, classification, and induction of certain medical, dental, and allied specialist Categories, and for other purposes*, Public Law 83-84, *U.S. Statutes at Large* 67 (1953): 86-90; *1955 Amendments to the Universal Military Training and Service Act*, Public Law 84-118, *U.S. Statutes at Large* 69 (1955): 223-225; *Universal Military Training and Service Act*

six—no matter whether they would ever be called up or not—those same men had been required to register for the draft as well.[3] The Vietnam War, however, had made conscription notoriously unpopular—so much so that, in 1973, Congress and President Richard Nixon had ended it and had made the U.S. military into an All-Volunteer Force (or AVF) instead.[4] In 1975, President Gerald Ford had also suspended registration, shuttling the Selective Service into "deep standby" mode.[5] Now, only five years later, Carter sought to bring back registration—and registration alone—just in case. "I believe that our volunteer forces are adequate for current defense needs," the president averred. But he also insisted that the country needed to be prepared for those defense needs to change, and with little advance notice. Reinstituting registration, Carter

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Introduction Extension, Public Law 86-4, *U.S. Statutes at Large* 73 (1959): 13; *Universal Military Training and Service Act Extension*, Public Law 88-2, *U.S. Statutes at Large* 77 (1963): 4; *Military Selective Service Act of 1967*, Public Law 90-40, *U.S. Statutes at Large* 81 (1967): 100-106; and *Military Selective Service Act*, Public Law 92-129, *U.S. Statutes at Large* 85 (1971): 348-362.

[3] *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644. Registration was also required under every law mentioned in the previous footnote.

[4] When Congress renewed the MSSA in 1971, the legislation already dictated that the president's induction authority would expire in July 1973. Secretary of Defense Melvin R. Laird ended up announcing the imminent end of the draft six months earlier, on January 27, 1973. The last man drafted into the U.S. Army began his obligated term of service on June 30, 1973. See *Military Selective Service Act of 1967 Amendments*, Public Law 92-129, *U.S. Statutes at Large* 85 (1971): 348-362; David E. Rosenbaum, "Nation Ends Draft, Turns to Volunteers," *New York Times*, January 28, 1973, 1, 28; and Beth L. Bailey, *America's Army: Making the All-Volunteer Force* (Cambridge: Belknap Press of Harvard University Press, 2009), 3.

[5] Proclamation No. 4360 of March 29, 1975, Terminating Registration Procedures Under Military Selective Service Act, As Amended, Ford Library & Museum, http://web.archive.org/web/20230814154040/https://www.fordlibrarymuseum.gov/library/speeches/pr4360.htm (accessed August 14, 2023) [hereafter cited as Proclamation No. 4360 of March 29, 1975]; "History of the Selective Service System," Selective Service System, http://web.archive.org/web/20230814154209/https://www.sss.gov/history-and-records/ (accessed August 14, 2023).

maintained—simply collecting the names and current addresses of prospective G.I.s—would allow for a speedier and more effective emergency response.[6]

Carter's State of the Union, however, included few details about his plans. It wasn't until February 8, 1980, a little over two weeks later, that the president issued a more comprehensive statement—and abruptly made clear that he was asking Congress not only to restart registering America's young men, but to begin registering its young women as well.[7]

It was this part of Carter's proposal—to make every young adult, regardless of sex, accountable to the Selective Service—which was perfectly new. By 1980, to be sure, American women had been part of the U.S. military for nearly a century.[8] During the Second World War, they had begun to enlist in every branch of the armed forces (and begun to earn "full military benefits" for the first time).[9] Since 1948, when Congress passed the Women's Armed Services Integration Act, they'd been regular, permanent members of the Army, Navy, Air Force, and Marine Corps.[10] Since 1967, when Congress removed the statutory limits on women's

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[6] Carter, "State of the Union Address 1980."
[7] Jimmy Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft," February 8, 1980, The American Presidency Project, http://web.archive.org/web/20230814154628/https://www.presidency.ucsb.edu/documents/selective-service-revitalization-statement-the-registration-americans-for-the-draft (accessed September 14, 2023) [hereafter cited as Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft"].
[8] American women had contributed to American war efforts since before the nation's founding, but had only been granted some measure of formal status beginning in the early twentieth century. The Army Nurse Corps was established in 1901 and the Navy Nurse Corps in 1908; both were granted military status in 1944, during the Second World War. During the First World War, in 1917 and 1918, women continued to serve in the Army and Navy Nurse Corps, and also began to serve as non-commissioned yeomen in the Navy and as "Hello Girls" in the Army Signal Corps as well. See *Women in the United States Military, 1901-1995: A Research Guide and Annotated Bibliography*, comp. Vicki L. Friedl (Westport: Greenwood Press, 1996), 201.
[9] *Women in the United States Military*, comp. Friedl, 201-202.
[10] *Women's Armed Services Integration Act of 1948*, Public Law 80-625, *U.S. Statutes at Large* 62 (1948): 356-375.

enlistment, their numbers had skyrocketed.[11] As of February 1980, as President Carter now emphasized, there were approximately 150,000 American servicewomen, consistently "performing well" and "improv[ing] the level of skills" in their assigned units.[12] But every one of them, of course, was a volunteer. They'd *always* only been volunteers. Even before the advent of the AVF, American women—of every citizenship status and every age—had never been made to register for the draft, never been made to join up against their will.[13]

Congressional hearings reliably ensued. But that wasn't all: as the U.S. Supreme Court would later note, Carter's announcement also "breathed new life" into a lawsuit challenging the Military Selective Service Act (or MSSA), which had then been languishing in the Eastern District of Pennsylvania for years.[14] That lawsuit—initially filed as *Rowland v. Tarr* in 1971 and eventually decided by the Supreme Court as *Rostker v. Goldberg* in 1981—is the subject of this chapter. For that lawsuit, in fits and starts and in altogether unpredictable ways, brought constitutional sanction for an enduring legal distinction between the sexes. Most of the civic obligations that Americans are expected to perform—like the obligation to pay taxes or to serve on a jury—are, by now, gender-neutral.[15] But, to this day, only young men are required to sign

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[11] *Female Military Officer Career Restriction Removal Act*, Public Law 90-130, *U.S. Statutes at Large* 81 (1967): 374-384. See also Jeanne Holm, *Women in the Military: An Unfinished Revolution*, rev. ed. (Novato: Presidio Press, 1992).
[12] Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft."
[13] Congress contemplated drafting women—and specifically female nurses—during the final year of World War II, but the proposal never came to pass. See U.S. Congress, House, *Nurses Selective Service Act of 1945*, H.R. 2277, 79th Cong., 1st sess., introduced in House February 22, 1945; and Jill Elaine Hasday, "Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change," *Minnesota Law Review* 93, no. 1 (November 2008): 105-106n35.
[14] *Rostker v. Goldberg*, 453 U.S. 57, 61 (1981).
[15] On the historically disparate, gendered obligations of American citizenship, see Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).

up with the Selective Service. Young women, on the other hand, still have no such responsibility.[16]

The original *Rowland* plaintiffs were not women's rights activists. They were not even women. They were four Philadelphia-area high school students—brothers Andrew and Steven Rowland, David Sitman, and David Freudberg—who had protested against the male-only draft because they'd opposed any kind of draft at all.[17] When they'd filed suit in June 1971—when conscription was still in place and the Vietnam War was still ongoing—sex discrimination had been but one of their objections.[18] They'd also argued that the MSSA stripped them of their property without due process of law; denied them a whole slew of other First and Fifth Amendment rights; impressed them into involuntary servitude; and bound them to fight in a war which was itself "contrary to the principles of military, national, and international law."[19]

In April 1972, a Pennsylvania district judge had dismissed their complaint.[20] But they'd brought their case to the U.S. Court of Appeals for the Third Circuit and, in May 1973, that court had determined that their sex discrimination claim—and their sex discrimination claim alone—merited additional scrutiny.[21] By July 1974, the same Pennsylvania district judge had acquiesced and changed his mind: their litigation could proceed—but only to determine if male-only

[16] *Military Selective Service Act*, *U.S. Code* 50 (2022), § 3802.
[17] *Rowland v. Tarr*, 341 F.Supp. 339, 340, 342 (E.D. Pa. 1972); *Goldberg v. Tarr*, 510 F.Supp. 292, 297n1 (E.D. Pa. 1980); Kerber, *No Constitutional Right to Be Ladies*, 267-269.
[18] *Rowland v. Tarr*, 341 F.Supp. 339 (E.D. Pa. 1972); *Goldberg v. Tarr*, 510 F.Supp. 292 (E.D. Pa. 1980).
[19] As summarized in *Rowland v. Tarr*, 480 F.2d 545, 546-547 (3rd Cir. 1973).
[20] *Rowland v. Tarr*, 341 F.Supp. 339, 343 (E.D. Pa. 1972).
[21] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973).

registration and conscription violated the federal government's mandate, under the Fifth Amendment, to provide for due process and equal protection of the law.[22]

After that, Andrew Rowland, Steven Rowland, and David Freudberg had in fact dropped the suit, unwilling to abide by the district court's new terms—and unwilling "to concede that if women were drafted, a draft would be acceptable."[23] The young men's attorney had persuaded David Sitman to stay on, and had soon rustled up another, more amenable plaintiff, a Penn State medical student named Robert Goldberg (who gave *Rostker v. Goldberg* part of its name).[24] Nonetheless, throughout the rest of the decade, they'd made no further progress—until suddenly, in early 1980, it seemed like the president of the United States was on their side.

The *Goldberg* suit made its way back into an Eastern District of Pennsylvania courtroom twice in 1980: first in February, just eleven days after Carter outlined his plans to revive and expand the Selective Service; and then again in July, with a newly installed Director of the Selective Service System, Bernard Rostker, now named as the other party.[25] In the intervening months, members of the House and Senate heatedly—and repeatedly—debated the prospect of

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[22] *Rowland v. Tarr*, 378 F.Supp. 766, 768, 772 (E.D. Pa. 1974). The Supreme Court held that the Fifth Amendment's due process clause, which applied to the federal government, also incorporated the Fourteenth Amendment's guarantees of due process and equal protection (which otherwise applied only to the states) in *Bolling v. Sharpe*, 347 U.S. 497 (1954).
[23] *Goldberg v. Tarr*, 510 F.Supp. 292, 297n1 (E.D. Pa. 1980). The quote is the historian Linda Kerber's, summarizing a conversation she had with David Sitman in 1995. See Kerber, *No Constitutional Right to Be Ladies*, 274, 374n201.
[24] *Goldberg v. Tarr*, 510 F.Supp. 292, 297n1 (E.D. Pa. 1980); Kerber, *No Constitutional Right to Be Ladies*, 274-275.
[25] *Goldberg v. Tarr*, 510 F.Supp. 292 (E.D. Pa. 1980); *Goldberg v. Rostker*, 509 F.Supp. 586 (E.D. Pa. 1980). The Supreme Court's decision in *Rostker v. Goldberg* is most often referred to with the one-name appellation "*Rostker*." However, because this dissertation examines this case from its origins in 1971 (eight years before the eponymous Bernard Rostker became Director of the Selective Service System) and alongside other, similar challenges to the U.S. military draft—all of which are referred to by the name(s) of the individual(s) challenging the draft, rather than by the opposing, government party—this dissertation uses "*Goldberg*" instead.

women's registration, and ultimately decided not to pursue it.[26] Joint Resolution 521, passed on June 12, allocated the necessary funds to register the nation's young men—but not their sisters.[27] By July 2, even Carter had acceded, issuing the Presidential Proclamation required to set the all-male Selective Service System back into motion.[28] It was all the more astonishing, therefore, when the U.S. District Court for the Eastern District of Pennsylvania finally ruled—on the second go-round, on July 18—to strike down the MSSA, on the grounds that it "unconstitutionally discriminate[d] between males and females."[29]

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[26] Notably, the prospect of women's registration also arose during congressional hearings on "Women in the Military," held in November 1979 and February 1980. But Carter's announcement also sparked a new spate of congressional bills and several additional—and rather more urgent—congressional hearings, specifically focused on women's registration. See U.S. Congress, House, Subcommittee on Military Personnel, Committee on Armed Services, *Hearings on Women in the Military*, 96th Cong., 1st and 2nd sess., 1979 and 1980 [hereafter cited as *Hearings on Women in the Military*, 96th Cong., 1st and 2nd sess., 1979 and 1980]; U.S. Congress, House, *A Bill To amend the Military Selective Service Act to allow the registration of both men and women*, H.R. 6569, 96th Cong., 2nd sess., introduced in House February 21, 1980; U.S. Congress, House, Subcommittee on Military Personnel, Committee on Armed Services, *Hearings on H.R. 6569, Registration of Women*, 96th Cong., 2nd sess., 1980 [hereafter cited as *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980]; U.S. Congress, Senate, Subcommittee on HUD-Independent Agencies, Committee on Appropriations, *Hearings on H.J. Res. 521, Military Draft Registration, FY80-81*, 96th Cong., 2nd sess., 1980 [hereafter cited as *Hearings on H.J. Res. 521,* 96th Cong., 2nd sess., 1980]; "Transfer of Funds for the Selective Service System," 96th Cong., 2nd sess., *Congressional Record* 126, pt. 11: 13854-13898; and U.S. Congress, Senate, Committee on Armed Services, *Authorizing Appropriations for Fiscal Year 1981 for Military Procurement, Research and Development, Active Duty, Selected Reserve, and Civilian Personnel Strength, Civil Defense, and for Other Purposes: Report (to Accompany H.R. 6974*), 96th Cong., 2nd sess., 1980, S. Rep. 96-826 [hereafter cited as 96th Cong., 2nd sess., 1980, S. Rep. 96-826]; and *Department of Defense Authorization Act, 1981*, Public Law 96-342, *U.S. Statutes at Law* 94 (1980): 1077-1122.

[27] *Additional Funding for Selective Service System*, Public Law 96-282, *U.S. Statutes at Large* 94 (1980): 552.

[28] Proclamation 4771 of July 2, 1980, Registration Under the Military Selective Service Act, Office of the Federal Register, https://web.archive.org/web/20230913181043/https://www.archives.gov/federal-register/codification/proclamations/04771.html (accessed September 13, 2023) [hereafter cited as Proclamation 4771 of July 2, 1980].

[29] *Goldberg v. Rostker*, 509 F.Supp. 586, 605 (E.D. Pa. 1980).

Suddenly, the nearly-decade-old *Goldberg* litigation was more urgent—and more prominent—than ever before. Bernard Rostker appealed directly to the Supreme Court, which agreed to hear the case, and after years of declining other similar opportunities.[30] Legal and political interest groups, none of which had paid much attention to the *Goldberg* suit before, rushed to add their voices to the fray. Men's Rights, Inc., for example, a "non-profit corporation deeply concerned with sexist attitudes and their impact upon American males," submitted an *amicus curiae* (or friend-of-the-court) brief arguing against the all-male draft.[31] So did a dozen women's rights organizations, including the Women's Equity Action League, the League of Women Voters, and the National Organization for Women, all of them similarly convinced that the all-male draft perpetuated "stereotypical views on women's place in society."[32] Phyllis

[30] *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). The Court had previously denied certiorari in: *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969), cert. denied, 395 U.S. 908 (1969); *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); and *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976), cert. denied, 429 U.S. 838 (1976).

[31] Brief for Men's Rights, Inc. as Amicus Curiae at 1, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_acb_0012/Amicus Curiae Brief?accountid=14657 (accessed October 2, 2023).The then-director of Men's Rights, Inc., Frederic Hayward, was among the leaders of a "national men's liberation movement." See William K. Stevens, "A Congress of Men Asks Equality for Both Sexes," *New York Times*, June 15, 1981, 9.

[32] Brief for Women's Equity Action League Educational and Legal Defense Fund, et al. as Amici Curiae at 2, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_acb_0013/Amicus Curiae Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Brief for Women's Equity Action League Educational and Legal Defense Fund, et al. as Amici Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981)]; Brief for the National Organization for Women as Amicus Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_acb_0016/Amicus Curiae Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Brief for the National Organization for Women as Amicus Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981)].

Schlafly's avowedly antifeminist Eagle Forum, by contrast, defended the status quo, convening sixteen ordinary women to file a brief on behalf of the "millions" more who (they claimed) supported their own exclusion from registration and conscription.[33]

Although they were not officially parties to the case, these *amici*—the men's rights and women's rights activists on the one hand and the antifeminist stand-ins on the other—powerfully conveyed all that seemed to be at stake in *Rostker v. Goldberg*: ideas about the nuclear family, normative domesticity, and women's (proper or improper) place in the home. Notions of (in)equality and (un)fairness. The long-standing burdens of masculinity. The time-honored privileges—or lack thereof—of femininity. The basic obligations of American citizenship, of full belonging in the American body politic.

Notably, however, the U.S. attorneys who submitted briefs on Rostker's behalf, arguing in favor of male-only registration, led with one, almost-exclusive concern: that of military necessity. According to the government briefs, at least, Congress had deliberately—and rightly—decided not to register women only because the military would never need to conscript them.

The basic outlines of the government's argument were as follows: before resolving to renew—but not to revise—the MSSA, the legislators had gamed out a very particular worst-case scenario. A major, months-long ground war, it was agreed, would likely overstrain the AVF. The military would need an infusion of non-volunteers—and a new draft to supply them. But that

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[33] Brief for Stacey Acker, et al. as Amicus Curiae at 2, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_acb_0009/Amicus Curiae Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Brief for Stacey Acker, et al. as Amicus Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981)]. See also Linda Greenhouse, "Justices, 6-3, Rule Draft Registration May Exclude Women," *New York Times*, June 26, 1981, 12; and Kerber, *No Constitutional Right to Be Ladies*, 295.

prospective draft—because of the AVF's present deficiencies and because of its expected deficiencies in the future—would prioritize combat troops and combat-eligible casualty replacements.[34] And servicewomen, whether by statute (in the Navy and the Air Force) or by policy (in the Army and the Marine Corps), were generally barred from both direct combat and close combat support.[35] Conscripting women, therefore, the government insisted, would impede rather than enhance military flexibility and military efficiency.[36] And registering women—beneficial only in as much as it helped to facilitate a flexible and efficient mobilization later on—would serve no real purpose.[37]

On June 25, 1981, in a 6-3 opinion delivered by Justice William Rehnquist, a Supreme Court majority accepted this hypothetical scenario—and its hypothetical logic—without hesitation.[38] After summarizing the history of the case and the congressional hearings that had been held alongside it, Rehnquist concluded: "Men and women, because of the combat

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[34] Brief for the Appellant at 7, 12-13, 29-35, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_apb_0011/Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Brief for the Appellant, *Rostker v. Goldberg*, 453 U.S. 57 (1981)].

[35] Brief for the Appellant at 7-8, 11-13, 21-23, 30-31, *Rostker v. Goldberg*, 453 U.S. 57 (1981). Servicewomen had been barred from combat from the moment they'd become permanent members of the military in 1948. As recently as 1978, Congress had expanded women's military roles somewhat—finally permitting women in the Navy and Air Force to serve on military ships and aircraft which *were not* "engaged in combat missions," for example, and integrating the Women's Army Corps into the regular Army (which also meant removing the *statutory* bars to women's combat service, without otherwise amending Army policy)—but, as of 1981, the prohibitions against women serving in direct combat and close combat support remained in place in every military branch. See also *Women's Armed Services Integration Act of 1948*, Public Law 80-625, *U.S. Statutes at Large* 62 (1948): 356-375; *Department of Defense Appropriation Authorization Act, 1979*, Public Law 95-485, *U.S. Statutes at Large* 92 (1978): 1611-1628; Holm, *Women in the Military*; and Hasday, "Fighting Women."

[36] Brief for the Appellant at 13-14, 28, 31-37, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[37] Brief for the Appellant at 3, 6-7, 12-14, 26-28, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[38] *Rostker v. Goldberg*, 453 U.S. 57 (1981).

restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."[39] Thus, for the MSSA to distinguish between men and women made practical as well as legal sense. It was "closely related" to the "important government interest" of providing for and promoting the national defense—satisfying a recently agreed-upon standard of review for sex discrimination cases—and it in no way infringed upon the Fifth Amendment.[40] The bottom line, according to the *Goldberg* Court, was not that the state *couldn't* compel American women to register, but that it didn't have to.

It was a landmark decision, and one that remains in effect until today, but—in no small part because of the rather narrow, combat-related grounds on which it was decided—scholars have tended to regard *Goldberg* as a telling symbol more than as an object of inquiry in its own right.

Historians of the New Right, for example, have principally viewed *Goldberg* as an odd outgrowth of the fight against the Equal Rights Amendment (ERA), which missed its first ratification deadline in 1979 and its second in 1982.[41] If Phyllis Schlafly thwarted the ERA by

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[39] *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).

[40] The "important government interest" standard was devised in *Craig v. Boren*, 429 U.S. 190 (1976), and was discussed and applied in this case at *Rostker v. Goldberg*, 453 U.S. 57, 59-60, 65, 70-72, 75, 79-80, 81-82 (1981). The majority specifically ruled that the Military Selective Service Act did not infringe upon the Fifth Amendment or upon due process at *Rostker v. Goldberg*, 453 U.S. 57, 59, 78-79 (1981).

[41] The House of Representatives passed the ERA in October 1971; the Senate passed the ERA in March 1972, at which point a congressional joint resolution also set an initial ratification deadline of 1979. In 1977, Congress considered another joint resolution—which would have extended the ERA's ratification deadline to 1982—but it did not pass the Senate. President Carter, however, signed the second joint resolution nonetheless. See U.S. Congress, House, *Joint Resolution Providing an amendment to the Constitution of the United States relative to equal rights for men and women*, H.J. Res. 208, 92nd Cong., 2nd sess., passed House October 12, 1971, passed Senate March 22, 1972; U.S. Congress, House, *Joint Resolution Extending the deadline for ratification of the equal rights amendment*, H.J. Res. 638, 95th Cong., 1st sess., introduced in House October 26, 1977; and Jimmy Carter, "Remarks on Signing H.J. 638 – The

warning ordinary Americans that their daughters would be conscripted and sent into combat, the story goes, then *Goldberg* faltered on precisely the same lines—or else helped ensure that such a future would never come to pass.[42]

Historians of the AVF, meanwhile, have generally adopted one of two approaches. Some see in *Goldberg* the consequences of Congress' and the military's own ambivalence about the still-nascent all-volunteer-force—and about the increasing number of servicewomen in its ranks. Others seem to see something like the opposite: a far-off ruling that—in reality—had little bearing on a U.S. military that had already abandoned the draft, had already committed to recruiting more and more volunteer servicewomen, and had already begun inching them closer and closer to actual combat.[43]

Without exception, these scholars have produced vital and compelling work, helping us make sense of the *Goldberg* decision by how it did—and did not—fit into our broader cultural and political narratives of the late 1970s and early 1980s. In so doing, however, they have also helped to sand down some of *Goldberg*'s own complexity.

Equal Rights Amendment," October 20, 1978, The American President Project, https://web.archive.org/web/20230913183845/https://www.presidency.ucsb.edu/documents/remarks-signing-hj-res-638-the-equal-rights-amendment (accessed September 13, 2023).

[42] See, for example, Robert O. Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012). Jill Elaine Hasday's "Fighting Women" and Linda K. Kerber's *No Constitutional Right to Be Ladies* examine *Rostker v. Goldberg* at much greater length, but also alongside the battle over the ERA. For an example of Phyllis Schlafly's rhetoric against the draft and against women in combat, see also *The Phyllis Schlafly Report* 6, no. 4 (November 1972), available at https://web.archive.org/web/20230714035025/https://eagleforum.org/wp-content/uploads/2017/03/PSR-Nov1972.pdf (accessed July 14, 2023).

[43] See, for example, Bailey, *America's Army*; and Holm, *Women in the Military*. Another excellent history of the AVF—Jennifer Mittelstadt's *The Rise of the Military Welfare State* (Cambridge: Harvard University Press, 2015)—also devotes a great deal of attention to political and military leaders' ambivalence toward the AVF and toward its female service personnel, in particular, but overlooks the Supreme Court's decision in *Goldberg* entirely.

It's not true, for example, that the Rehnquist opinion endorsed or even imagined a future in which as few servicewomen as possible enlisted in the U.S. military. To the contrary: both the Department of Justice and the Supreme Court—which relied on the government's math—anticipated that women would continue to join the armed forces, and at ever-higher rates.[44] Even as part of the prospective, worst-case scenario that warranted reinstituting the draft, the Court admitted that even *more* women—above and beyond those already projected to sign up—would also need to enlist, to "fre[e] men to go to the front" and give the military a fighting chance.[45] The majority opinion only wouldn't concede that they'd need to be conscripted against their will. Instead, Rehnquist insisted, "whatever the need for women…it could be met by volunteers."[46]

It's likewise not true that the *Goldberg* Court, assembled at the dawn of President Ronald Reagan's first term, was the first to uphold male-only registration and conscription. When the original *Rowland* plaintiffs first filed suit in 1971, they were not alone: historians now estimate that, throughout the Vietnam War, over half a million draft-age men somehow fought against their own conscription.[47] (Not counting the approximately fifteen million more who claimed deferments or exemptions—fairly or unfairly—as, say, college students, or fathers of dependents, or National Guardsmen.)[48] Some young men absconded to Canada.[49] Others, like

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[44] See, for example, Brief for the Appellant at 7, 12-13, 32-33, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[45] *Rostker v. Goldberg*, 453 U.S. 57, 80-83 (1981).
[46] *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981).
[47] Self, *All in the Family*, 55; David Cortright, *Peace: A History of Movements and Ideas* (New York: Cambridge University Press, 2008), 165.
[48] Self, *All in the Family*, 50-55; Cortright, *Peace*, 164; Amy J. Rutenberg, *Rough Draft: Cold War Military Manpower Policy and the Origins of Vietnam-Era Draft Resistance* (Ithaca: Cornell University Press, 2019).
[49] Robert O. Self categorizes those who "fled the country to safe havens in Canada and Sweden" as among those who resisted the draft by "refus[ing] induction on antiwar principles." Michael S. Foley, on the other hand, categorizes these same men as "draft evaders" rather than "draft

Andrew Rowland and Robert Goldberg, agreed to register but then objected to the Military Selective Service Act later on.[50] Many more resisted the draft by daring the government to track them down instead. They steered clear of their local draft boards, or turned in their draft cards blank, or refused to report for induction—all in a deliberate attempt to overburden the Selective Service System and the federal courts.[51]

According to the historian David Cortright, over 200,000 of these men were formally "accused of draft violations," over 8,000 were ultimately found guilty, and over 3,000 were sentenced to time in prison.[52] It's impossible to know how many, while attempting to defend themselves from criminal indictments or convictions, also questioned the constitutionality of the draft itself. Perhaps every one of them. Perhaps many, many fewer. But at least eighteen of the draft resisters brought up on charges between 1968 and 1975—in addition to the *Rowland*/*Goldberg* five—challenged registration and conscription on sex discrimination grounds. And with one notable exception—itself quickly overturned—they continually failed.[53]

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resisters." For Foley, by contrast, draft resisters—by definition—stayed in the United States and risked prosecution in the United States. See Self, *All in the Family*, 55; and Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 6-7.

[50] When the original *Rowland* plaintiffs initially filed suit in June 1971, only Andrew Rowland was old enough to register for the draft—which he did. Robert Goldberg, added as a co-plaintiff in 1975, also registered for the draft as soon as he was eligible. See *Rowland v. Tarr*, 341 F.Supp. 339, 340 (E.D. Pa. 1972); *Rowland v. Tarr*, 378 F.Supp. 766, 773n1 (E.D. Pa. 1974); *Goldberg v. Tarr*, 510 F.Supp. 292, 27n1, 297n13 (E.D. Pa. 1980); and Kerber, *No Constitutional Right*, 267-268, 274-275, 373n176.

[51] Cortright, *Peace*, 164-165; Foley, *Confronting the War Machine*, 14.

[52] Cortright, *Peace*, 165.

[53] See *United States v. St. Clair*, 291 F.Supp. 122 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969); *Suskin v. Nixon*, 304 F.Supp. 71 (N.D. Ill., E.D. 1969); *United States v. Clinton*, 310 F.Supp. 333 (E.D. La., New Orleans Div. 1970); *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306 (W.D. Pa. 1970); *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971); *United States v. Bertram*, 477 F.2d 1329 (10th Cir. 1973); *United States v. Yingling*, 368 F.Supp. 379 (W.D. Pa. 1973); *United States v. Offord*, 373

Nonetheless, these cases have been under-examined: not only on their own but also in relation to *Rostker v. Goldberg*.[54] Taken together, they reveal that the Supreme Court's 1981 decision was simultaneously groundbreaking and decidedly not. It afforded constitutional protection to the all-male draft a full eight years after the draft had come to an end—but several other, lower courts had already done the same. It preserved the obligations of registration and conscription—and thus some kind of first-class citizenship—for men and men alone, even while pledging to apply the "important government interest" test designed to root out sex discrimination in particular.[55] It justified its logic with military necessity, with combat exclusion policies, and with the details—and limits—of women's participation in the armed forces. But other, lower courts had already done all that, too.

What most distinguished the *Goldberg* decision from those that preceded it was, yet again, what scholars have tended to overlook: that it counted on volunteer servicewomen in even its most dire predictions for the future, and thus made them ironically—necessarily—part of the all-male draft's legal defense.

F.Supp. 1117 (E.D. Wis. 1974); *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974); and *United States v. Reiser*, 394 F.Supp. 1060 (Mon., Butte Div. 1975)—which was overturned by *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976). The *Offord* suit was brought by seven defendants; the other eleven suits were all brought by one defendant each. It's quite possible that other similar cases have slipped through the cracks, whether because they didn't generate written opinions or—as in the case of the *Rowland* plaintiffs' first court appearance—because the written opinion didn't explicitly acknowledge that the men had made a sex discrimination claim.

[54] In addition to the historiographical trends outlined earlier in the chapter, histories of the draft resistance movement tend to conclude in 1973, with the end of the draft—and tend to ignore the (admittedly small number of) men who challenged the MSSA on sex discrimination grounds, including in the years after the AVF was established.

[55] In his dissenting opinion, Justice Thurgood Marshall claimed both that the MSSA did not pass the "important government interest" test and that the Court majority had not truly applied it. See *Rostker v. Goldberg*, 453 U.S. 57, 87-90 (1981).

Phyllis Schlafly may have rejoiced in the Court's decision—she certainly did—but *Rostker v. Goldberg* did not strictly validate her worldview.[56] Far from confirming that women's rightful place was in the home, it bore out that some number of American women—150,000 in 1980, probably 100,000 more by 1985, as many as 80,000 more than that in an expected emergency—would always need to join the service.[57] In fact, it was precisely these women's willingness to volunteer—to serve their country *without* being compelled—which justified their exclusion from registration and conscription, and which obviated the military obligations of every other woman in the country.

The Military Selective Service Act, first passed in 1948 and periodically renewed until the early 1970s, made registration and conscription ostensibly universal: because, as the legislation itself explained, "in a free society the obligations and privileges of serving in the armed forces…should be shared generally."[58] But the MSSA never quite lived up to its own lofty language. In fact, its various exceptions were built in from the very beginning. All women, of course, were expressly excluded. And although all young men were required to *register* for the draft, many were still able to sidestep their own military service—even if and when their draft numbers were eventually called. Elected officials, for example, were not subject to mandatory induction. Neither were ordained ministers; divinity students; college students; high school

[56] See, for example, Phyllis Schlafly quoted in Linda Greenhouse, "Justices, 6-3, Rule Draft Registration May Exclude Women," *New York Times*, June 26, 1981, 12.
[57] The majority opinion explicitly acknowledged the additional 80,000 figure (without explicitly acknowledging the 150,000 and 100,000 figures), but it was a projection arrived at based upon the assumption that women's participation in the armed forces would continue to grow at this particular rate—as both Justice Byron White and Justice Thurgood Marshall pointed out in their dissenting opinions. See *Rostker v. Goldberg*, 453 U.S. 57, 80-83, 84-85, 90-91 (1981).
[58] *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644.

students; men with wives or children who depended on them for support; or men whose jobs were deemed "necessary to the maintenance of the national health, safety, or interest."[59]

Throughout the late 1940s, 1950s, and early 1960s, these policies occasioned little outrage. The outbreak of the Vietnam War, however, changed all that. Beginning in 1965, the Selective Service first doubled and then tripled its monthly call-ups, forcing more and more draft-age men to risk their lives—or else to lay claim to a legal deferment or exemption instead.[60] As the war continued on, it became more and more apparent that middle- and upper-class white men, better positioned (for example) to begin undergraduate or graduate coursework, were finding it easier to stay at home—and that minority and working-class men were being sent to fight and die, disproportionately, in their stead.[61] By 1968, outright draft resistance—increasingly at the vanguard of antiwar activism—was itself a veritable movement.[62]

The hundreds of thousands of young men who became draft resisters not only declined to put in for deferments or exemptions but also looked askance at anyone else who did. Merely eluding the draft—and doing so by totally legal means—was, in the words of one historian, "tantamount to letting the system win."[63] The resisters, by contrast, deliberately refused to report to their local draft boards, or deliberately refused to report for induction. They sought out conflict and strived for prosecution. If enough draft-age men faced criminal trials, they believed,

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[59] *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644. Eventually, even before conscription came to an end, some of these deferment and exemption policies were amended in response to public outcry. In 1971, for example, Congress decreed that college students could no longer receive automatic deferments (though they could still postpone their inductions until the end of the semester or term in which their draft number was called). See *Military Selective Service Act*, Public Law 92-129, *U.S. Statutes at Large* 85 (1971): 348-362.
[60] Bailey, *America's Army*, 16-17; Self, *All in the Family*, 50-53.
[61] Foley, *Confronting the War Machine*, 10-12.
[62] Foley, *Confronting the War Machine*, 13-14.
[63] Foley, *Confronting the War Machine*, 7.

not only the war but the Selective Service itself and the entire federal justice system would become gradually more impossible to sustain.[64] But, even still, the MSSA's basic inequities were never far from draft resisters' minds.[65] And when they were, in fact, hauled into court, they often seized the opportunity to argue that those same inequities also violated the U.S. Constitution.

In particular, between 1968 and 1971, at least seven draft resisters—brought up on criminal charges for violating the MSSA in any number of ways—insisted that the law unconstitutionally discriminated between men and women.[66] Theirs was a rather radical gambit, not least because the U.S. Supreme Court only struck down a state law which afforded "different treatment…on the basis of sex"—for the first time—in a case known as *Reed v. Reed*, decided in late November 1971.[67] But these draft resisters were unexpected (and under-examined) pioneers, keen to avoid prison time by any means necessary—and unusually alive to the draft law's distinctive burdens.

Accordingly, whenever they inveighed against the male-only nature of registration and conscription, they invariably lodged other legal complaints at the same time. Daniel Fallon, for example, a draft-age man from the Chicagoland area, argued in 1969 that that the draft-exempt status of several categories of people—not only women but also (male) ministers, (male) divinity students, (male) college students, fathers, and men above the "'magic age of 26'"—all together

[64] Foley, *Confronting the War Machine*, 14.
[65] Foley, *Confronting the War Machine*, 7.
[66] See *United States v. St. Clair*, 291 F.Supp. 122 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969); *Suskin v. Nixon*, 304 F.Supp. 71 (N.D. Ill., E.D. 1969); *United States v. Clinton*, 310 F.Supp. 333 (E.D. La., New Orleans Div. 1970); *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306 (W.D. Pa. 1970); and *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971).
[67] *Reed v. Reed*, 404 U.S. 71, 75 (1971).

violated due process and equal protection.[68] Another Illinois draft resister, Edward Suskin, objected that same year to the "legislative policy to exclude women and the clergy," specifically, "from compulsory military service."[69] Two men, both of whom filed suit in the Western District of Pennsylvania in 1970, similarly protested the MSSA's endorsement of sex discrimination alongside its endorsement of age discrimination, in particular.[70] Also in 1970, in the Eastern District of Louisiana, a draft resister named Oscar Clinton took issue with the "automatic deferments" of medical and dental students as well.[71] Three of the men also contended that the Vietnam War was itself illegal and, consequently, that the draft—which would send them to fight in Vietnam—was equally illegal.[72] Two claimed that mandatory conscription amounted to involuntary servitude.[73] Two more claimed that mandatory induction deprived them of what they called "'the right to one's own life.'"[74]

In every instance, however, these wide-ranging, path-breaking arguments failed. The federal judges who heard these draft resisters' complaints—time and time again throughout the late 1960s and early 1970s—consistently dismissed them.[75] Thus, it came as no great surprise

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[68] *United States v. Fallon*, 407 F.2d 621, 623 (7th Cir. 1969).
[69] *Suskin v. Nixon* 304 F.Supp. 71, 72 (N.D. Ill., E.D. 1969).
[70] *United States v. Cook*, 311 F.Supp. 618, 619, 621 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306, 1307-1308 (W.D. Pa. 1970).
[71] *United States v. Clinton*, 310 F.Supp. 333, 335-336 (E.D. La., New Orleans Div. 1970).
[72] *United States v. St. Clair*, 291 F.Supp. 122, 123, 125 (S.D. N.Y. 1968); *United States v. Clinton*, 310 F.Supp. 333, 337 (E.D. La., New Orleans Div. 1970); *United States v. Camara*, 451 F.2d 1122, 1125-1226 (1st Cir. 1971).
[73] *United States v. St. Clair*, 291 F.Supp. 122, 123, 124 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621, 623-624 (7th Cir. 1969).
[74] *United States v. Cook*, 311 F.Supp. 618, 619-621 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306, 1307 (W.D. Pa. 1970).
[75] *United States v. St. Clair*, 291 F.Supp. 122, 125 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621, 624 (7th Cir. 1969); *Suskin v. Nixon*, 304 F.Supp. 71, 73 (N.D. Ill., E.D. 1969); *United States v. Clinton*, 310 F.Supp. 333, 337 (E.D. La., New Orleans Div. 1970); *United States v.*

when the original *Rowland* plaintiffs—who also adopted "something of a 'kitchen sink' approach" when they first filed suit in June 1971—likewise met with an early defeat.[76]

Of course, they'd tried for a different outcome. Unlike most other draft resisters, the lead plaintiff, Andrew Rowland, had made sure to register with the Selective Service as soon as he turned eighteen.[77] His co-plaintiffs—his brother, Steven Rowland; David Sitman, their classmate at Philadelphia's Central High School; and David Freudberg, another student from nearby Cheltenham—hadn't done the same, but only because they were still too young.[78] Perhaps that was why members of a local antiwar organization (Philadelphia Resistance) had identified the four high schoolers as candidates for a test case, and why attorneys from a local law firm (Kohn, Savett) had agreed to take them on pro bono.[79] They didn't need to defend themselves against criminal charges. Instead, they went to court entirely on their own terms—and offered up any number of reasons why the MSSA might be found unconstitutional.

Their initial complaint, filed against Curtis Tarr (then the National Director of the Selective Service) and against Henry Sherrard (then in charge of Local Board No. 138), embraced five counts.[80] The fact that the MSSA discriminated between men and women was

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Cook, 311 F.Supp. 618, 622 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306, 1308 (W.D. Pa. 1970); and *United States v. Camara*, 451 F.2d 1122, 1126 (1st Cir. 1971).

[76] *Rowland v. Tarr*, 341 F.Supp. 339 (E.D. Pa. 1972); *Goldberg v. Tarr*, 510 F.Supp. 292 (E.D. Pa. 1980). The phrase "something of a 'kitchen sink' approach" comes from Joanna Weinberg, the wife of *Rowland*/*Goldberg* attorney David Weinberg, as quoted in Kerber, *No Constitutional Right to Be Ladies*, 268.

[77] *Rowland v. Tarr*, 341 F.Supp. 339, 340 (E.D. Pa. 1972); *Rowland v. Tarr*, 378 F.Supp. 766, 773n1 (E.D. Pa. 1974); Kerber, *No Constitutional Right*, 267-268, 373n176.

[78] *Rowland v. Tarr*, 341 F.Supp. 339, 340 (E.D. Pa. 1972); *Rowland v. Tarr*, 378 F.Supp. 766, 773n1 (E.D. Pa. 1974); Kerber, *No Constitutional Right*, 267-268.

[79] Kerber, *No Constitutional Right to Be Ladies*, 267-268, 373n177.

[80] *Rowland v. Tarr*, 341 F.Supp. 339 (E.D. Pa. 1972); as summarized in *Rowland v. Tarr*, 480 F.2d 545, 546-547 (3rd Cir. 1973).

Count III.[81] Much like the draft resisters who'd levied sex discrimination claims before them, the *Rowland* men also argued that the MSSA impressed them into involuntary servitude; forcibly stripped them of their property; infringed upon various other First and Fifth Amendment-guaranteed rights; and, by binding them to participate in the "illegal and unconstitutional" Vietnam War, flouted international law as well.[82]

But James Gorbey, the Eastern District of Pennsylvania judge assigned to *Rowland v. Tarr*, was unimpressed with their ingenuity.[83] In an opinion handed down on April 27, 1972, he not only dismissed their complaint but declined to address their constitutional claims on an individual basis—or, in truth, very much at all.[84] Instead, Gorbey's ruling was a sweeping one. He emphasized that Congress possessed the sole—and unassailable—authority to "declare war, raise and support military forces, and make rules for their governance."[85] By definition, he insisted, this meant that Congress also possessed the sole authority to establish mandatory service requirements—and to determine upon whom they should (and should not) be imposed and under what circumstances.[86] Even if there were reasons to amend the Selective Service requirements, Gorbey wrote—to make them "better, different or more equitable"—then that, too,

[81] As summarized in *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973); and *Rowland v. Tarr*, 378 F.Supp. 766, 768 (E.D. Pa. 1974).
[82] As summarized in *Rowland v. Tarr*, 480 F.2d 545, 546-547 (3rd Cir. 1973).
[83] James Gorbey was nominated to a seat on the U.S. District Court for the Eastern District of Pennsylvania by President Richard Nixon in 1970 and served until his death in 1977. See "Gorbey, James Henry," Federal Judicial Center, https://web.archive.org/web/20230913192850/https://www.fjc.gov/node/1381371 (accessed September 13, 2023).
[84] *Rowland v. Tarr*, 341 F.Supp. 339, 343 (E.D. Pa. 1972).
[85] *Rowland v. Tarr*, 341 F.Supp. 339, 341 (E.D. Pa. 1972).
[86] *Rowland v. Tarr*, 341 F.Supp. 339, 341-342 (E.D. Pa. 1972).

was for Congress (rather the courts) to decide.[87] And, in this way, he dismissed all five counts—and without even naming them—in one fell swoop.[88]

The *Rowland* litigation did not end there, however—even as everything else began to change. On January 27, 1973, delegates from the United States and North and South Vietnam signed the Paris Peace Accords, signaling an official end to a war that had never actually been declared.[89] That same day, Secretary of Defense Melvin R. Laird announced that the president would not seek to renew his induction authority after it expired in the summer—and that, beginning in July, the U.S. military would become an All-Volunteer Force.[90] By the end of March, American combat troops were out of Vietnam.[91]It was less than a month later, on April 24, that the *Rowland* plaintiffs successfully filed an appeal with the U.S. Court of Appeals for the Third Circuit.[92] And on May 11, 1973, that court suddenly ruled—at least in part—in their favor.[93]

Unlike the lower court, the Third Circuit carefully distinguished between—and painstakingly evaluated—each aspect of the *Rowland* complaint. It ruled, for example, that Count I (the "taking of…property"), Count II (involuntary servitude), and Count IV (the First and Fifth Amendment claims) had all been "properly dismissed," because they had already "been

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[87] *Rowland v. Tarr*, 341 F.Supp. 339, 342 (E.D. Pa. 1972).
[88] *Rowland v. Tarr*, 341 F.Supp. 339, 343 (E.D. Pa. 1972).
[89] "Agreement on ending the war and restoring peace in Viet-Nam," conclusion date: January 27, 1973, *United Nations Treaty Series Online*, registration no. 13295, https://web.archive.org/web/20230913193542/https:/treaties.un.org/doc/Publication/UNTS/Volume%20935/volume-935-I-13295-English.pdf (accessed September 13, 2023).
[90] David E. Rosenbaum, "Nation Ends Draft, Turns to Volunteers," *New York Times*, January 28, 1973, 1, 28. See also *Military Selective Service Act*, Public Law 92-129, *U.S. Statutes at Large* 85 (1971): 348-362.
[91] Fox Butterfield, "936 Men Leave in Day," *New York Times*, March 28, 1973, 1, 8, 97.
[92] *Rowland v. Tarr*, 480 F.2d 545 (3rd Cir. 1973).
[93] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973).

conclusively and adjudicated by the Supreme Court"—and all against the appellants.[94] It further ruled that Count V (the illegality of the Vietnam War) was "non-justiciable," because the fighting had already ended and so "no one subject to the Military Selective Service Act" could be compelled to take part in it anymore.[95] But the court did not take that same opportunity to invalidate the entire complaint. To the contrary: the Third Circuit decided that Count III—the sex discrimination claim—warranted additional scrutiny.[96] This particular argument had never come before the Supreme Court, the opinion explained, and it was also unclear why, exactly, the lower had "rejected" it.[97] Thus, *Rowland v. Tarr* was remanded back to the Eastern District of Pennsylvania, and with a single mandate: to determine whether the male-only MSSA violated the Constitution.[98]

Curtis Tarr, then the Director of the Selective Service, filed a motion to dismiss, contending that the end of the draft—now fully accomplished—had rendered the litigation "moot."[99] Judge Gorbey, however—now writing the majority opinion for a three-judge-panel (instead of adjudicating the case on his own)—denied the government's motion.[100] His opinion, issued on July 1, 1974, confirmed that the *Rowland* plaintiffs had standing to sue: because anyone who had received a deferment remained theoretically eligible for induction; and because all young men—and young men alone—still faced "severe criminal penalties" for failing to

[94] *Rowland v. Tarr*, 480 F.2d 545, 546-547 (3rd Cir. 1973).
[95] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973).
[96] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973).
[97] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973).
[98] *Rowland v. Tarr*, 480 F.2d 545, 547 (3rd Cir. 1973); as further summarized in *Rowland v. Tarr*, 378 F.Supp. 766, 768 (E.D. Pa. 1974).
[99] *Rowland v. Tarr*, 378 F.Supp. 766, 768 (E.D. Pa. 1974).
[100] *Rowland v. Tarr*, 378 F.Supp. 766, 772 (E.D. Pa. 1974).

register in the future, as well as for violating the MSSA in any number of ways in the past.[101] Furthermore, while the opinion did not address the merits of the plaintiffs' sex discrimination claim directly, it confirmed that Count III raised a "[s]ubstantial federal question" and, thus, that the litigation could and should continue on.[102]

The *Rowland* plaintiffs might have been thrilled. Instead, they were anything but. As David Sitman, one of the four original parties to the suit, later relayed to the historian Linda Kerber, his co-plaintiffs felt that going along with the court's decision—as ostensibly encouraging as it was—meant giving up on their principles.[103] Sitman, slightly more amenable (if not necessarily more appalled at court-sanctioned sex discrimination), agreed to stick with the case regardless; but Andrew Rowland, Steven Rowland, and David Freudberg promptly moved to have their names taken off the suit.[104]

That wasn't the end of the litigation, of course. The following summer, in July 1975, another young man—Robert Goldberg, a twenty-one-year-old Penn State medical student who just so happened to live next door to a Kohn, Savett attorney—became the second "party plaintiff" (and the case became known as *Goldberg v. Tarr*).[105] But by that time, President Gerald Ford had already issued Presidential Proclamation 4360, which suspended registration in

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[101] *Rowland v. Tarr*, 378 F.Supp. 766, 768-769 (E.D. Pa. 1974).
[102] *Rowland v. Tarr*, 378 F.Supp. 766, 768, 769 (E.D. Pa. 1974).
[103] Kerber, *No Constitutional Right to Be Ladies*, 274, 374n201.
[104] *Goldberg v. Tarr*, 510 F.Supp. 292, 297n1 (E.D. Pa. 1980); Kerber, *No Constitutional Right to Be Ladies*, 274.
[105] *Goldberg v. Tarr*, 510 F.Supp. 292, 297n1 (E.D. Pa. 1980). Goldberg was allowed to join the case—at least in part—because he was a future physician who had received a conditional deferment during the war, "pending further processing at a time within the discretion of the Selective Service." Indeed, 1-H registrants like Goldberg remained theoretically draftable even after the advent of the AVF—as Goldberg's and Sitman's attorney regularly reminded the courts. See Kerber, *No Constitutional Right to Be Ladies*, 274-277.

addition to conscription.[106] And while the MSSA remained good law—at least in theory—it became easier and easier for the Department of Justice to argue that Sitman and Goldberg's complaint was moot or, at the very least, nonurgent.[107] The suit moved forward, by way of motions and memos, but at a snail's pace.[108] Procedural hurdles became postponements, became further postponements.[109] *Goldberg* would eventually make its way back to an Eastern District of Pennsylvania courtroom—and, from there, to the U.S. Supreme Court—but not until the early 1980s.

If the continual delays frustrated Sitman and Goldberg, however, they also kept the case alive—and far longer than several other challenges to the all-male MSSA. Indeed, throughout 1973, 1974, and 1975—or throughout the very same years in which the *Rowland* complaint became a sex discrimination complaint and then, consequently, became the *Goldberg* complaint—at least eleven other draft resisters also protested, chiefly or even solely, against the male-only nature of registration and conscription.[110]

These other men, all brought up on criminal charges for violating the MSSA, seem to have chosen this narrower strategy deliberately.[111] And for good reason: in May 1973, after the

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[106] Proclamation No. 4360 of March 29, 1975.
[107] Kerber, *No Constitutional Right to Be Ladies*, 275-277, 374-375.
[108] Kerber, *No Constitutional Right to Be Ladies*, 275-277, 374-375.
[109] Kerber, *No Constitutional Right to Be Ladies*, 275-277, 374-375.
[110] See *United States v. Bertram*, 477 F.2d 1329 (10th Cir. 1973); *United States v. Yingling*, 368 F.Supp. 379 (W.D. Pa. 1973); *United States v. Offord*, 373 F.Supp. 1117 (E.D. Wis. 1974); *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974); and *United States v. Reiser*, 394 F.Supp. 1060 (Mon., Butte Div. 1975)—which was overturned by *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976). The *Offord* suit was brought by seven defendants; the other four suits were all brought by one defendant each.
[111] In contrast to the *Rowland* litigation, none of the opinions cited here suggest that the complaints were narrowed down by the judges hearing the cases, rather than by the defendants themselves.

U.S. had already withdrawn from Vietnam and when the draft, too, was soon set to expire, the Supreme Court also struck down a pair of Air Force regulations which automatically disbursed benefits to every male servicemember with dependents (no matter their actual financial situation), but which disbursed benefits to a female servicemember only if she provided her husband—and could prove she provided him—with "over one-half of his support."[112] This decision, *Frontiero v. Richardson*, wasn't the first time that the Court ruled against "dissimilar treatment for men and women who are…similarly situated."[113] But it was the first time that a Court plurality decision held that, just like race-based classifications, sex-based classifications were "inherently suspect" and subject to stricter scrutiny—and the first time that a Court majority decision worked to root out sex discrimination from within the U.S. military in particular.[114] And thus, although the original *Rowland* plaintiffs quite resented it, it *made sense* to inveigh against male-only registration and conscription—and, since there was no longer any real danger of being impressed into "involuntary servitude," or of taking a clergy member's otherwise-rightful spot in the next monthly call-up, it made sense to inveigh against male-only registration and conscription and little else.

That didn't mean, however, that the draft resisters' common sense was rewarded. To the contrary: in every instance—just as had happened in every instance before the *Rowland*/*Goldberg* litigation began—the other men's lawsuits failed. And in this way, in fact, it was other draft resisters—just as much as the *Rowland*/*Goldberg* plaintiffs—whose trials and tribulations paved the way for the Supreme Court's ultimate ruling.

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[112] *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).
[113] The Court first ruled against such dissimilar treatment in *Reed* in 1971. See *Reed v. Reed*, 404 U.S. 71, 77 (1971); and *Frontiero v. Richardson*, 411 U.S. 677, 683-684, 688 (1973).
[114] *Frontiero v. Richardson*, 411 U.S. 677, 682, 688 (1973).

It wasn't just that the various federal judges assigned to the various criminal cases continued to uphold the all-male draft but also *how*. Consider, for example, *United States v. Yingling* (1973). The defendant, Patrick Yingling, had been indicted in October 1973, in the Western District of Pennsylvania, for failing "to keep his local draft board advised of his correct and current address" three years earlier.[115] As part of his motion to dismiss, which he filed in November, Yingling had argued that he was the "victim of selective, intentional, and discriminatory prosecution" (since the indictment arrived so long after his alleged, relatively "minor" offense); and that the MSSA, which "requires that only males, not females…keep the[ir] local board informed," violated the equal protection clause—and thus ran counter to the Supreme Court's decisions in both *Reed v. Reed* (1971) and *Frontiero v. Richardson* (1973).[116]

On December 20, 1973, however—after dispensing with Yingling's accusations of prosecutorial bias—the Pennsylvania district judge also cast aside the Court's most prominent sex discrimination precedents.[117] Instead his opinion reached back, rather pointedly, to earlier justifications of the all-male draft—to five cases decided prior to *Reed* and to another two decided prior to *Frontiero*—and proclaimed that nothing had changed.[118] Quoting liberally from

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[115] *United States v. Yingling*, 368 F.Supp. 379, 380-381 (W.D. Pa. 1973).
[116] *United States v. Yingling*, 368 F.Supp. 379, 381-382, 385 (W.D. Pa. 1973).
[117] *United States v. Yingling*, 368 F.Supp. 379, 382-384, 384-387 (W.D. Pa. 1973). The judge, Daniel Snyder, was nominated to a seat on the U.S. District Court for the Western District of Pennsylvania by President Richard Nixon in 1973 and served until his death in 1980. See "Snyder, Daniel John, Jr.," Federal Judicial Center, https://web.archive.org/web/20231006172027/https://www.fjc.gov/history/judges/snyder-daniel-john-jr (accessed October 6, 2023).
[118] *United States v. Yingling*, 368 F.Supp. 379, 384-387 (W.D. Pa. 1973). The earlier decisions excerpted and cited here were: *United States v. St. Clair*, 291 F.Supp. 122 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969); *United States v. Clinton*, 310 F.Supp. 333 (E.D. La., New Orleans Div. 1970); *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306 (W.D. Pa. 1970); *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971); and *United States v. Bertram*, 477 F.2d 1329 (10th Cir. 1973).

these past opinions, the judge offered up lines of reasoning that were alternately sweeping—Congress has the power "'to raise and maintain armed forces'"; Congress has the power "'to determine who shall be required to serve in these forces'"—and narrower in scope.[119] In particular, for example, he defended the proposition that the MSSA passed muster because servicewomen already played a part—but a tightly controlled part—in the U.S. armed forces.

On the one hand, the *Yingling* judge reaffirmed, the MSSA applied only to men because—despite the "'modern thinking'" to the contrary—men and women were innately, immutably different, and "'physical strength [was] a male characteristic.'"[120] Thus, as long as every other nation in the world also raised armies which were, by and large, "'composed of males,'" the United States would have to do the same—or else fail to "'compete'" and risk Americans' safety and security in the process.[121] On the other hand, the judge also reiterated that "'women [were] not excluded from service in the Armed Forces'" and were in fact encouraged to enlist.[122] But Congress had exempted them from the MSSA regardless, he explained again, deliberately authorizing "'involuntary service for men and voluntary service for women,'" and thereby satisfying the Constitution's promises of due process and equal protection without endangering the United States' military needs.[123]

Of course, the *Yingling* judge—signing his opinion in December 1973, almost a full six months after the advent of the AVF—did not acknowledge that every American, male or female, was now equally unlikely to be conscripted into involuntary service. But that's precisely why he

[119] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973).
[120] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973).
[121] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973).
[122] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973).
[123] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973).

relied upon earlier justifications of the all-male draft, and precisely why he could rely upon them with such apparent ease. Everything else had changed—the war ended, the president's induction authority expired, the military remade into a new kind of fighting force—but servicewomen's status had stayed exactly the same. They were volunteers then and they were volunteers now. In *Yingling*, that was reason enough to rule out sex discrimination in the same way, too. The continuity—despite *Reed* and despite *Frontiero*—was the point.

Not every judge was quite so beholden to past precedent. But if *Yingling*'s many, lengthy citations made the opinion somewhat atypical, its attention to volunteer servicewomen was anything but rare. The following year, for example, on December 23, 1974, the U.S. Court of Appeals for the Fourth Circuit used a similar line of reasoning to uphold another draft resister's criminal conviction.[124] The defendant, Bruce Baechler, was a Quaker who had "refused to register for the draft because of his religious beliefs."[125] In April 1974, a twelve-person jury had found him guilty of violating the MSSA, and a North Carolina district judge had sentenced him to twenty-six months in prison.[126] Subsequently, he had appealed—and had thereupon insisted

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[124] *United States v. Baechler*, 509 F.2d 13, 13-14, 16 (4th Cir. 1974). According to his obituary in the *Hartford Courant*, Andrew Baechler was "the first post-Vietnam era draft resister to be convicted for refusing to register with selective service." (It is difficult to know what this means for Patrick Yingling, who was indicted, by contrast, for failing to keep his draft board apprised of his address—and who may have ultimately escaped conviction.) See "BAECHLER, BRUCE ANDREW," *Hartford Courant* (Hartford, CT), September 20, 2000, accessed August 21, 2023, http://web.archive.org/web/20230822015156/https://www.courant.com/2000/09/20/baechler-bruce-andrew/. The judges who decided Baechler's case were Herbert Boreman, Albert Bryan, and Dortch Warriner. On Boreman and Bryan, see "Remembering the Fourth Circuit Judges: A History from 1941 to 1998," *Washington and Lee Law Review* 55, no. 2 (1998): 471-526. On Warriner, see "D. Dortch Warriner," *New York Times*, March 18, 1986, 33.

[125] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974); "Quaker Found Guilty on Draft Charge," *The Gettysburg Times* (Gettysburg, PA), April 25, 1974, 14.

[126] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974); "Quaker Found Guilty on Draft Charge," *The Gettysburg Times* (Gettysburg, PA), April 25, 1974, 14; "State Quaker Free, Appeals Draft Case," *The Bridgeport Post* (Bridgeport, CT), April 26, 1974, 6.

not only that he should have been exempted from registration as a conscientious objector (instead of merely being exempted from combatant service later on), but also that male-only registration "denied him equal protection of the law."[127]

The Fourth Circuit, in turn, not only rejected Baechler's already-failed religious liberty argument but his new sex discrimination claim as well. To contend with the latter, much as in *Yingling*, the opinion in *United States v. Baechler* turned to volunteer servicewomen—and even offered up some more fulsome words of praise. America's women, according to *Baechler*, "may and do perform *vital* services in the armed forces"; and their "physical and mental capabilities" likewise made for "*valued* contributions to the nation" and its lasting security [emphasis mine].[128] Nonetheless, the opinion declared, Congress had no "constitutional obligation…to subject [women] to call equally with men."[129] This disparity was due to the "nature of the demands of military service," the Fourth Circuit explained (though without articulating what that "nature" might be).[130] It did not prevent women from joining up of their own accord, or from otherwise volunteering to serve their country, but it did justify hard limits on their (compulsory) enlistment. And since this satisfied a "rational" reason to distinguish the sexes, the male-only MSSA was—according to *Baechler* and according to its interpretation of *Frontiero*—unquestionably constitutional.[131] Bruce Baechler requested a rehearing en banc in February 1975 and, in May 1975, filed a petition for certiorari with the Supreme Court. Both were denied.[132]

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[127] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974).
[128] *United States v. Baechler*, 509 F.2d 13, 15 (4th Cir. 1974).
[129] *United States v. Baechler*, 509 F.2d 13, 15 (4th Cir. 1974).
[130] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974).
[131] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974).
[132] *United States v. Baechler*, 509 F.2d 13, 16 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975).

Meanwhile, in the U.S. District Court for the District of Montana, Butte Division, it began to seem—for a brief moment—like the MSSA might in fact come undone. The draft resister who occasioned this possibility was George Kenneth Reiser (who most often went by his middle name), a Bozeman native who'd graduated from high school in 1971.[133] In 1972, when his draft number was called, he had requested but was denied an exemption as a conscientious objector.[134] Thereafter, he had refused to enlist and, in November 1973, a grand jury had indicted him—under various provisions of the MSSA—"for failure to submit to induction into the armed forces."[135] But he'd filed a motion to dismiss the indictment, arguing only that because the MSSA "establishes a sex-based classification which burdens and penalizes members of one sex and not the other," it infringed upon his Fifth and Fourteenth Amendment-guaranteed rights to due process and equal protection of the laws.[136] And on May 16, 1975, less than two weeks before the Supreme Court denied Bruce Baechler's petition for certiorari, a Montana district judge granted Kenneth Reiser's motion instead.[137]

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[133] Kenneth Reiser, Bozeman High School: 1969, Bozeman, MT, U.S. School Yearbooks (1880-2012), image 84, *Ancestry.com* (accessed September 27, 2023); G. Kenneth Reiser, Bozeman High School: 1971, Bozeman, MT, U.S. School Yearbooks (1880-2012), image 47, *Ancestry.com* (accessed September 27, 2023); Gallatin County, Montana, marriage certificate no. 79-04694 (1979), George Kenneth Reiser and Gwen Elizabeth Massey, Montana State Marriage Records (1943-1986), Montana Department of Public Health and Human Services, Helena, MT, image 1696, *Ancestry.com* (accessed September 27, 2023).
[134] "Montana judge rules draft unconstitutional," *Washington Court House Record-Herald* (Washington Court House, OH), May 17, 1975, 1.
[135] *United States v. Reiser*, 394 F.Supp. 1060, 1060-1061 (Mon., Butte Div. 1975); "Montana judge rules draft unconstitutional," *Washington Court House Record-Herald* (Washington Court House, OH), May 17, 1975, 1.
[136] *United States v. Reiser*, 394 F.Supp. 1060, 1061, 1069n1 (Mon., Butte Div. 1975).
[137] *United States v. Baechler*, 509 F.2d 13, 16 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); *United States v. Reiser*, 394 F.Supp. 1060, 1069 (Mon., Butte Div. 1975). The assigned judge, William Murray, was nominated to a seat on the U.S. District Court for the District of Montana by President Harry Truman in 1949, assumed senior status in 1965, and served until his death in 1994. See "Murray, William Daniel," Federal Judicial Center,

Here, too, the judge's decision turned (at least in part) on America's already-enlisted servicewomen. But where the *Yingling* and *Baechler* opinions had found evidence of women's ancillary military status, as well as evidence of nondiscrimination—since women were permitted to enlist of their own accord, if not required to join up against their will—the *United States v. Reiser* opinion found reason to expand both their opportunities and their obligations to serve.

Indeed, according to the *Reiser* opinion, American women were "'more fit to wage war than ever before.'"[138] They were increasingly suited for combat, itself increasingly conducted with "'bombs, missiles, and high-powered guns'"—long-range weapons wielded just as easily by less-well-built soldiers—rather than with pistols or (even rarer) fists.[139] And they were undoubtedly suited for noncombat roles as well, which had likewise become increasingly essential to the "modern military machine."[140] The opinion reported, for example, that during the Vietnam War, as many as 85% of servicemembers had not joined combat units, but had taken on "administrative, clerical, technical, logistical, medical, [or] maintenance" jobs instead.[141] The opinion seemed to leave open the possibility that women's enlistment should have been kept to a minimum in an earlier era—when warfare was less "mechanized" and less weighted towards "massive logistical support"—but made clear that the present reality could not justify the same.[142]

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https://web.archive.org/web/20230914021130/https://www.fjc.gov/node/1385566 (accessed September 14, 2023).

[138] *United States v. Reiser*, 394 F.Supp. 1060, 1067 (Mon., Butte Div. 1975). Here, the opinion quoted from Mariclaire Hale and Leo Kanowitz, "Women and the Draft: A Response to Critics of the Equal Rights Amendment," *Hastings Law Journal* 23, no. 1 (November 1971): 199-220.

[139] *United States v. Reiser*, 394 F.Supp. 1060, 1066-1067 (Mon., Butte Div. 1975).

[140] *United States v. Reiser*, 394 F.Supp. 1060, 1067 (Mon., Butte Div. 1975).

[141] *United States v. Reiser*, 394 F.Supp. 1060, 1067 (Mon., Butte Div. 1975).

[142] *United States v. Reiser*, 394 F.Supp. 1060, 1067 (Mon., Butte Div. 1975).

This was no small matter. This Montana district judge (unlike the judges in *Baechler*) understood the Supreme Court's decision in *Frontiero* to mean that, in order for a sex-based classification to pass muster, it needed to serve a "compelling state interest" (instead of only offering up a "rational basis" for its existence).[143] And if, as the *Reiser* judge had come to believe, women's "innate physical attributes" did not make them any less well-suited for military service, then there was no "national security" logic—and thus no compelling state interest—which accounted for their exclusion from registration or conscription, either.[144] The opinion conceded that some number of women would undoubtedly fail to meet "the mental and physical standards" which still determined one's eligibility for military service (no matter how much that service had changed).[145] But the same was true of a great many men who had been called to serve, subsequently assessed by military officials, and promptly sent on their way (including, for example, approximately half of the men drafted in 1969).[146] To satisfy *Frontiero*, this judge declared, the Selective Service would need to establish these same procedures for American

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[143] *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974); *United States v. Reiser*, 394 F.Supp. 1060, 1063-1064 (Mon., Butte Div. 1975). In *United States v. Yingling*, the district judge purported to take the "compelling interest of the government" into consideration, but upheld the all-male MSSA nonetheless. Years later, a Department of Justice memorandum—presented to the House Subcommittee on Military Personnel, as part of the Hearings on the Registration of Women (see below)—conceded that "the reasoning" of the *Yingling* opinion "suggests that [it] was applying a class 'rationality' standard.'" See *United States v. Yingling*, 368 F.Supp. 379, 385 (W.D. Pa. 1973); and "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 10.

[144] *United States v. Reiser*, 394 F.Supp. 1060, 1065-1068 (Mon., Butte Div. 1975).

[145] *United States v. Reiser*, 394 F.Supp. 1060, 1068 (Mon., Butte Div. 1975).

[146] *United States v. Reiser*, 394 F.Supp. 1060, 1067-1068 (Mon., Butte Div. 1975). In making this point, the opinion also made a race-sex analogy: although a higher percentage of "black male draftees" had been "rejected" than "white male draftees" in 1969, the judge wrote, no one had "suggested that blacks ought to be entirely exempted from the draft on the basis of these statistics." The judge thus continued, "To say that qualified women are ineligible because some of their sisters are unfit is supporting exactly the kind of evil that the Constitution was designed to prohibit."

women—subjecting them to registration and conscription and only determining their suitability for induction later on, and on a case-by-case basis—instead of simply assuming that they were all, or even mostly, unqualified.[147]

The Montana judge knew that plenty of women would resent his decision. Military service was often "unpleasant," and mandatory military service even more so.[148] But it was also "one of the most serious and onerous duties of citizenship," he wrote, and thus an integral part of achieving women's "total equality" under the law.[149] He proposed that the all-male draft did not need to be eliminated so much as it needed to be amended and made universal: so that the "obligations and privileges of serving in the armed forces" might truly be "*shared generally*"—and so that women might no longer be consigned to the "role…[of] wife and mother," and might no longer be regarded as helpless objects of "paternalistic" protection, but be "treat[ed]…rightly because they are persons and citizens" instead.[150]

And thus—for eight months, and only eight months—Kenneth Reiser's criminal indictment was no more. The federal government quickly appealed the decision, however, and on January 26, 1976, the U.S. Court of Appeals for the Ninth Circuit handed down an opposite

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[147] *United States v. Reiser*, 394 F.Supp. 1060, 1067-1069 (Mon., Butte Div. 1975).
[148] *United States v. Reiser*, 394 F.Supp. 1060, 1062 (Mon., Butte Div. 1975).
[149] *United States v. Reiser*, 394 F.Supp. 1060, 1062 (Mon., Butte Div. 1975). To support the idea that "[t]he draft, resulting in compulsory service, is one of the most serious and onerous duties of citizenship," the *Reiser* opinion quoted from the Supreme Court's decision in *United States v. Schwimmer*, 279 U.S. 644 (1929)—the subject of Chapter 1 of this dissertation—which included the phrase "the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution." The opinion did not explain that *Schwimmer* had involved a woman's promise to bear arms in defense of the United States (or, rather, her unwillingness to make such a promise), but it seems notable nonetheless.
[150] *United States v. Reiser*, 394 F.Supp. 1060, 1061-1062, 1069 (Mon., Butte Div. 1975).

ruling.[151] Its "order of reversal" (joined by future Supreme Court Justice Anthony Kennedy) was four sentences long, its reasoning confined to just two:

> The district court's rationale was that the Selective Service Act violates appellee's rights to due process and equal protection under the Fifth Amendment because it subjects men, but not women, to registration and induction under the Act.
> There is, however, a clear rational relationship between the government's legitimate interests, as expressed in the Act, and the classification by sex, and thus no violation of appellee's constitutional rights. *Campbell v. Beaughler*, 519 F.2d 1307, 1309 (9th Cir. 1975).[152]

With these few words, the Ninth Circuit simultaneously dismissed the lower court's concerns about the equal obligations of citizenship (by ignoring them entirely); suggested that the Supreme Court's decision in *Frontiero* demanded proof of a "rational relationship" to a state interest (rather than anything more compelling); and offered up an alternative precedent—namely, *Campbell v. Beaughler*—by which to measure sex discrimination within the military, in particular, instead.

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[151] *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976).

[152] *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976). The judges assigned to the case were Richard Chambers, Anthony Kennedy, and Dick Yin Wong. Chambers was nominated to a seat on the Ninth Circuit by President Dwight Eisenhower in 1954; he served as chief judge from 1959 until 1976, and then maintained senior status until his death in 1994. Kennedy was nominated to a seat on the Ninth Circuit by President Gerald Ford in 1975, when he was only thirty-eight years old; he later went on to serve on the U.S. Supreme Court from 1988 until 2018. Wong was a district judge for the U.S. District Court for the District Court of Hawaii, appointed to the court by Ford in 1975, "sitting by designation" in *Reiser*. See "Chambers, Richard Harvey," Federal Judicial Center, https://web.archive.org/web/20230914024729/https://www.fjc.gov/node/1379001 (accessed September 14, 2023); "Anthony M. Kennedy," Oyez, https://www.oyez.org/justices/anthony_m_kennedy (accessed September 27, 2023); and "Wong, Dick Yin," Federal Judicial Center, https://web.archive.org/web/20230914025257/https://www.fjc.gov/node/1390031 (accessed September 14, 2023).

The Ninth Circuit had decided *Campbell* only seven months earlier.[153] The case had revolved around several Marine Corps regulations which together permitted female personnel—but not male personnel—to grow out their hair and to wear wigs.[154] Several male reservists (including a Lance Corporal named David Campbell) had challenged the regulations, in part, on equal protection grounds.[155] But the reservists' commanding officer (a Captain Michael Beaughler) and another Marine Corps general had submitted affidavits testifying to the need for short hair—for male Marines, and for male Marines alone—which the Ninth Circuit had found more compelling.[156] Above all, the *Campbell* opinion had explained in summary, a man's long hair, whether natural or accorded by a wig, might "present a safety hazard" in combat and in combat training.[157] A woman's long hair, however, presented no such threat—because "women Marines do not train for combat."[158]

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[153] *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975). Three different judges had decided *Campbell* in June 1975: Eugene Wright, Herbert Choy, and Gus Solomon (an Oregon senior district judge). Wright was appointed to the Ninth Circuit by President Richard Nixon in 1969; Choy was appointed to the Ninth Circuit by Nixon in 1971; Solomon was appointed to the U.S. District for the District of Oregon by President Harry Truman in 1950. See "Wright, Eugene Allen," Federal Judicial Center, https://web.archive.org/web/20230914030237/https://www.fjc.gov/node/1390151 (accessed September 14, 2023); "Choy, Herbert Young Cho," Federal Judicial Center, https://web.archive.org/web/20230914030514/https://www.fjc.gov/node/1379086 (accessed September 14, 2023); and "Solomon, Gus Jerome," Federal Judicial Center, https://web.archive.org/web/20230914030644/https://www.fjc.gov/node/1388076 (accessed September 14, 2023).

[154] The reservists had also challenged the regulations as violations of their freedom of expression and their right to privacy, but the case was largely decided on equal protection grounds. See *Campbell v. Beaughler*, 519 F.2d 1307, 1308, 1309n1 (9th Cir. 1975).

[155] *Campbell v. Beaughler*, 519 F.2d 1307, 1308-1309 (9th Cir. 1975).

[156] *Campbell v. Beaughler*, 519 F.2d 1307, 1308 (9th Cir. 1975).

[157] *Campbell v. Beaughler*, 519 F.2d 1307, 1308 (9th Cir. 1975).

[158] *Campbell v. Beaughler*, 519 F.2d 1307, 1309 (9th Cir. 1975).

In affirming this distinction, the Ninth Circuit had not decided that the disparate regulations *weren't* the result of a sex-based classification—and that they were actually based on a distinction between the combat-eligible and the combat-ineligible—but it had used the female Marines' combat restrictions to prove that the sex-based classification was "rationally based."[159] And, in this way, the Ninth Circuit had purported to satisfy *Frontiero*—just as it purported to do when citing *Campbell* in defense of male-only registration and conscription the following year.[160] According to the Ninth Circuit, in other words, combat exclusion policies also justified women's exclusion from the draft.

Other courts had offered up similar lines of reasoning in the recent past, referring, for example, to men's greater "physical strength" (as in *Yingling*) or to the "nature of the demands of military service" (as in *Baechler*).[161] But in *Reiser*, the Ninth Circuit made matters more concrete, relying (if only implicitly) upon specific regulations which marked the limits of volunteer servicewomen's military roles—and using them to make certain that future servicewomen remained volunteers. Five years later, in *Rostker v. Goldberg*, the Supreme Court would do much the same—in no small part because it had already been done before.

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It wasn't inevitable that *Rostker v. Goldberg* foundered on combat restriction policies. It wasn't inevitable that *Rostker v. Goldberg* reached the Supreme Court at all. Since Robert Goldberg had become a co-plaintiff, in the summer of 1975—just months after President Ford's

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[159] *Campbell v. Beaughler*, 519 F.2d 1307, 1309 (9th Cir. 1975).
[160] *Campbell v. Beaughler*, 519 F.2d 1307, 1309 (9th Cir. 1975); *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976).
[161] *United States v. Yingling*, 368 F.Supp. 379, 386 (W.D. Pa. 1973); *United States v. Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974).

administration had suspended registration, in addition to conscription—he'd not made it into a courtroom for over four years.[162] But on December 24, 1979, the Soviet Union invaded Afghanistan—and, in response, on February 8, 1980, President Carter announced that he would ask Congress to renew the Military Selective Service Act, to restart registering the nation's young men, and, for the first time, to begin registering its young women as well.[163]

Only eleven days later, on February 19, an Eastern District of Pennsylvania judge handed down a fourth opinion in the long-running *Goldberg v. Tarr* litigation.[164] The judge denied the government's motion for summary judgment, which insisted that the legitimacy of male-only registration be regarded as "a nonjusticiable political question," and instead confirmed—for the third time—that the *Goldberg* suit could and should proceed.[165]

In his "Statement on the Registration of Americans for the Draft," President Carter had endeavored to disaggregate registration from conscription—and, even more to the point, from "the issue of women in combat."[166] He'd expressed his admiration for and trust in the All-Volunteer Force and foresworn any intention to revive the draft, unless a "national emergency" truly demanded it. He'd suggested bringing back registration as a means of preparing for that

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[162] On the various procedural delays, see *Goldberg v. Tarr*, 510 F.Supp. 292, 294 (E.D. Pa. 1980); and Kerber, *No Constitutional Right to Be Ladies*, 275-277, 374-375.
[163] Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft."
[164] *Goldberg v. Tarr*, 510 F.Supp. 292, 294 (E.D. Pa. 1980). The new judge assigned to the case was Edward Cahn, who took over after James Gorbey died in November 1977. Cahn was appointed to the U.S. District Court for the Eastern District of Pennsylvania in 1974 by President Gerald Ford and served in that position for twenty-four years. See "Cahn, Edward Norman," Federal Judicial Center, https://web.archive.org/web/20230914032921/https://www.fjc.gov/node/1378716 (accessed September 14, 2023).
[165] *Goldberg v. Tarr*, 510 F.Supp. 292, 294-295, 297 (E.D. Pa. 1980).
[166] Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft."

hypothetical emergency, but only just in case. He'd proposed to include women in registration because "there [were] already 150,000 women serving" in the AVF, already "performing well" and already taking on all kinds of military "tasks"—including some "which, in the event of hostilities, would involve deploying them in or near combat zones."[167]

He'd stopped short of recommending that servicewomen engage in direct combat or close combat support, however—both of which, as he'd made sure to acknowledge, were still prohibited in every branch of the service. He'd also made clear that every young woman newly made to register with the Selective Service would be signing up—even if the draft were in fact revived—for the possibility of "noncombat service" alone.[168] In other words, Carter had not only attempted to ward off any potential critics—who might object to the idea that American women would suddenly be sent into the line of fire—but had also attempted to ensure that those evaluating his proposal would ignore the what-ifs of combat entirely.

Congress, however, refused to cooperate—not least because the *Goldberg* lawsuit was also already back in motion. To be sure, Congress had discussed (and dismissed) the prospect of women in combat before, while debating the ERA and as part of various "Hearings on Women in the Military" held in the late 1970s.[169] But when Carter's announcement precipitated a new (and

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[167] Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft."
[168] Carter, "Selective Service Revitalization Statement on the Registration of Americans for the Draft."
[169] See, for example, U.S. Congress, House and Senate, Subcommittee on Priorities and Economy in Government, Joint Economic Committee, *Hearings on the Role of Women in the Military*, 95th Cong., 1st sess., 1977; U.S. Congress, House, Subcommittee on Military Personnel, Committee on Armed Services, *Hearings on H.R. 7431, Women Aboard Naval Vessels*, 95th Cong., 2nd sess., 1978; and *Hearings on Women in the Military*, 96th Cong., 1st and 2nd sess., 1979 and 1980. In the mid-1970s, Congress had also rejected several proposals that would have affirmatively enabled female soldiers to serve in combat roles. See also Hasday, "Fighting Women"; U.S. Congress, House, *A Bill To amend title 10 of the United States Code in*

rather more urgent) round of congressional hearings on the prospect of women's registration, which began on March 5, 1980, it was attorneys from the Department of Justice—who already knew that they'd soon be back in the Eastern District of Pennsylvania, made to defend the all-male MSSA all over again, no matter how Carter's proposal turned out—who took steps to ensure that combat came up again.[170] Indeed, while the U.S. attorneys who were called to testify left the question of whether or not to amend the MSSA up to the legislators, they requested—that if the legislators decided *not* to amend the MSSA, and to keep registration a male-only obligation instead—that they simultaneously, deliberately craft the kind of "legislative history" that would "be helpful rather than hurtful in the litigation."[171] More precisely, the attorneys asked that Congress avoid the "sexual stereotypes" that had permeated the MSSA's initial enactment in 1948—and that it concentrate, in particular, on the sex-specific combat restrictions that the attorneys felt confident they could "defend" in court.[172]

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order to prohibit the exclusion, solely on the basis of sex, of women members of the Armed Forces from duty involving combat, H.R. 58, 94th Cong., 1st sess., introduced in House January 14, 1975; U.S. Congress, House, *A Bill To amend title 10 of the United States Code in order to prohibit the exclusion, solely on the basis of sex, of women members of the Armed Forces from duty involving combat*, H.R. 2190, 94th Cong., 1st sess., introduced in House January 28, 1975; and U.S. Congress, House, *A Bill To amend title 10 of the United States Code in order to prohibit the exclusion, solely on the basis of sex, of women members of the Armed Forces from duty involving combat*, H.R. 12649, 94th Cong., 2nd sess., introduced in House March 18, 1976.

[170] See, for example, "Memorandum Re: Constitutionality of All-Male Draft Registration" in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 11-12.

[171] Larry Simms at *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 15.

[172] Larry Simms at *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 15, 27. The idea that the MSSA's initial, male-only passage had been premised upon various "sexual stereotypes"—and the idea that Congress in 1980 had blindly reenacted the same old legislation—would become a major part of Sitman and Goldberg's argument at the Supreme Court. See, for example, Motion to Affirm at 4-6, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_mot_0004/Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Motion to Affirm, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

In advocating for this strategy, the U.S. attorneys drew upon several, specific precedents, which they compiled in a short memorandum, which also laid out how these very hearings might influence *Goldberg*'s eventual outcome.[173] As the memo described, for example, in *Frontiero v. Richardson* (1973), the Supreme Court had signaled that any laws which discriminated between men and women for the sole purpose of "administrative convenience"—and, notably, that any military policies which did the same—could not be sustained.[174] In *Schlesinger v. Ballard* (1975), however, the Court had indicated that military regulations which accorded different treatment to men and women who were "*not* similarly situated"—in this case, to male naval officers who could be assigned to combat duty and to female naval officers who could not be so assigned—were in fact constitutional.[175] In *United States v. Reiser* (1976), decided by the Ninth Circuit, the memo found additional evidence that the Supreme Court might also uphold the all-male MSSA, in particular, on the basis of servicewomen's collective exclusion from combat.[176] And the memo found reassurance, as well, in the whole series of lower-court decisions—going back to the late 1960s—which had similarly preserved male-only registration and conscription,

[173] "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 8-13.
[174] *Frontiero v. Richardson*, 411 U.S. 677 (1973), as discussed in "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 8.
[175] *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), as discussed in "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 8-9.
[176] *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976), as discussed in "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 9-10.

and in the fact that the Supreme Court had never granted certiorari to any of the defendants who had challenged those rulings.[177]

As the memo also explained, however, no court had contemplated the MSSA since December 1976, when the Supreme Court had decided—in *Craig v. Boren*—that sex-based classifications needed to pass not only a "'rational basis' test" but an "important governmental interest" test as well.[178] This higher standard of review, the U.S. attorneys warned, might be more difficult to meet.[179] Thus, while they concluded that the MSSA—even if it were merely renewed and in no way revised—was still "constitutionally defensible," they also conveyed that it might depend on exactly *how* Congress renewed it.[180] "[W]e can use all the help we can get," pleaded one Justice Department official.[181] Moments later, he instructed, "This is what you ought to be focusing on: How do you relate your decision not to register women to the fact that you

[177] *United States v. St. Clair*, 291 F.Supp. 122 (S.D. N.Y. 1968); *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969), cert. denied, 395 U.S. 908 (1969); *United States v. Clinton*, 310 F.Supp. 333 (E.D. La., New Orleans Div. 1970); *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970); *United States v. Dorris*, 319 F.Supp. 1306 (W.D. Pa. 1970); *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); *United States v. Bertram*, 477 F.2d 1329 (10th Cir. 1973); *United States v. Yingling*, 368 F.Supp. 379 (W.D. Pa. 1973); *United States v. Offord*, 373 F.Supp. 1117 (E.D. Wis. 1974); *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); and *United States v. Reiser*, 532 F.2d 673 (9th Cir. 1976), cert. denied, 429 U.S. 838 (1976), all as discussed in "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 2nd sess., 9-11.

[178] *Craig v. Boren*, 429 U.S. 190 (1976), as discussed in "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 11-12.

[179] "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 10-12.

[180] "Memorandum Re: Constitutionality of All-Male Draft Registration," in *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 8, 13.

[181] Larry Simms at *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 25.

will not use them in combat," so that the all-male MSSA might have a greater chance of being upheld?[182]

The legislators, by and large, took heed. Not all of them, to be sure: Congress solicited a great deal of testimony—much of it in favor of universal registration or, at the very least, not opposed to universal registration—and a number of individual congresspeople expressed their own support in response.[183] But the House Subcommittee on Manpower and Personnel's ultimate, "specific findings of fact" recommended against amending the MSSA, as did the summary report put out by the Senate Armed Services Committee—and both documents made plain that servicewomen's combat restrictions were the principal cause.[184]

Both documents also presumed that the purpose of registration was to better prepare for and eventually facilitate a far-off, emergency mobilization (as President Carter had himself proposed) and thus considered the AVF's present problems—its struggles to recruit as many

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[182] Larry Simms at *Hearings on H.R. 6569*, 96th Cong., 2nd sess., 1980, 27.

[183] Several of the most compelling pieces of testimony were cited in the district court's decision striking down the all-male MSSA. See, for example, *Goldberg v. Rostker*, 509 F.Supp. 586, 589, 601- 605, 606n6, 606n18, 606n20, 606n21, 606n22, 606n23, 606n24, 606n25, 606n26, 606n27, 606n28, 606n29, 606n30, 606n31 (E.D. Pa. 1980). For further examples of this testimony, see also Hasday, "Fighting Women"; *Hearings on Women in the Military*, 96th Cong., 1st and 2nd sess., 1979 and 1980 (which took place in the months before—and shortly after—President Carter announced his intention to revitalize the Selective Service); *Hearings on H.R. 6569, Registration of Women*, 96th Cong., 2nd sess., 1980; and *Hearings on H.J. Res. 521, Military Draft Registration, FY80-81*, 96th Cong., 2nd sess., 1980.

[184] As above, the most compelling pieces of testimony marshaled against the registration were also cited in the district court's decision. See *Goldberg v. Rostker*, 509 F.Supp. 586, 597-599 (E.D. Pa. 1980). For further examples of this testimony, see also Hasday, "Fighting Women"; *Hearings on Women in the Military*, 96th Cong., 1st and 2nd sess., 1979 and 1980 (which took place in the months before—and shortly after—President Carter announced his intention to revitalize the Selective Service); *Hearings on H.R. 6569, Registration of Women*, 96th Cong., 2nd sess., 1980; *Hearings on H.J. Res. 521, Military Draft Registration, FY80-81*, 96th Cong., 2nd sess., 1980; "Transfer of Funds for the Selective Service System," 96th Cong., 2nd sess., *Congressional Record* 126, pt. 11: 13854-13898; and 96th Cong., 2nd sess., 1980, S. Rep. 96-826.

soldiers as necessary without the inducement of a draft, the particular units and "specialties" that were already insufficiently staffed—when predicting how the military might need to respond to a crisis.[185] The House's findings, for example, succinctly outlined that "Present manpower deficiencies under the All-Volunteer Force are concentrated in the combat arms – infantry, armor, combat engineers, field artillery and air defense"; that, consequently, "[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements"; and that, since, servicewomen were generally barred from combat, "There is no military need to include women in a selective service system."[186]

The Senate report embroidered upon the various complications that might arise if "very large numbers of women"—and thus very large numbers of combat-ineligible soldiers—were first registered and then, in the event of an emergency, conscripted and inducted.[187] The report concluded, for example, that training would necessarily slow down; that it would become more difficult to rotate otherwise-noncombat troops into combat roles (as was often required at the front lines); and that a schism—between those trapped "in permanent combat" and those "in permanent support"—might forever rend the military in two.[188] All of these were pragmatic, military reasons not to register women—but that's precisely why the Justice Department believed they might withstand constitutional scrutiny as well.

By June 12, 1980, Congress had passed Joint Resolution 521, which allocated the necessary funds to revitalize the Selective Service and to register the nation's young men—and

[185] As excerpted in *Goldberg v. Rostker*, 509 F.Supp. 586, 598 (E.D. Pa. 1980).
[186] As excerpted in *Goldberg v. Rostker*, 509 F.Supp. 586, 599 (E.D. Pa. 1980).
[187] As excerpted in *Goldberg v. Rostker*, 509 F.Supp. 586, 598 (E.D. Pa. 1980).
[188] As excerpted in *Goldberg v. Rostker*, 509 F.Supp. 586, 598 (E.D. Pa. 1980).

those young men alone.[189] By July 2, Carter had issued Presidential Proclamation No. 4771, formally applying those funds to the Selective Service System and bringing it back to life.[190] Male-only registration was set to begin again on July 21—but, for a brief moment, the *Goldberg* litigation intervened.

On July 18, in *Goldberg v. Rostker* (now renamed for the new Director of the Selective Service, Bernard Rostker), the Eastern District of Pennsylvania ruled to strike down the renewed—but un-revised—Military Selective Service Act.[191] The opinion was quite different from those that the same court had handed down before—in 1972, 1974, and even February 1980—and not only in the sense that David Sitman and Robert Goldberg finally emerged victorious. For the first time, as well, the Pennsylvania district court's opinion devoted most of its attention to the ranks of already-enlisted volunteer servicewomen.

Other courts—like the Fourth Circuit in *United States v. Baechler* or like the Ninth Circuit in *United States v. Reiser*—had already done the same, albeit to uphold the MSSA rather than to strike it down. The recent congressional hearings had followed suit, speculating as to the consequences of women's future registration by extrapolating from the details—and limits—of

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[189] *Additional Funding for Selective Service System*, Public Law 96-282, *U.S. Statutes at Large* 94 (1980): 552.
[190] Proclamation 4771 of July 2, 1980.
[191] *Goldberg v. Rostker*, 509 F.Supp. 586, 605-606 (E.D. Pa. 1980). In addition to Edward Cahn, two other judges were assigned to the case: Joseph Lord and Max Rosenn. Lord was nominated to a seat on the U.S. District Court for the Eastern District of Pennsylvania by President John F. Kennedy in 1961; he served as senior judge from 1971 until 1982. Rosenn was a Third Circuit judge, appointed to serve on that court by President Richard Nixon in 1970. See "Lord, Joseph Simon III," Federal Judicial Center, https://web.archive.org/web/20230914043444/https://www.fjc.gov/node/1384016 (accessed September 14, 2023); and "Rosenn, Max," Federal Judicial Center, https://web.archive.org/web/20230914043531/https://www.fjc.gov/node/1387146 (accessed September 14, 2023).

their present participation in the armed forces. Now, however, the Eastern District of Pennsylvania relied upon those same hearings to declare that Congress had been wrong to revive male-only registration—not only because it violated the plaintiffs' Fifth Amendment rights, but because it contravened actual military necessity.[192]

In reaching this conclusion, the Eastern District of Pennsylvania primarily recovered congressional testimony that had been rendered invisible by the House Subcommittee's "specific findings of fact" and by the Senate Armed Services Committee's summary report. Ironically, for example, Selective Service head Bernard Rostker had himself declared that there would be "no administrative obstacles" to implementing universal registration.[193] As the *Goldberg* opinion further relayed, top officers of the Army, Navy, Air Force and Marine Corps had similarly sworn that "they would have no objection to the registration of women."[194]

According to the *Goldberg* opinion, moreover, various Department of Defense officials had also suggested that American women might very well need to be conscripted one day as well. One Assistant Secretary of Defense, for example, had testified that, on top of the additional 100,000 women already projected to enlist (of their own accord) over the next five years, the military would also need to induct another 80,000 women in the event of an emergency.[195] This forecast did not deny that the military's most "immediate need" would be for combat troops and combat replacements—and thus for men and men alone. But it imagined that those men would be already-enlisted soldiers, rotated out of noncombat roles and into combat ones—and that

[192] *Goldberg v. Rostker*, 509 F.Supp. 586, 588, 592-596, 600-605 (E.D. Pa. 1980).
[193] *Goldberg v. Rostker*, 509 F.Supp. 586, 589, 604, 606n18 (E.D. Pa. 1980).
[194] *Goldberg v. Rostker*, 509 F.Supp. 586, 589, 604, 606n30 (E.D. Pa. 1980).
[195] *Goldberg v. Rostker*, 509 F.Supp. 586, 600-603(E.D. Pa. 1980).

"female registrants" would be needed, as quickly as possible, to take their place.[196] Another Assistant Secretary of Defense had gone so far as to suggest that women's experiences in the civilian labor market—as secretaries, bookkeepers, and nurses, and in other female-dominated fields—might even merit a supplementary "special skills draft" of women only, if, during that same emergency, too many combat-eligible men were confined to the front lines.[197]

By bringing this testimony to the forefront, the *Goldberg* opinion aimed to illustrate that "military opinion" was more complicated than Congress' decision not to amend the MSSA had made it seem—and that a more honest accounting proved that "the availability of women registrants would materially increase flexibility, not hamper it."[198] The district court also took a broader view of congressional intent: as the opinion emphasized, for example, prior to excluding women from registration, "Congress ha[d] continuously allocated funds for the increase of the number of women in the armed services, in both absolute terms and as a percentage of total forces."[199] It was impossible to believe, the *Goldber*g opinion now argued, that "our national defense" demanded more and more volunteer servicewomen—and simultaneously demanded that they forever remain volunteers.[200]

Consequently, according to the Eastern District of Pennsylvania, the all-male MSSA failed the "'important government interest' test."[201] The *Goldberg* opinion did not apply the more burdensome "compelling government interest" test (as the Montana district court had in

[196] *Goldberg v. Rostker*, 509 F.Supp. 586, 600-603 (E.D. Pa. 1980).
[197] *Goldberg v. Rostker*, 509 F.Supp. 586, 600-603, 606n27 (E.D. Pa. 1980).
[198] *Goldberg v. Rostker*, 509 F.Supp. 586, 603 (E.D. Pa. 1980).
[199] *Goldberg v. Rostker*, 509 F.Supp. 586, 603 (E.D. Pa. 1980).
[200] *Goldberg v. Rostker*, 509 F.Supp. 586, 603-605 (E.D. Pa. 1980).
[201] *Goldberg v. Rostker*, 509 F.Supp. 586, 593, 605 (E.D. Pa. 1980).

United States v. Reiser in 1975, before that decision was overturned).[202] It didn't rhapsodize about the obligations of citizenship, or about the urgent need to achieve women's full equality under the law.[203] It didn't question the fact that "military opinion" should be used to determine the criteria for registration and conscription, only offered up different ways to measure the military's preparedness and future effectiveness instead. But that was enough. The district court ruled that the MSSA was unconstitutional and "permanently enjoined" the Selective Service from putting it into action.[204]

Of course, it was rather less than permanent. Bernard Rostker, acting in his capacity as Director of the Selective Service, immediately appealed to the Supreme Court.[205] On July 19, just one day after the Eastern District of Pennsylvania handed down its opinion, Justice William Brennan issued a stay.[206] Registration—male-only registration—began again, on time, on July 21.[207] But the district court's decision continued to shape the litigation, which likewise continued to move forward. Indeed, it was in no small part because the lower court had focused so fully on military matters that, in crafting their arguments for the Supreme Court, both litigants endeavored to do the same.

For the appellees, Sitman and Goldberg, concentrating on the armed forces meant puncturing the idea that Congress had decided to exclude women from registration because it

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[202] See *United States v. Reiser*, 394 F.Supp. 1060, 1062-1069 (Mon., Butte Div. 1975). The *Goldberg* district court opinion specifically rejected the applicability of the "compelling government interest" test at *Goldberg v. Rostker*, 509 F.Supp. 586, 593 (E.D. Pa. 1980).
[203] See, by contrast, *United States v. Reiser*, 394 F.Supp. 1060, 1061-1062, 1069 (Mon., Butte Div. 1975).
[204] *Goldberg v. Rostker*, 509 F.Supp. 586, 605-606 (E.D. Pa. 1980).
[205] *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).
[206] *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).
[207] *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

would somehow endanger national security to include them—and thus proving that the all-male MSSA was in fact premised upon outdated thinking which held "that men are meant for war and women solely for home and hearth."[208] But they left any deeper examination of that thinking to their various *amici*, which included an array of prominent women's rights organizations.[209]

The National Organization for Women (NOW) brief, for example, outlined the particular, "negative stereotypes" that the all-male MMSA encouraged—and teased out their even-more-negative, real-world consequences.[210] If women's exclusion from compulsory military service supported the idea that women "weak and vulnerable," for instance, then NOW insisted that the same line of thinking inclined "[m]en…to attack them [instead of] another man," and thus contributed to the nation's "staggering incidence of rape and domestic violence."[211] Likewise, if male-only registration and conscription suggested that men—solely tasked with ensuring "the community's survival"—were solely "entitl[ed]…to lead it" as well, then that helped account for the "pitifully small number of women in positions of political power."[212] Moreover, NOW argued, if the military was still "our largest vocational and professional training institution"—and, what's more, if veterans' preference laws were still common throughout the country—then

[208] Motion to Affirm at 23, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[209] Brief for Women's Equity Action League Educational and Legal Defense Fund, et al. as Amici Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the National Organization for Women as Amicus Curiae, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[210] Brief for the National Organization for Women as Amicus Curiae at 19, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[211] Brief for the National Organization for Women as Amicus Curiae at 19-21, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[212] Brief for the National Organization for Women as Amicus Curiae at 22-24, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

the all-male MSSA enabled women's persistent economic inequality.[213] All in all, the NOW brief did not minimize the importance of military service—quite the opposite—but it measured that importance in terms of women's citizenship and in terms of America's "basic democratic commitment to equality for all."[214]

The appellees themselves, by contrast, not only regarded women as present and potential soldiers, but also focused—almost exclusively—on their present and potential usefulness to the military. Most prominently (and not unlike the district court the year before), the appellees emphasized that the same Congress that had renewed the all-male MSSA had also "been a prime mover in expanding the role of women in the military."[215] They explained that just in the past fifteen years, for example, Congress had removed the statutory limits on women's overall enlistment; ordered the service academies to admit women as well as men; integrated the Women's Army Corps into the Regular Army; and sanctioned servicewomen's deployment "'throughout the battlefield'" (if not, still, in direct combat or close combat support).[216] The appellees insisted that these policy changes all shared one rationale in common—namely, that servicewomen were instrumental to "the most effective and efficient possible defense

[213] Brief for the National Organization for Women as Amicus Curiae at 27-28, *Rostker v. Goldberg*, 453 U.S. 57 (1981). The Supreme Court had upheld veterans' preference laws two years earlier, in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).
[214] Brief for the National Organization for Women as Amicus Curiae at 3, 21-25, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[215] Motion to Affirm at 13-14, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[216] Motion to Affirm at 13-14, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellees at 11, 28-29, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_ab_0014/Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Brief for the Appellees, *Rostker v. Goldberg*, 453 U.S. 57 (1981)].

capability"—and further insisted that the same rationale justified women's inclusion in registration and, if necessary, in conscription as well.[217]

To that end, the appellees also elaborated upon the various pieces of congressional testimony—most of them also cited in the lower court's opinion—which had predicted that servicewomen would be just as vital in a future emergency as they were in the present.[218] In particular, the appellees' briefs delved into the details of Congress' contemplated worst-case scenario—the one that would trigger a new military draft, allegedly (per the House and Senate Armed Services Committees' reports) for combat troops and combat troops alone. The appellees acknowledged that this hypothetical scenario—a war waged against the Soviet Union, fought "in Europe with the Warsaw Pact nations" over the course of at least six months—demanded many more combat-eligible soldiers than combat-ineligible ones.[219] But they contended, nonetheless, that military officials' best-guess battle plans had also called for women—in fact, for as many as 80,000 women—to be drafted as noncombat replacements.[220] (The district court, assessing the 1980 congressional hearings, had reached the same conclusion.)[221] In laying out these facts and figures, the appellees did not challenge the idea that registration's primary purpose was to expedite an emergency response, but instead argued that women would necessarily be a part of any such mobilization.

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[217] Brief for the Appellees at 29, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[218] Motion to Affirm, at 13, 40-46, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellees at 21-22, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[219] Motion to Affirm at 40-41, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[220] Motion to Affirm at 13, 40-41, 40-41, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellees at 21-22, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[221] *Goldberg v. Rostker*, 509 F.Supp. 586, 600-603 (E.D. Pa. 1980).

Elsewhere in the briefs, however, the appellees endeavored to complicate this claim—and in ways that seemed to betray some ambivalence, or even skepticism, about women's place in the military. For example, as often as the appellees' briefs reiterated that a European ground war would warrant 80,000 additional servicewomen—above and beyond those servicewomen already expected to enlist voluntarily—they more often maintained that the Selective Service System existed precisely because the future was fundamentally unknowable.[222] In this way, the appellees held open the possibility that conscription might be "re-imposed" in another, less "extreme" situation, and that the new draft—rather than focusing only on combat troops—might not distinguish between men and women very much at all.[223] But that also meant holding upon the opposite possibility: that women would in fact never be drafted, no matter whether they'd registered or not.[224] Indeed, the briefs regularly reminded the Court that only registration—rather than conscription or induction—was the matter at hand, and that mandating gender-neutral registration in no way mandated a gender-neutral draft, not to mention gender-neutral military units or assignments.[225] In other words, in an effort to undermine the Justice Department's certainty about its projected worst-case scenario, and perhaps to persuade any justices who might balk at the idea of female conscripts—but not at the idea of female registrants—the appellees also ended up conceding that servicewomen might very well prove less essential than their brothers-in-arms.

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[222] Brief for the Appellees at 24, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[223] Motion to Affirm at 13, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellees at 24, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[224] Brief for the Appellees at 1-2, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[225] Motion to Affirm at 3, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellees at 1-2, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

Meanwhile, Bernard Rostker and the U.S. attorneys were even more narrowly focused on military necessity—much to the dismay of other supporters of the all-male MSSA. Indeed, Phyllis Schlafly's Eagle Forum (formerly STOP ERA) not only convened sixteen would-be-draft-age women to disclaim their own interest in mandatory military service but also proposed that they participate as additional appellants and, subsequently, that they participate in oral arguments, precisely because the Justice Department was refusing to "press [their] interests."[226] These women took a different tack, arguing that gender-neutral conscription—and even gender-neutral registration—would disrupt family life, violate the "cultural values" of "western civilization," and contravene the religious beliefs of several faiths.[227] They argued, too, that the fact that women were permitted and even "increasingly encouraged to *volunteer* for military service" meant that there was no real sex discrimination involved in exempting those who *didn't* wish to volunteer.[228] But the Supreme Court denied both of the Eagle Forum's motions to intervene—leaving them to contribute as *amici* instead—and their various claims left no impact on the government's legal briefs.[229] To the contrary: the government briefs avoided all discussion

[226] Docket, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_doc_0500/Docket?accountid=14657 (accessed October 2, 2023) [hereafter cited as Docket, *Rostker v. Goldberg*, 453 U.S. 57 (1981)]; Motion to Intervene of Stacey Acker, et al. at 11, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_mot_0002/Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Motion to Intervene of Stacey Acker, et al., *Rostker v. Goldberg*, 453 U.S. 57 (1981)]. See also Kerber, *No Constitutional Right to Be Ladies*, 295.
[227] Motion to Intervene of Stacey Acker, et al. at 6-11, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[228] Motion to Intervene of Stacey Acker, et al. at 5-6, 13, 17-18, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for Stacey Acker, et al. as Amicus Curiae at 9-10, 21-25, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[229] Docket, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

of ordinary people—and made use of volunteer servicewomen in a more deliberate and more elaborate way as well.

First and foremost, the U.S. attorneys endeavored to demonstrate that the district court had inappropriately relied upon its own estimation of the military's present and future needs, when it should have deferred to Congress—and to the expert testimony Congress had solicited—instead.[230] To that end, the government briefs continually insisted that registration only mattered inasmuch as it helped to facilitate conscription; that conscription only mattered inasmuch as it helped to address the All-Volunteer Force's prevailing "shortfalls"; that the AVF was already struggling to recruit for combat-related military occupational specialties; that, in an emergency, filling those same occupational specialties would only become more urgent; and, most important, that every one of those occupational specialties was "foreclosed" to servicewomen barred from direct combat and close combat support.[231] Here, the briefs did not name the particular, worst-case scenario (the six-month war in Europe) that had come up at the congressional hearings. Instead, they maintained that these predictions—that a draft would prioritize combat troops and combat replacements, that a draft would pass over combat-ineligible women—would always prove true.[232] Consequently, the government maintained, while universal registration might

[230] Jurisdictional Statement at 6,12 , *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C80-251_js_0001/Brief?accountid=14657 (accessed October 2, 2023) [hereafter cited as Jurisdictional Statement, *Rostker v. Goldberg*, 453 U.S. 57 (1981)]; Brief for the Appellant at, 9, 13, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[231] Jurisdictional Statement at 4-5, 12, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellant at 3, 9, 12, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[232] Brief for the Appellant at 27, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

"satisfy political concerns of equity," it served no military purpose—and thus was not demanded by the Constitution, either.[233]

The briefs did not stop there, however. For the first time—in the *Rowland*/*Goldberg* litigation and, as best I can determine, in any of the lawsuits challenging the all-male draft—the U.S. attorneys went so far as to argue that the MSSA did not truly distinguish between men and women, but between the combat-eligible and the combat-ineligible.[234] In other words, the government not only justified the all-male MSSA on the basis of the military's present, sex-specific combat restrictions, but transformed those restrictions into the renewed MSSA's own reasoning. In this way, the briefs simultaneously advocated for a lower standard of review—since combat restrictions, as opposed to national origin, or race, or even sex, were "hardly immutable"—and also dangled the possibility that the MSSA might be modified in the future, if and when the combat restrictions were eliminated, and even without the Supreme Court's "[i]ntervention."[235] In this way, too, the briefs simultaneously communicated that servicewomen were decidedly less essential than their brothers-in-arms *now* and that they might very well prove just as essential in the future.

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[233] Jurisdictional Statement at 3, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellant at 27, 31, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[234] Jurisdictional Statement at 14, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellant at 20, *Rostker v. Goldberg*, 453 U.S. 57 (1981). The appellees objected to this line of reasoning precisely because it was "entirely new." See Brief for the Appellees at 2, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[235] Brief for the Appellant at 24, *Rostker v. Goldberg*, 453 U.S. 57 (1981). It was "immutable characteristics," like race and national origin, which were generally understood to merit strict scrutiny. Sex, on the other hand, was generally understood to merit heightened scrutiny (at least since *Craig v. Boren*, 429 U.S. 190 (1976)). But the government argued that even heightened scrutiny was inapposite here: because the MSSA was actually based upon a distinction between the combat-eligible and combat-eligible (rather than a distinction between men and women), and because even bona fide sex-based classifications did not merit heightened scrutiny *in a military context*. See also Brief for the Appellant at 14-20, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

That the U.S. attorneys thus evinced some measure of confidence in America's servicewomen was not contrary to their other claims but rather in line with them. Indeed, the government briefs regularly reported that there had been a "dramatic increase" in the number of enlisted female personnel "in recent years," and repeatedly conceded that women were making "important contributions" throughout the armed forces.[236] According to these briefs, however, it was precisely the AVF's record of success in recruiting women volunteers—and those women's record of success in carrying out their myriad, necessarily-voluntary responsibilities—which justified their exclusion from the military's contingency planning and, as a result, from the Selective Service System. In fact, the government briefs implied that it was in no small part *because* servicewomen were barred from combat-related military occupational specialties that those roles were already more difficult to fill—and, consequently, that they would need to be filled by draftees in any future crisis.[237] By contrast, the briefs recounted, there was already an "'overstrength'" in the noncombat units that servicewomen were permitted to join—which meant, consequently, that any future draft could afford to overlook them.[238]

To make this argument most effectively, the government also needed to insist that servicewomen's voluntary enlistment rates would continue to grow—and, even more to the point, that women would continue to volunteer even during the hypothetical crisis that would precipitate a new (male-only) draft. And, indeed, the government briefs did just that. They cited the Armed Service Committee's findings that the "dramatic increase" among female military

[236] Jurisdictional Statement at 12-13, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellant at 7, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[237] Jurisdictional Statement at 12-13, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[238] Brief for the Appellant at 13, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

personnel was "a trend that it expected to continue."[239] They quoted Army, Air Force, and Marine Corps generals, who had together testified not only that they were exceeding their recruiting "objectives" for servicewomen now, but also that they anticipated doing the same "in a period of draft."[240] In this way, the U.S. attorneys isolated the lower court's key insight—that servicewomen were becoming continuously more, even irreversibly vital to the U.S. armed forces—and turned it toward their own ends. The all-male MSSA wasn't "inconsistent" with the burgeoning numbers of volunteer servicewomen, they claimed; rather, it was volunteer servicewomen's burgeoning—and reliably burgeoning—numbers which "obviated the need" to amend the MSSA.[241]

This particular claim, much like their bold, new distinction between the combat-eligible and the combat-ineligible, was unique to the *Goldberg* government briefs. Throughout the 1960s and '70s, in response to other draft resisters' lawsuits, various lower courts—including the district court that decided *United States v. Yingling* (1973)—had ruled that the mere fact of women's voluntary enlistment made the MSSA's all-male-ness not matter.[242] Even here, in *Rostker v. Goldberg*, Phyllis Schlafly's sixteen, ordinary *amici* asserted the same.[243] But the Justice Department did something different: it relied upon hundreds of thousands of volunteer servicewomen not only to justify an (imagined) all-male draft, but also to account for how and

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[239] Jurisdictional Statement at 12-13, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for the Appellant at 7, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[240] Brief for the Appellant at 13, 32-32, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[241] Brief for the Appellant at 32-33, *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[242] To make this particular point, the court in *United States v. Yingling*, 368 F.Supp. 379 (W.D. Pa. 1973) had also cited *United States v. St. Clair*, 291 F.Supp. 122 (S.D. N.Y. 1968) and *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970).
[243] Motion to Intervene of Stacey Acker, et al. at 5-6, 13, 17-18, *Rostker v. Goldberg*, 453 U.S. 57 (1981); Brief for Stacey Acker, et al. as Amicus Curiae at 9-10, 21-25, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

why it could actually *work*. Only combat-eligible men would be conscripted against their will—but only because combat-ineligible women would keep joining up of their own accord.

At the *Goldberg* oral arguments, held on March 24, 1981, Solicitor General Wade McCree made matters even more concrete.[244] Towards the end of McCree's time, Justice William Brennan posed a series of questions about the military's (and Congress') emergency plans. Hadn't the Armed Services Committee also found that there were "grave shortages" of "Army surgeons and nurses," he asked, in addition to the shortages in combat-related military occupational specialties? Wouldn't any future mobilization need medical personnel, too? Couldn't women be registered for noncombat "jobs like that?" McCree answered that achieving "maximum flexibility" meant assigning combat-eligible men—and only combat-eligible men—to those roles, so that they might be transferred to the front lines and "pressed into service" if necessary, as had happened at the Battle of the Bulge.[245]

Brennan followed up: "Didn't the Director of Selective Service testify here that if we had to mount an effort in Europe we'd need 650,000 males and 80,000 women?…wasn't that in support of the idea that we ought to register women so that we can get that 80,000 even in a period of mobilization?" In other words, wouldn't 80,000 women need to be conscripted, too, even if only as noncombat replacements for the many men conveyed to the front? That was

[244] Wade McCree served in the U.S. military during World War II. Before becoming Solicitor General, he'd also held seats on the U.S. District Court for the Eastern District of Michigan and the U.S. Court of Appeals for the Sixth Circuit, becoming the first Black man to serve on both courts. See "Solicitor General: Wade H. McCree, Jr.," Office of the Solicitor General, United States Department of Justice, https://web.archive.org/web/20231015222952/https://www.justice.gov/osg/bio/wade-h-mccree-jr (accessed October 15, 2023).

[245] Oral Argument, March 24, 1981, *Rostker v. Goldberg*, 453 U.S. 57 (1981), Oyez, https://www.oyez.org/cases/1980/80-251 (accessed September 27, 2023).

certainly how the Eastern District of Pennsylvania—and how Sitman and Goldberg, in making their case to the Supreme Court—had interpreted that particular worst-case scenario. But McCree recast these figures. "He thought the 80,000 women would be furnished by volunteer[s]," McCree replied, adding that the prediction had been made "in the light of females volunteering for the service."[246] In that instant, the Solicitor General simultaneously undermined one of the appellees' most important pieces of evidence, bolstered the government's own claims about steadfast female voluntarism, and gave the Supreme Court specific numbers it could put to use. "The 80,000" made their way straight into the *Rostker v. Goldberg* majority opinion—and ultimately transformed the constitutional basis for male-only registration and conscription.[247]

The 6-3 opinion, delivered by Justice William Rehnquist and joined by Justices Warren Burger, Potter Stewart, Harry Blackmun, Lewis Powell, William Rehnquist, and John Paul Stevens, was handed down on June 25, 1981.[248] It relied upon several provisions of the Constitution, including Congress' Article I, § 8 powers "to raise and regulate armies and navies," and upon several earlier Supreme Court precedents, including *Schlesinger v. Ballard* (1975), which had also hinged on sex-specific combat restrictions, as well as various other decisions which had also shown "a healthy deference to legislative and executive judgments in the area of military affairs."[249] It found that Congress "did not act 'unthinkingly'" or otherwise endorse "'a

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[246] Oral Argument, March 24, 1981, *Rostker v. Goldberg*, 453 U.S. 57 (1981), Oyez, https://www.oyez.org/cases/1980/80-251 (accessed September 27, 2023).
[247] *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981).
[248] *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[249] *Rostker v. Goldberg*, 453 U.S. 57, 59, 65-69 (1981). One of the cases that the majority opinion cited here was *United States v. Macintosh*, 283 U.S. 605 (1931)—covered in Chapter 1 of this dissertation—which, at 622, declared, "To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy;

traditional way of thinking about females'" when it renewed—but declined to revise—the Military Selective Service Act in 1980.[250] To the contrary, the *Goldberg* majority declared, Congress had "extensively considered" the prospect of women's registration "in hearings, floor debate, and in committee"—and when it decided to *reject* that prospect, it had been guided by "the current thinking as to the place of women in the Armed Services" as well as by the military's specific, projected plans for "any future draft."[251]

Here, the *Goldberg* majority parroted the government briefs (which in turn had parroted particular pieces of congressional testimony) almost exactly. The Court established, for example, that registration was a necessary part of any emergency mobilization—and, by the same token, that the Selective Service System "serve[d] no other purpose beyond providing a pool for the draft"; that any emergency mobilization would prioritize combat troops and combat replacements; and that women were—whether by statute (in the Navy and Air Force) or by policy (in the Army and Marine Corps)—excluded from direct combat.[252] "The Constitution requires that Congress treat similarly situated persons similarly," Justice Rehnquist wrote—but

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deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

[250] *Rostker v. Goldberg*, 453 U.S. 57, 72, 74-75 (1981). To make this particular point, the *Goldberg* majority explicitly rebutted the appellees' argument that Congress in 1980 had blindly renewed the Selective Service Act of 1948: which had reflected more "stereotypical" thinking about women and war; which, notably, had been passed in an era when married women had not been permitted to enlist in the military and when pregnant servicewomen had been automatically discharged; and which, by definition, had not involved any discussion of a prospective, post-1980 draft. See also Motion to Affirm at 4-6, *Rostker v. Goldberg*, 453 U.S. 57 (1981); and Brief for the Appellees at 31-35, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[251] *Rostker v. Goldberg*, 453 U.S. 57, 71-76 (1981).

[252] *Rostker v. Goldberg*, 453 U.S. 57, 75-77 (1981).

"because of the combat restrictions," he decided, men and women were "simply not similarly situated."[253] Consequently, according to the *Goldberg* opinion, there was no "military need" *and* no constitutional need to conscript women—and, consequently, no constitutional need to compel them to register, either.[254]

But if the *Goldberg* majority thus declared, once and for all, that the all-male MSSA "does not violate the Due Process Clause" of the Fifth Amendment (or the equal protection clause incorporated therein), it did not stop there.[255] Instead, the opinion concluded by complicating its own logic. It conceded that some "military experts" had in fact "testified in favor of registering women," if not necessarily in favor of conscripting them.[256] Then it conceded that Congress had in fact heard evidence "that in the event of a draft of 650,000 the military could absorb some 80,000 female inductees"—all of whom, though barred from combat, "would be used to fill noncombat positions," and thereby enable combat-eligible "men to go to the front."[257]

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[253] *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).
[254] *Rostker v. Goldberg*, 453 U.S. 57, 75-80 (1981).
[255] *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). The majority opinion declared that the MSSA "does not violate the Due Process Clause" at p. 79, but it did not specify there which standard of review it was applying to make that assessment. At p. 70, the majority wrote, "No one could deny that under the test of Craig v. Boren, supra, the Government's interest in raising and supporting armies is an 'important governmental interest,'" but it did not explicitly make this same claim with regard to registration (or male-only registration), in particular. At p. 78, the majority made matters less clear by writing, "This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all- Lutheran, or an all-Republican or all-Democratic registration," and thereby contrasting the putatively not-similarly situated combat-eligible men and combat-ineligible women with various similarly situated groups which themselves would have merited disparate standards of review. The Court had also not specified the particular standard of review it was employing when it had distinguished between combat-eligible men and combat-ineligible women in *Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975).
[256] *Rostker v. Goldberg*, 453 U.S. 57, 80-81 (1981).
[257] *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981).

The *Goldberg* opinion did not deny this evidence outright; it could not deny that *some* number of noncombat positions would always exist—or that *some* number of noncombat positions would always be filled by female soldiers, in particular—even in this contemplated worst-case scenario. The majority reasoned, however, that Congress had deliberately disregarded the evidence nonetheless: because "even if a small number of women could be drafted for noncombat roles," the attendant administrative "burdens" would outweigh the benefits; because "military flexibility" demanded that most noncombat personnel also be able to rotate into combat roles (as only combat-eligible men could do); and, most important, because Congress had determined "that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers."[258]

The majority did not explicitly acknowledge that the Court had considered "administrative convenience" an insufficient justification for sex-based classifications for the previous ten years.[259] Though the opinion quoted a Senate Report testifying to the dangers of inducting "'very large numbers of women,'" it did not explicitly account for how 80,000 women—approximately 12% of an expected draft of 650,000—satisfied that definition.[260]

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[258] *Rostker v. Goldberg*, 453 U.S. 57, 81-82 (1981).

[259] The Supreme Court first struck down a pair of statutes which discriminated on the basis of sex—and which involved the administration of estates—in *Reed v. Reed*, 404 U.S. 71 (1971). In *Frontiero v. Richardson*, 411 U.S. 677 (1973), at 689, the Court interpreted *Reed* to mean that laws could no accord different treatment to men and women for "no other purpose than mere 'administrative convenience.'" In *Rostker v. Goldberg*, 453 U.S. 57 (1981), at 81, the majority opinion only implicitly acknowledged that it was being unusually deferential to the military's administrative convenience, writing "It is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization." In their dissenting opinions (see below), both Justice Byron White and Justice Thurgood Marshall criticized the majority for its attitude toward the military's administrative convenience. See *Rostker v. Goldberg*, 453 U.S. 57, 85, 95 (1981).

[260] *Rostker v. Goldberg*, 453 U.S. 57, 82 (1981).

Finally, the majority did not give grounds for why so many women—and *only* women, as opposed to men—could be relied upon to join up of their own accord. But it was in this way, finally, that the Supreme Court ruled to reverse the Eastern District of Pennsylvania's decision from the year before.[261] And it was in this way, for the first time, that the Court transformed the dependable and measurable willingness of thousands and thousands of American women—to serve their country *without* being compelled—into the reason to relieve millions more women from having to do the same.

The Court's decision was not unanimous. Justice Thurgood Marshall penned a dissent, as did Justice Byron White, and Justice William Brennan joined both.[262] Of the two, Justice Marshall's was the more thoroughgoing. He accused the majority of failing to properly apply the "important government interest" test; emphasized that, by ruling to uphold male-only registration, the Court had not only sanctioned a contentious sex-based classification but had also "categorically exclude[d] women from a fundamental civic obligation"; and further condemned the Court for laying down "its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.'"[263] Even still, Marshall's dissent focused primarily on the imagined logistics of a future, wartime draft and on the imagined wartime role of America's present and prospective servicewomen (rather than on the ordinary female citizens already being made to live with that "ancient canard").

Most prominently, Marshall took issue with the majority's intertwining of registration and conscription. As he explained in the dissent's opening paragraphs, when the draft had come

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[261] *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).
[262] Justice White's dissent can be found at *Rostker v. Goldberg*, 453 U.S. 57, 83-86 (1981), Justice Marshall's at *Rostker v. Goldberg*, 453 U.S. 57, 86-113 (1981).
[263] *Rostker v. Goldberg*, 453 U.S. 57, 86, 90, 94 (1981).

to an end in 1973, the MSSA itself had also been "specifically amended to preclude conscription"—and any attempts to revive the draft, therefore, would "require a legislative amendment."[264] By definition, then, according to Marshall, the Court was not being asked "to decide whether either men or women can be drafted at all, whether they must be drafted in equal numbers, in what order they should be drafted, or, once inducted, how they are to be trained for their respective functions."[265] Even more to the point, perhaps, he insisted that the Court couldn't possibly be asked to endorse the idea "that conscription would be reimposed by Congress only in circumstances where, and in a form under which, all conscripts would have to be trained for and assigned to combat or combat rotation positions"—something that was inherently impossible to know ahead of time. As Marshall argued, Congress could just as easily resolve, tomorrow or the next day or years down the line, that the All-Volunteer Force was failing "to meet the Nation's defense needs even in times of peace and reinstitute peacetime conscription."[266] And, if that were to happen, then the *Goldberg* majority's reasoning would necessarily fall to pieces—and the Court might thereupon "be forced to declare the male-only registration program unconstitutional."[267]

Marshall also offered up evidence that—in Congress' estimation as well as in the military's own—a future, emergency mobilization *wouldn't* necessarily exclude the combat-ineligible. He emphasized, for example, that there were already 150,000 women serving in the AVF and another 100,000 projected to enlist (voluntarily) within the next five years—and that these increasing numbers were both the result of deliberate policy and broadly regarded as boons

[264] *Rostker v. Goldberg*, 453 U.S. 57, 86-87 (1981).
[265] *Rostker v. Goldberg*, 453 U.S. 57, 87 (1981).
[266] *Rostker v. Goldberg*, 453 U.S. 57, 96 (1981).
[267] *Rostker v. Goldberg*, 453 U.S. 57, 96 (1981).

to "military effectiveness" and "military flexibility," rather than the opposite.[268] Furthermore, Marshall explained, there was "[n]othing in the Senate Report" which suggested that "combat eligibility is a prerequisite for *all* the positions that would need to be filled in the event of a draft"—and there was instead ample evidence suggesting that, in the event of an six-months-or longer ground war fought in Europe, women could be made subject to the draft, and "could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted."[269]

By recuperating this congressional testimony, Marshall directly rebutted the majority's claim that these 80,000 women could all be volunteers.[270] He also called attention to the claim's essential absurdity. The sole "purpose of registration," as he reminded the Court, "is to protect against unanticipated shortages of volunteers"—so "conjectures about the expected number of female volunteers" necessarily accomplished very little.[271] It wasn't just that the *Goldberg* majority had willfully misinterpreted the military's war plans, in other words, but also that it had willfully misunderstood the legislation it was meant to evaluate. This was only part of Justice Marshall's wide-ranging dissent, to be sure, but it was a crucial one: for it was here that he most clearly demonstrated the gap between registration and conscription—and here that he declared there was no possible definition of "military need" which accounted for women's "total exclusion" from the Selective Service System.[272]

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[268] *Rostker v. Goldberg*, 453 U.S. 57, 90-91, 106-108 (1981). Marshall acknowledged that military flexibility could suffer if the military drafted "'*very large numbers* of women," but insisted that "drafting only a *limited* number of women" was a different proposition—and, he insisted, a proposition that most military leaders and Department of Defense officials in fact seemed to support.
[269] *Rostker v. Goldberg*, 453 U.S. 57, 97, 100-101 (1981).
[270] *Rostker v. Goldberg*, 453 U.S. 57, 105-106 (1981).
[271] *Rostker v. Goldberg*, 453 U.S. 57, 105 (1981).
[272] *Rostker v. Goldberg*, 453 U.S. 57, 105-106 (1981).

Justice White's dissent, which was altogether more concise, was also even more focused on the 80,000 servicewomen who might (or might not) be called up in the event of an emergency. White, much like Marshall, did not believe that Congress had truly determined that "every position in the military, no matter how far removed from combat, must be filled with combat-ready men"—and, consequently, did not believe that such a calculation had truly guided Congress' decision not to amend the MSSA.[273] To illustrate this point, he not only referred to the congressional testimony to the contrary—which evidenced that the military would not be able to rely upon women volunteers alone and, specifically, that at least 80,000 women draftees could be put to use in an emergency—but also teased out the *Goldberg* majority's fundamental illogic.[274] If a draft needed to be reserved for the combat-eligible—because, during a war, even otherwise-noncombat personnel needed to be able take on combat positions—then why would the military have any use for combat-ineligible soldiers at all? Why would it matter if the women had been conscripted or if they'd volunteered? And why would it possibly need the services of 80,000 *additional* women—above and beyond the hundreds of thousands already expected to enlist (voluntarily) in the coming years?[275]

In laying out this puzzle, White wasn't only registering his dismay. He made clear that if the majority's math had been correct—that if the Court could know that "all positions for which women would be eligible in wartime could and would be filled by female volunteers"—then he would not have dissented.[276] Under other circumstances, he averred, he would have preferred to "remand [*Goldberg*] for further hearings and findings"—expressly to ascertain whether, and how

[273] *Rostker v. Goldberg*, 453 U.S. 57, 83-85 (1981).
[274] *Rostker v. Goldberg*, 453 U.S. 57, 84 (1981).
[275] *Rostker v. Goldberg*, 453 U.S. 57, 83-84 (1981).
[276] *Rostker v. Goldberg*, 453 U.S. 57, 84, 85 (1981).

many, women might be expected to volunteer without the inducement of an emergency draft. As it was, however, 80,000 prospective servicewomen were the one and only reason that Justice White filed his own opinion.

The *Goldberg* dissents were less fiery than feminists might have hoped. Ever since the case had made its way back to the Eastern District of Pennsylvania in 1980, the litigants—both Sitman and Goldberg and their government opponents—had concentrated almost exclusively on military attitudes and affairs. The justices largely followed suit—even the dissenters. But by singling out—and remonstrating against—the *Goldberg* majority's treatment of present and potential volunteer servicewomen, in particular, Justice Marshall and Justice White also identified what was in fact most audacious and most unique about the majority opinion.

As we've seen, *Rostker v. Goldberg* was far from the first time that a federal court upheld the all-male Military Selective Service Act. It wasn't the first time that a federal court upheld the MSSA after the end of the war in Vietnam or after the end of the draft. It wasn't the first time that a federal court upheld the MSSA by leaning on military necessity or by alluding to sex-specific combat restrictions. But it was the first time that a federal court incorporated not only the abstract fact of volunteer servicewomen, but a precise and ostensibly predictable number of women volunteers, into its decision-making. The *Goldberg* Court counted on American women to keep signing up to serve their country—arguably more than it counted on American men to keep doing the same—and thus decided not that the state couldn't compel women to register, but that it wouldn't need to.

In the decades since *Rostker v. Goldberg* was decided, female members of the U.S. armed forces have been gradually permitted to serve in every sort of specialized unit, every military occupational specialty, and every possible area of hostilities. The last remaining combat

exclusion policies were finally removed by Defense Department edict in 2015, but they were also steadily eroded—throughout the Gulf War, the wars in Afghanistan and Iraq, and various smaller-scale conflicts—in the decades beforehand.[277] Nonetheless, *Goldberg* has never been overturned. The draft has never been revived, either—but that hasn't made the Supreme Court reconsider. To this day, Selective Service registration remains a male-only obligation: in no small part because a tiny proportion of American women have joined the military of their own accord.

[277] See, for example, Matthew Rosenberg and Dave Philipps, "Pentagon Opens All Combat Roles to Women: 'No Exceptions,'" *New York Times*, December 4, 2015, Section A, 1. See also *Women in the United States Military*, comp. Friedl, 202-205; and Holm, *Women in the Military*.

CONCLUSION

James Lesmeister first sued the Selective Service System in the spring of 2013.[1] He had recently turned eighteen and, much like Andrew Rowland and Robert Goldberg had done decades before, he had already registered with the Selective Service, as was still required of "every male citizen of the United States" and (most) "every other male person residing in the United States" between the ages of eighteen and twenty-six.[2] Unlike Rowland and Goldberg, Lesmeister was not part of a bona fide draft resistance movement—or, at the very least, not one that could claim over half a million adherents.[3] By 2013, no one had been drafted into the U.S. military—an All-Volunteer Force since 1973—in forty years.[4] But Lesmeister did have institutional backing, and a co-plaintiff: the National Coalition for Men.[5]

The National Coalition for Men, or NCFM, is a 501(c)(3) non-profit organization now headquartered in San Diego, "committed to ending harmful discrimination and stereotypes

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[1] Complaint at 1, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013), available at National Coalition for Men (NCFM), https://web.archive.org/web/20231025162011/https://ncfm.org/wp-content/uploads/2013/04/130405-NCFM-Selective-Service-lawsuit-complaint-3.pdf (accessed October 25, 2023) [hereafter cited as Complaint, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013)].

[2] Complaint at 3, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013); *Military Selective Service Act*, *U.S. Code* 50 (2022), § 3802.

[3] On the Vietnam War-era draft resistance movement, see Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003); David Cortright, *Peace: A History of Movements and Ideas* (New York: Cambridge University Press, 2008), especially Chapter 8; and Robert O. Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012), especially Chapter 2.

[4] On the creation of the All-Volunteer Force (or AVF), see Beth L. Bailey, *America's Army: Making the All-Volunteer Force* (Cambridge: Belknap Press of Harvard University Press, 2009).

[5] Complaint at 1-3, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013).

against boys, men, their families and the women who love them."[6] Even now, the NCFM isn't wholly focused on challenging male-only registration, and it wasn't in 2013 either. The organization's website, for example, directly addresses a potential visitor who's been "a victim of paternity fraud," or has "lost [his] children in family court," or has been "denied health services or protection by a domestic violence shelter."[7] But 2013 marked a turning point for the NCFM—because it marked a turning point for America's servicewomen. In January of that year, Secretary of Defense Leon Panetta announced the imminent end of "'the direct combat exclusion rule,'" which, he explained, no longer accorded with the already-dangerous realities of women's deployments in Afghanistan and Iraq.[8] Consequently, in April, Lesmeister and the NCFM filed suit: because "the sole legal basis for requiring only males to register with the [Selective Service System] for the military draft no longer applies."[9]

Indeed, from its inception, *National Coalition for Men v. Selective Service System* not only took on the Military Selective Service Act but also the U.S. Supreme Court decision—in *Rostker v. Goldberg* (1981)—which had once upheld it.[10] To this end, members of the NCFM eventually joined forces with several unexpected allies and, in time, even achieved some short-lived successes. Ultimately, however, the *NCFM* suit did not give rise to a new legal precedent

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[6] "About Us," National Coalition for Men (NCFM), https://web.archive.org/web/20230914225421/https://ncfm.org/ncfm-home/ (accessed September 12, 2023).
[7] "About Us," National Coalition for Men (NCFM), https://web.archive.org/web/20230914225421/https://ncfm.org/ncfm-home/ (accessed September 12, 2023).
[8] Elisabeth Bumiller and Thom Shanker, "Equality at the Front Line: Pentagon is Set to Lift Ban on Women in Combat Roles," *New York Times*, January 24, 2013, Section A, 1.
[9] Complaint at 1-2, 5, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013).
[10] Complaint at 5, *National Coalition for Men v. Selective Service System*, No. CV13-02391 (C.D. Cal. 2013).

or to any new national policies. Instead, the litigation ultimately bore out the all-male MSSA's strange staying power, as well as the courts' enduring deference to Congress—and to Congress' authority over military matters—in the face of new facts on the ground.

But this comes as something less than a surprise. *Rostker v. Goldberg*, as this dissertation has shown, did not merely turn on the fact that "[m]en and women, because of the combat restrictions on women, [were] simply not similarly situated."[11] The decision also acknowledged volunteer servicewomen's increasing importance to the armed forces, turned to the future—and to a particular, hypothetical scenario in which the draft might be revived—and made some extraordinary predictions: 650,000 additional service personnel would need to enlist; the 570,000 or so additional men would be called up against their will; the 80,000 or so additional women would join up of their own accord.[12] The various *NCFM* opinions, handed down between 2013 and 2021, evinced little of this same precision. But the fact that servicewomen had only become more vital to the twenty-first-century military only moved the needle so much. And, in the end, it was Congress' uncertain plans for the future—rather than men and women's disparate, present-day treatment under the law—which made all the difference.

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The *NCFM* litigation, much like the *Goldberg* litigation decades earlier, proceeded in tandem with developments in the military and in the legislature. In 2013, for example, the plaintiffs filed suit because Defense Secretary Panetta had just announced that servicewomen's combat restrictions would be removed. It was set to be a "multi-year process," however, and its "full extent" was not yet apparent when the case first reached the U.S. District Court for the

[11] *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).
[12] *Rostker v. Goldberg*, 453 U.S. 57, 81-83 (1981).

Central District of California—which was why the judge assigned to the case promptly dismissed it as "unripe."[13]

In December 2015, a new Secretary of Defense, Ashton Carter, clarified that every combat post, in every branch of the military—"no exceptions"—would soon be opened up.[14] It was largely for this reason that, in February 2016, the U.S. Court of Appeals for the Ninth Circuit ruled to "reverse and remand for further proceedings" in the Central District of California—meant to determine, first and foremost, if "women's roles in combat [had]…changed sufficiently to revisit" the Supreme Court's decision from 1981.[15]

In November 2016, the *NCFM* litigation started to slow down once again. The same California district judge who had decided to dismiss the plaintiffs' complaint three years earlier now decided that, while James Lesmeister had standing to sue, the NCFM did not.[16]

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[13] As summarized in *National Coalition for Men v. Selective Service System*, No. 13-56690, slip op. at 1-2 (9th Cir. 2016), available at Justia, https://law.justia.com/cases/federal/appellate-courts/ca9/13-56690/13-56690-2016-02-19.html (accessed October 24, 2023) [hereafter cited as *National Coalition for Men v. Selective Service System*, No. 13-56690 (9th Cir. 2016)]. The judge assigned to the case was Dale S. Fischer, appointed to the U.S. District Court for the Central District of California by President George W. Bush in 2003. See *National Coalition for Men v. Selective Service System*, Civil Action No. H-16-336, slip op. at 2 (S.D. Tex., Houston Div. 2018), available at Justia, https://cases.justia.com/federal/district-courts/texas/txsdce/4:2016cv03362/1396506/66/0.pdf?ts=1523093692 (accessed October 24, 2023) [hereafter cited as *National Coalition for Men v. Selective Service System*, Civil Action No. H-16-3362 (S.D. Tex., Houston Div. 2018)]; and "Fischer, Dale S.," Federal Judicial Center, https://web.archive.org/web/20231005180558/https://www.fjc.gov/history/judges/fischer-dale-s (accessed October 5, 2023).

[14] Matthew Rosenberg and Dave Philipps, "Pentagon Opens All Combat Roles to Women: 'No Exceptions,'" *New York Times*, December 4, 2015, Section A, 1.

[15] *National Coalition for Men v. Selective Service System*, No. 13-56690, slip op. at 2-3 (9th Cir. 2016). The Selective Service had "argue[d] that women's roles in combat have not changed sufficiently to revisit" *Rostker v. Goldberg*, but the Ninth Circuit regarded that as "a question about the merits of the Coalition and Lesmeister's claims, not about ripeness"—and thus regarded it as yet another reason to remand the suit for further proceedings.

[16] As summarized in *National Coalition for Men v. Selective Service System*, Civil Action No. H-16-3362, slip op. at 2 (S.D. Tex., Houston Div. 2018).

Accordingly, the judge also "transferred the case to the Southern District of Texas," where Lesmeister in fact lived.[17] A little over a month later, Congress passed the National Defense Authorization Act for Fiscal Year 2017, which, among other provisions, established a new National Commission on Military, National, and Public Service.[18] The Commission was endowed with several objectives—all of them aimed at "increas[ing] and "incentiviz[ing]" public service, especially military service, and especially among young people—but it was also tasked, specifically, with determining whether the Selective Service System was still necessary, and whether "expanding registration to include women" might help improve it.[19] This marked the first time since 1980—and since *Rostker v. Goldberg*—that Congress had seriously considered the possibility of a universal, gender-neutral MSSA.[20]

While the Commission got to work, the litigation also continued to move forward, now in another state. First, in August 2017, Gray H. Miller, a district judge appointed to the U.S. District Court for the Southern District of Texas by President George W. Bush, permitted Lesmeister to add a new co-plaintiff, Anthony Davis.[21] Then, in April 2018, Judge Miller ruled that, because

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[17] As summarized in *National Coalition for Men v. Selective Service System*, Civil Action No. H-16-3362, slip op. at 2 (S.D. Texas, Houston Div., 2018).
[18] *National Defense Authorization Act for Fiscal Year 2017*, Public Law 114-328, *U.S. Statutes at Large* 130 (2016): 2000-2968.
[19] *National Defense Authorization Act for Fiscal Year 2017*, Public Law 114-328, *U.S. Statutes at Large* 130 (2016): 2000-2968.
[20] "The Senate version of the bill"—which did not pass—"would have required women to register…but the final law instead created a commission to study the military Selective Service process to determine, among other questions, whether the process was needed at all and, if so, whether to conduct it 'regardless of sex.'" See *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 548 (5th Cir. 2020).
[21] *Lesmeister v. Selective Service System*, Civil Action No. H-16-3362, slip op. at 2, 10 (S.D. Tex., Houston Div. 2017), available at Justia, https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2016cv03362/1396506/59/ (accessed October 24, 2023). Gray H. Miller was appointed to a seat on the U.S. District for the Southern District of Texas by President George W. Bush in 2006. He would assume senior status the next year, in December 2018. See

Davis (unlike Lesmeister) was an official "member of the NCFM," the organization now had "associational standing" as well.[22] It wasn't until February 2019, almost six years after the plaintiffs initially filed suit, that Miller finally ruled on the merits of their claims—and finally decided that the all-male MSSA violated young men's Fifth Amendment rights.[23]

Miller's opinion did not abandon *Rostker v. Goldberg* altogether. Indeed, it was chiefly because the Supreme Court had pledged to apply the "important government interest" test in *Goldberg* that Miller now vowed to do the same here.[24] Furthermore, although the *NCFM* plaintiffs had argued—much like *Goldberg* appellees had argued decades earlier—that a potential, future draft would "not necessarily be used to draft combat troops in future wars," Miller declined to pursue that line of reasoning.[25] Instead, much like the *Goldberg* Court, he deliberately deferred to Congress—which, as his opinion relayed, "still understands the draft…to be for the 'mass mobilization of primarily combat troops.'"[26] Thus, according to Miller, the "important government interest" that the MSSA needed to satisfy in 2019 was just the same as it had been almost forty years earlier: that of "raising and supporting armies" and, more precisely,

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"Miller, Gray Hampton," Federal Judicial Center, https://web.archive.org/web/20231005182139/https://www.fjc.gov/history/judges/miller-gray-hampton (accessed October 5, 2023).

[22] *National Coalition for Men v. Selective Service System*, Civil Action No. H-16-3362, slip op. at 2, 6 (S.D. Tex. Houston Div. 2018).

[23] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 572, 578-582 (S.D. Tex., Houston Div. 2019); as further summarized in *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 548 (5th Cir. 2020).

[24] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 577-578 (S.D. Tex., Houston Div. 2019).

[25] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 578 (S.D. Tex., Houston Div. 2019).

[26] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 578 (S.D. Tex., Houston Div. 2019).

that of "drafting and raising combat troops."[27] Additionally, Miller's opinion explicitly affirmed—citing the *Goldberg* majority opinion—that onerous "administrative burden[s]," such as those likely involved in expanding registration and conscription, could be reason enough to sustain sex-based classifications in the context of "military affairs," in particular.[28]

And, even still, Judge Miller offered up a new verdict. Back in 1980, he explained, Congress' "administrative concerns" had revolved around calling up, training, and determining how to deploy "large numbers" of the combat-ineligible—but women were now eligible for combat.[29] In 1981, the Supreme Court had upheld the MSSA because men and women were "'not similarly situated'" for a prospective draft of combat troops and combat replacements—but women could now take on, and rotate in and out of, every one of these military roles.[30] "In short," Judge Miller wrote, "while historical restrictions on women in the military may have justified past discrimination"—they no longer did.[31]

The Selective Service promptly appealed to the U.S. Court of Appeals for the Fifth Circuit, which had jurisdiction over Louisiana, Mississippi, and Texas federal courts, and which had also become "one of the most conservative – and influential – courts in America" since President Donald Trump had appointed six of its judges.[32] In October 2019, the American Civil

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[27] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 578, 582 (S.D. Tex., Houston Div. 2019).
[28] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 580 (S.D. Tex., Houston Div. 2019).
[29] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 580 (S.D. Tex., Houston Div. 2019).
[30] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 576, 581-582 (S.D. Tex., Houston Div. 2019).
[31] *National Coalition for Men v. Selective Service System*, 355 F.Supp.3d 568, 582 (S.D. Tex., Houston Div. 2019).
[32] *National Coalition for Men v. Selective Service System*, 969 F.3d 546 (5th Cir. 2020); David Smith, "How Trump reshaped the fifth circuit to become the 'most extreme' US court," *The*

Liberties Union, working together with several other civil rights groups (including the National Organization for Women and the National Women's Law Center), filed an *amicus curiae* (or friend-of-the-court) brief in support of Lesmeister, Davis, and the NCFM.[33] Less than six months later, meanwhile, in March 2020, the National Commission on Military, National, and Public Service released its final report, which advocated for "extending the obligation of registering for the Selective Service to all Americans, men and women, and reconceiving registration as a solemn occasion that requires reflection on the obligation to serve one's country if called to do so in a time of national emergency."[34] This was just one of several recommendations that the Commission outlined, however—none of which were binding—and Congress did not instantly act to amend the male-only MSSA (or to "reconceiv[e] registration" in any other way). Then, in August, the Fifth Circuit ruled to overturn the lower court's decision.[35]

The three judges assigned to the case—one appointed to the Fifth Circuit by President George H.W. Bush, one by President Bill Clinton, and one by President Trump—did not deny that "the factual underpinning of the controlling Supreme Court decision [had] changed," but

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Guardian, November 15, 2021, accessed October 5, 2023, https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us. As of November 2021, twelve of the Fifth Circuit's seventeen "active judges" were Republican appointees; President Donald Trump appointed six of them.

[33] Brief for the American Civil Liberties Union, et al. as Amicus Curiae, *National Coalition for Men v. Selective Service System*, 969 F.3d 546 (5th Cir. 2020), available at American Civil Liberties Union (ACLU), https://www.aclu.org/cases/national-coalition-men-et-al-v-selective-service-system-et-al#legal-documents (accessed September 12, 2023).

[34] National Commission on Military, National, and Public Service, "Inspired to Serve: Executive Summary" (March 2020): 11, available at U.S. House of Representatives Document Repository, https://web.archive.org/web/20231024043034/https://docs.house.gov/meetings/AS/AS00/20210519/112680/HHRG-117-AS00-Wstate-HeckJ-20210519-SD001.pdf (accessed October 24, 2023) [hereafter cited as National Commission on Military, National, and Public Service, "Inspired to Serve"].

[35] *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 547, 550 (5th Cir. 2020).

they insisted that their hands were tied nonetheless.[36] As the opinion explained, the Supreme Court had already upheld "the exact statute at issue here" almost forty years earlier—and, as the opinion further insisted, it was the Supreme Court, and the Supreme Court alone (rather than any district or appellate court), which had the authority to overturn its own decisions.[37] According to the Fifth Circuit, *Rostker v. Goldberg*, once premised upon extensive "legislative history" and an appropriate deference to Congress, was still good law—and thus still "controlling" in the case at hand.[38]

At this point, the American Civil Liberties Union took fuller charge of the litigation, filing a petition for a writ of certiorari with the Supreme Court in January 2021.[39] The National Organization for Women filed another *amicus* brief arguing against the all-male MSSA.[40]

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[36] *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 549-550 (5th Cir. 2020). The three judges assigned to the case were Jacques Wiener, nominated to a seat on the Fifth Circuit by President George H.W. Bush in 1989 and confirmed in 1990; Carl Stewart, nominated to a seat on the Fifth Circuit by President Bill Clinton and confirmed in 1994; and Don Willett, nominated to a seat on the Fifth Circuit by President Donald Trump and confirmed in 2017. See "Wiener, Jacques Loeb, Jr.," Federal Judicial Center, https://web.archive.org/web/20231005194423/https://www.fjc.gov/history/judges/wiener-jacques-loeb-jr (accessed October 5, 2023); "Stewart, Carl E.," Federal Judicial Center, https://web.archive.org/web/20231005194520/https://www.fjc.gov/history/judges/stewart-carl-e (accessed October 5, 2023); and "Willett, Don R.," Federal Judicial Center, https://web.archive.org/web/20231005194657/https://www.fjc.gov/history/judges/willett-don-r (accessed October 5, 2023).

[37] *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 547, 550 (5th Cir. 2020).

[38] *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 548-550 (5th Cir. 2020).

[39] Petition for Writ of Certiorari, *National Coalition for Men v. Selective Service System*, 593 U.S. ____ (2021), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C20-928_pwc_0002/Brief?accountid=14657 (accessed October 5, 2023).

[40] Brief for the National Organization for Women Foundation, et al. as Amici Curiae, *National Coalition for Men v. Selective Service System*, 593 U.S. ____ (2021), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C20-928_acb_0005/Amicus Curiae Brief?accountid=14657 (accessed October 5, 2023).

Perhaps more remarkably, several military affinity groups (including the Modern Military Association of America and the Service Women's Action Network) also submitted a similar brief—as did ten "retired senior military officers," who stated categorically that "the exclusion of women from the selective service is inimical to the Nation's security interests."[41] Nevertheless, in June 2021, the Supreme Court declined to hear the case.[42]

The Supreme Court—not unlike the Fifth Circuit—had also become increasingly conservative during the Trump administration.[43] But here, the justices' reluctance to weigh in crossed partisan lines: it was Justice Sonia Sotomayor, a stalwart of the Court's liberal wing, who published a statement "respecting the denial of certiorari," which was also signed by both Clinton nominee Stephen Breyer and Trump nominee Brett Kavanaugh.[44] The statement recapitulated the Court's reasoning in *Rostker v. Goldberg* ("women were 'excluded from combat' roles and hence 'would not be needed in the event of a draft'"); reviewed the latest, most relevant facts (women, now uniformly eligible for combat, had become Army Rangers, Green Berets, even Navy SEALs); and explained that this gap—between the "role of women in

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[41] Brief for the Modern Military Association of America, et al. as Amici Curiae, *National Coalition for Men v. Selective Service System*, 593 U.S. ____ (2021), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C20-928_acb_0004/Amicus Curiae Brief?accountid=14657 (accessed October 5, 2023); Brief for Gen. Michael Hayden, et al. as Amici Curiae at 1-2, *National Coalition for Men v. Selective Service System*, 593 U.S. ____ (2021), *Supreme Court Insight*, https://supremecourt-proquest-com.proxy.uchicago.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C20-928_acb_0003/Amicus Curiae Brief?accountid=14657 (accessed October 5, 2023).

[42] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 1, 3 (2021).

[43] Strikingly, between 2019 and 2021, the justices overturned thirteen of the fifteen Fifth Circuit decisions they faced on appeal. See David Smith, "How Trump reshaped the fifth circuit to become the 'most extreme' US court," *The Guardian*, November 15, 2021, accessed October 5, 2023, https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us.

[44] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 1 (2021).

the military" in 1981 and in 2021—accounted for why *National Coalition for Men v. Selective Service System* was now before the highest court in the land.[45] The statement also explained, however, that the NCFM and its supporters were "not the only ones asking whether a male-only registration requirement can be reconciled with the role women can, and already do, play in the modern military."[46] Congress, which had created the National Commission on Military, National, and Public Service, was busy doing the same—and, as recently as "a few months ago," Sotomayor recounted, "Senate Armed Services Committee…Chairman Jack Reed [had] expressed his 'hope' that a gender-neutral registration requirement will be 'incorporated into the next national defense bill.'"[47] By June 2021, Congress had not yet taken any steps to make gender-neutral registration a reality. "But at least for now," Sotomayor concluded, "the Court's longstanding deference to Congress on matters of national defense and military affairs cautions against granting review while Congress actively weighs the issue."[48]

As of this writing, in October 2023, the Selective Service System remains the same as ever. Soon, young men born in 2006 will begin to register for a military draft that may never come. Women born in 2006, though they may very well soon enlist in the armed forces—in every possible unit and in every possible role—will do nothing of the sort.

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It was only two months after the Supreme Court denied certiorari in *National Coalition for Men v. Selective Service System*, at the end of August 2021, that the U.S. military withdrew

[45] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 1-2 (2021).
[46] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 2 (2021).
[47] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 2 (2021).
[48] *National Coalition for Men v. Selective Service System*, 593 U.S. ____, slip op. at 3 (2021).

its troops from Afghanistan.[49] By that time, America had been at war in Afghanistan—and all around the world, fighting a nebulous, "global network of terrorists"—for almost twenty years.[50] Nonetheless, in 2020 and 2021, when members of Congress—and the Supreme Court justices who deferred to Congress' authority—contemplated "a time of national emergency" in which American men, and perhaps American women, might one day be called upon to serve their country, they only imagined a far-off future.[51] The twenty-first-century war on terror, which was never formally declared, has also never come to a close—but it has been waged entirely by volunteers, and by a smaller and smaller slice of the American populace.[52] It has not been a "shared civil projec[t]."[53] It has not been "shared generally" at all.[54] Which is yet another reason, perhaps, why the Court steered clear of the *NCFM* litigation: because registration no longer seems tethered to reality, and no longer feels like a meaningful civic obligation.

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[49] See, for example, Robert Burns and Lolita C. Baldor, "Last troops exit Afghanistan, ending America's longest war," *AP News*, August 30, 2021, accessed September 12, 2023, https://apnews.com/article/afghanistan-islamic-state-group-e10e038baea732dae879c11234507f81.

[50] George W. Bush, "Address to a Joint Session of Congress and the American People," September 20, 2001, https://web.archive.org/web/20230915180722/https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html (accessed September 15, 2023).

[51] National Commission on Military, National, and Public Service, "Inspired to Serve," 11.

[52] See, for example, Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012), especially Chapter 4; Jennifer Mittelstadt, *The Rise of the Military Welfare State* (Cambridge: Harvard University Press, 2015); Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (New York: Simon & Schuster, 2016); and Phil Klay, *Uncertain Ground: Citizenship in an Age of Endless, Invisible War* (New York: Penguin Press, 2022).

[53] The idea that, until the Vietnam War, Americans wars were regarded as "shared civil projects" can be found in Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Cambridge: Harvard University Press, 2018), 21.

[54] The Selective Service Act of 1948 had proposed that "in a free society the obligations and privileges of serving in the armed forces…should be shared generally." See *Selective Service Act of 1948*, Public Law 80-759, *U.S. Statutes at Large* 80 (1948): 604-644.

This dissertation began with a cartoon, but it also began years before that: as I grew up, graduated from high school, graduated from college, and enrolled in a Ph.D. program in a time of unceasing—but largely unseen—warfare. I looked to the past, in part, because I expected to find something different: military conflicts which mattered precisely because they demanded the service and sacrifice of all Americans, men and women alike—and which transformed the rights and obligations of twentieth-century citizenship accordingly.

But this dissertation has revealed a more complicated picture.

In the 1920s, naturalization examiners and federal judges—up to and including the justices of the Supreme Court—began to insist that petitioners for American citizenship, women as well as men, make a pledge to bear arms in defense of the United States. It was a demand which took root and spread in the years *between* the First and Second World Wars, rather than in the midst of actual hostilities—and in the exact period when millions of immigrant women, as well as thousands of expatriated, native-born women, were first made to apply for naturalization on their own (instead of becoming citizens automatically through marriage). But *United States v. Schwimmer* (1929) and its progeny did not, in fact, impose any new military policies—and did not pave the way for women to be conscripted into combatant service. The court decisions only required that resident alien women—and resident alien women alone—be willing to take up arms without ever being obligated to do the same.

In the late 1940s, after World War II, the U.S. armed forces began to deploy its servicemembers—and their growing families—all around the globe. There were many reasons to suddenly care and provide for hundreds of thousands of service wives—to boost recruitment, to improve morale, to strengthen America's international reputation—and these women came to be regarded as integral members of military communities overseas. But it was this same attitude

which justified civilian service wives' trials by court-martial—even though they'd never enlisted in the military themselves, and even though the United States was no longer actively at war. Dependent service wives, in other words, not only benefited from the military's largesse but also exposed its overlarge judicial authority to view. And so, in *Reid v. Covert* (1957), the Supreme Court not only defended the proposition that married women remained independent citizens, entitled to their own Fifth and Sixth Amendment-guaranteed rights to trial by jury, but did so as a means of reining in the postwar U.S. military, its specialized courts, and its global footprint.

In the 1950s and '60s, at the height of the Cold War, ordinary Americans began to agonize over a whole slew of dystopian possibilities: even if nuclear war didn't annihilate everyone on the planet, the thinking went, then global overpopulation might set off a third world war; or a communist takeover—or, just as likely, homegrown government overreach—might destroy the nuclear family and all it stood for. The Planned Parenthood League of Connecticut weaponized these anxieties, consistently arguing that its campaign to legalize birth control—and, specifically, to ensure that Connecticut married couples could plan their families without censure or surveillance—was part and parcel of the United States' fight against the Soviet Union. *Griswold v. Connecticut* (1965), which first affirmed a constitutional right to marital privacy, validated the PPLC's long-term strategy. But *Griswold* likewise ensured that certain Americans, less well-positioned to take advantage of the Court's regard for normative domesticity, were also less well-protected.

In the late 1960s, during the Vietnam War, a small number of draft resisters began to challenge the Military Selective Service Act on sex discrimination grounds. It was a radical gambit which became less and less radical over time, as the Supreme Court gradually struck down more and more sex-based classifications, as both the war and the draft itself eventually

came to an end, and as female soldiers became increasingly vital to the brand-new All-Volunteer Force. Nonetheless, federal courts, up to and including the Supreme Court in *Rostker v. Goldberg* (1981), continued to uphold the all-male MSSA, transforming the military's present-day reliance upon women volunteers into an expectation that women would continue to volunteer in the future—and thus obviating the need to ever conscript them against their will.

In every instance, the Supreme Court trafficked in compromises, indulged in contradictions, and set off a string of unintended consequences which we're still living with today. As we've seen, American women—of every citizenship status and of every age—are still excluded from Selective Service registration. Since the Supreme Court struck down abortion rights in 2022, the *Griswold* precedent has likewise come under attack, alongside many more decisions and policies that have protected women's reproductive rights and other sexual civil liberties over the past half-century.[55] Generous family policies remain an indispensable (and controversial) part of military recruitment, especially as social welfare for civilians has stayed in decline; and questions about the appropriate sweep of military jurisdiction also continue to loom large, not only for the ever-rising ranks of civilian contractors but also for enlisted servicewomen

[55] See, for example, Justice Clarence Thomas's concurring opinion in *Dobbs v. Jackson Women's Health Organization, et al*., 142 S.Ct. 2228, 2301 (2022); and Carol Sanger, "The Rise and Fall of a Reproductive Right: *Dobbs v. Jackson Women's Health Organization*," *Family Law Quarterly* 56, no.s 2-3 (2022-2023): 117-160. In February 2023, less than a year after the Supreme Court decided *Dobbs*, the Department of Defense "announced that it would give U.S. service members up to 21 days of leave for abortions or fertility treatments and reimburse travel and transportation costs while obtaining such treatments." In response, however, Alabama Senator Tommy Tuberville has—as of this writing—singlehandedly prevented the promotions of hundreds of military officials. See Karoun Demirjian, "One Senator Is Holding Up Promotions Over Military's Abortion Policy," *New York Times*, April 1, 2023, Section A, 12; and Karoun Demirjian, "3 Promotions for Generals Get Through Senator Hold," *New York Times*, September 22, 2023, Section A, 17.

who have been sexually assaulted by their fellow soldiers.[56] And immigration and naturalization policies are still regarded as matters of national security, arguably more now than when petitioners for citizenship were still made to promise to bear arms, and with devastating consequences for migrant women and children, in particular.[57]

This dissertation offers no clear or easy solutions. But by suggesting new ways of thinking about women, war, and the law in the past, it may also help us rethink and respond to equally complicated and contingent formations in the present.

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[56] See, for example, Brooks, *How Everything Became War and the Military Became Everything*; Mittelstadt, *The Rise of the Military Welfare State*; Brittany Warren, "The Case of the Murdering Wives: *Reid v. Covert* and the Complicated Question of Civilians and Courts-Martial," *Military Law Review* 212 (Summer 2012), 185-193; Jennifer Steinhauer, "Old-Guard Senators Defy Changes to Military Handling of Sex Assault," *New York Times*, June 4, 2021, Section A, 16; and Melinda Wenner Moyer, "'A Poison in the System': The Epidemic of Military Sexual Assault," *New York Times Magazine*, August 3, 2021, accessed October 24, 2023, https://web.archive.org/web/20231024042633/https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html.

[57] See, for example, the *Homeland Security Act of 2002*, Public Law 107-296, *U.S. Statutes at Law* 116 (2002): 2135-2321, which created the Department of Homeland Security (DHS), and which now also includes U.S. Immigration and Customs Enforcement (ICE); the Supreme Court's decision in *Trump v. Hawaii*, No. 17-965, 585 U.S. ____ (2018), more commonly known as the "Muslim ban" case; and the articles Manny Fernandez, "'You Have to Pay with Your Body': The Hidden Nightmare of Sexual Assault on the Border," *New York Times*, March 3, 2019, accessed October 24, 2023, https://web.archive.org/web/20231024042804/https://www.nytimes.com/2019/03/03/us/border-rapes-migrant-women.html; and Susan Ferriss, "The Trump administration knew migrant children would suffer from family separations. The government ramped up the practice anyway," *The Texas Tribune*, December 16, 2019, accessed October 24, 2023, https://web.archive.org/web/20231024042911/https://www.texastribune.org/2019/12/16/trump-administration-knew-family-separations-harm-migrant-children/.

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