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Examining Entrenched Masculinities within the Republican Government Tradition

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EXAMINING ENTRENCHED MASCULINITIES IN THE REPUBLICAN GOVERNMENT TRADITION

Jamie R. Abrams*

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I. INTRODUCTION

“May all our citizens be soldiers, and all our soldiers citizens,” Sarah Livingston Jay toasted to revelers celebrating the Revolutionary War in 1789.¹ She expressly conveyed what this article describes as the “foundational fusion” of republican government traditions coupling the military service of citizens-soldiers with male political citizenship.² While the core of this fusion is deep, long-standing, and well-documented, this article explores the implicit tensions conveyed in her toast – the dominant masculinity dimensions of this foundational fusion.³ How do women and black men historically gain full political citizenship and effectuate republican government guarantees given its anchoring in entrenched dominant masculinities? Examining the masculinities dimensions of the foundational fusion, this article concludes that entrenched masculinities persist within the republican government tradition – even in its post Reconstruction rebirth – absent full military integration, thus rendering both the republican government clause and the voting amendments relevant to military integration.

This article reveals how masculinities played a stabilizing and central role in our nation’s founding. Masculinities, the study of how men relate to each other and construct their identity, have historically been unexamined within our legal and social institutions, even as they profoundly shape institutions, histories, politics, and human relations.⁴ Yet masculinities are “both omnipresent and invisible.”⁵ After famously declaring “American men have no history,” Michael Kimmel began the monumental task of documenting how manhood and masculine relations in America have shaped history, institutions, and social order over time.⁶ He explored the changing visions of “ideal” masculinity throughout history and the competing constructions of masculinities that chal-

¹ LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 236 (1998).

² The term “foundational” here refers to the historical period of our nation’s founding. This article describes the foundational fusion in a historical and descriptive sense to examine its modern relevance. It does not take a normative view of this fusion.

³ Masculinities, the study of how men relate to each other and construct their identity, have historically been unexamined within our legal and social institutions. *See e.g.*, TODD W. REESER, MASCULINITIES IN THEORY 20 (2010).

⁴ Todd Reeser explains the symbiotic relationship of masculinities and institutions: “[M]asculinity can be thought of both as created by institutions and as creating them, and the process of the construction of masculinity as a constant back-and-forth movement between masculinity and institutions.” *Id.*

⁵ REPRESENTING MASCULINITY: MALE CITIZENSHIP IN MODERN WESTERN CULTURE (Dudink, Hagemann & Clark eds. 2007).

⁶ MICHAEL S. KIMMEL, MANHOOD IN AMERICA 1 (2d ed. 2006). Kimmel explained that the task of documenting a history of men as men involved charting the definition of masculinity and how it has changed historically and also how manhood has affected the activities of men. *Id.*

lenged the normative ideal (characterized as dominant and marginalized masculinities).⁷ Kimmel's work specifically and masculinities scholarship generally has revealed transformational historical moments during which American masculinities were in crisis as men reinvented and redefined their identities and their social interactions. These masculinities crises or transformational episodic periods aligned with shifts in the foundational fusion of military service and citizenship.

The citizen-soldier tradition fused, not just military service and citizenship, but masculinities squarely within the republican government tradition. Men engaged in collective self-defense, therefore they self-governed. Exploring the masculinities dimensions of the republican government tradition necessarily positioned historical enfranchisement struggles for women and for black men to challenge the foundation of republican government and dominant masculinities itself. The Civil War yielded precisely the seismic shifts necessary for enfranchisement as it transformed masculinities, military service, and citizenship, and therein the republican government tradition to which they were fused. Reconstruction destabilized longstanding dominant masculinities and shifted military service to a duty of national citizenship, weakening its local performative function in all regions and abandoning it in others. Yet it also revealed that "bullets for ballots" was still the driving catalyst for political rights and that entrenched masculinities persist in political citizenship.

The Nineteenth Amendment⁸ is treated in a eulogistic way today.⁹ This paper uses masculinities analysis to challenge that treatment, arguing instead that the Nineteenth Amendment cannot be understood without positioning it in its broader constitutional context of citizenship. If military service was constructed in the republican government tradition symbiotically with voting and as an expression of masculinities, then military integration remains essential to equal citizenship today. Revealing the masculinities dimensions of the suffrage movement against the historical backdrop of the morphing foundational fusion suggests that military integration is not just about individual rights, but it is necessary to fulfill republican government guarantees, to eliminate vestiges of coverture and separate sphere ideologies,¹⁰ and to decouple masculinity and citizenship.

⁷ KIMMEL, *supra* note 6, at 4.

⁸ The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation. U.S. CONST. amend. XIX.

⁹ See e.g., Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 132-33 (Sarat & Kearns eds., 2002) (noting that the Nineteenth Amendment is "for all practical purposes an irrelevance").

¹⁰ Historian Linda Kerber explains the importance of coverture to United States history, foreshadowing its vestigial role in the military service exclusion: "[Since the Revolutionary War], 'the substitution of married women's obligations to their husbands and families for their obligations to the state has been a central element in the way Americans have thought about the relation

II. THE “FOUNDATIONAL FUSION” OF MILITARY SERVICE, CITIZENSHIP, AND MASCULINITIES

Military service, citizenship, and masculinities have been fused since our founding.¹¹ In 1789, Sarah Livingston Jay toasted revelers celebrating the Revolutionary War: “May all our citizens be soldiers, and all our soldiers citizens.”¹² She expressly conveyed deep-rooted founding principles linking republican government, military service, and citizenship. The fusion of military service and citizenship dates back to ancient Greece in republican governance.¹³ The connections are symbiotic whereby citizens serve in the military to ensure good governance and they govern to decide when to wage war.¹⁴ While deep questions exist regarding the threshold fusion of citizenship and military service in political systems, this paper puts that question aside at the outset to focus on the masculinities implications of the fusion to modern citizenship.

The tradition that Jay invokes is notably a performative one. Performative expressions of republican citizenship include military service, voting,¹⁵ and jury service.¹⁶ “Individuals *become* republican citizens *only* as they engage together in civic and martial practices. Only through such participation do they . .

of all women, including unmarried women, to state power. One by one, most of these substitutions have come to seem inappropriate and have been abandoned, but in each case only after a long and complicated struggle.” KERBER, *supra* note 1, at 11.

¹¹ See generally COLLEEN SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 175 (2009) (examining examination of Madison’s political thought during the 1790s to understand his view of republicanism).

¹² KERBER, *supra* note 1, at 236.

¹³ R. CLAIRE SNYDER, CITIZEN-SOLDIERS AND MANLY WARRIORS 1 (1999). Historian Thomas R. Martin explains that participation in the military was essential to helping poor citizens in Ancient Greece gain citizenship. See THOMAS R. MARTIN, ANCIENT GREECE: FROM PREHISTORIC TO HELLENISTIC TIMES, 64-65 (2000); JAMES WHITLEY, THE ARCHEOLOGY OF ANCIENT GREECE, 179 (2001) (“In Classical times participation in a city’s navy or army was one of the principal conditions of citizenship.”).

¹⁴ SNYDER, *supra* note 13, at 1. James Madison said that “a certain degree of preparation for war is not only indispensable to avert disasters in the onset, but affords also the best security for the continuance of peace.” WARREN W. HASSLER, PRESIDENT AS COMMANDER IN CHIEF 7 (1971).

¹⁵ SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES, 88 (2003) (“voting is a fundamental issue in the US for, in a republican form of government, whoever has control of the ballot box would presumably control the country”).

¹⁶ Jury service was another performative expression of civic obligation, explained by Thomas Jefferson as “the school by which [the] people learn the exercise of civic duties as well as rights.” Siegel, *supra* note 9, at 129. Siegel notes that De Tocqueville described juries as the means of “making the people rule, [and] the most efficacious means of teaching [them] how to rule well.” *Id.* at 131. See generally AKHIL REED AMAR, THE BILL OF RIGHTS 81-118 (1998) (explaining that “juries were at the heart of the Bill of Rights and they were “drawn from the community; like the militia they were ordinary citizens, not permanent government officials on the government payroll”).

. [exhibit the] patriotism, fraternity, and civic virtue that form the necessary foundation for the possibility of government [for] the common good.”¹⁷

Performing the citizen-soldier traditions particularly framed the early republic, as the founders keenly understood the need to stabilize the union and defend against external threats.¹⁸ Militias expressed citizenship, reinforced constitutional values, and structured local communities. They were heavily local, entirely male, white, and intertwined with civic participation. The Militia Act of 1792 codified the local citizen-soldier duty.¹⁹ It required the “enrollment of every free, white, able-bodied male citizen between 18 and 45 in the ‘unorganized’ or ‘common’ militia of his state and required each man to provide his own weapons.”²⁰ This largely codified existing local practices as nine of the original thirteen state constitutions already compelled male military service.²¹

Militias ritualized citizen-soldier practices locally, featuring civic festivals with military dress and display, resembling a modern sporting event.²² Political scientist R. Claire Snyder explained this local connection, foreshadowing the Civil War’s seismic shifts:

¹⁷ SNYDER, *supra* note 13, at 3 (emphasis in original). This performative expression of citizenship was central to Madison’s republican vision. SHEEHAN, *supra* note 11, at 175 (“The need to form an active citizenry whose ongoing participation in the life of the polity and responsibility for its destiny was no less part of Madison’s republican vision than the doctrine of separation of powers and checks and balances. It was, in fact, the more overarching concern for him.”).

¹⁸ See generally SAMUEL KERNELL, *THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT* 238-39, n.3 (2003) (noting that defending the union from “external military threat[s]” was a “primary motivation” for the founders as they sensed the need to protect from threats posed by Great Britain and Spain).

¹⁹ HASSLER, *supra* note 14, at 28-29 (noting that the Militia Act was enacted just one year after the Second Amendment was ratified).

²⁰ Act of May 2, 1792, ch. XXVIII, 1 Stat. 264. (“Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the company, within whose bounds such citizen shall reside . . . every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder”).

²¹ KERBER, *supra* note 1, at 242 (quoting historian J. G. A. Peacock and noting that this was an absolute requirement, consent was not necessary).

²² SNYDER, *supra* note 13, at 86-87 (Martial displays reflected a “constitution of patriotism, fraternity, civic virtue, citizenship, and masculinity.”); MARIA J. FALCO, *FEMINIST INTERPRETATIONS OF NICCOLÒ MACHIAVELLI*, (explaining that “democratic potential of the citizenship of civic practices is undermined when the primary civic practice constitutive of citizenship is service in the civic militia, because the martial practices inherent in the civic militia produce a particularly combative form of armed masculinity that ultimately undermines the mutuality entailed in the idea of republican citizenship”).

The ideal of the Citizen-Soldier required participation in the *states'* militias and thus helped constitute not *national* citizenship but citizenship that was rooted in local communities within particular states. Indeed, the emergence of American nationalism actually corresponded to a decline in the centrality of the Citizen-Soldier ideal to American politics.²³

Military service is both a performative expression of citizenship and also an age-old catalyzing agent to citizenship.²⁴ In 390 BC, for example, Rome offered males citizenship in exchange for military service, expressly hinging their stake in the commonwealth on their relative arms investment.²⁵ As a young republic, the United States also expanded suffrage in ratifying conventions beyond existing standards believing that those who fought in the war should vote on the Constitution: "If denied the right of suffrage it would debase their spirit and detach them from the interest of the country," the founders believed.²⁶ This foundational fusion is also embedded in various constitutional provisions.

A. *The Constitutional Roots of the Foundational Fusion*

This foundational fusion is constitutionally enshrined in the republican government guarantee clause, Second Amendment, jury trial amendments, commander in chief clause, and congressional war powers. The republican government guarantee clause positioned citizen-soldier defenses centrally. Article IV, Section 4 guaranteed republican government to every state and protection from invasion.²⁷ It answered the "primary question" of the form of our new government, distinctly contrasting an aristocracy or the monarchy against which the Founders had fought and linking the type of government to protection from invasion.²⁸

²³ SNYDER, *supra* note 13, at 90 (emphasis in original).

²⁴ See e.g., WOMEN'S RIGHTS IN THE UNITED STATES, A DOCUMENTARY HISTORY 305 (Winston E. Langley & Vivian C. Fox, eds., 1994); Ronald R. Krebs, *The Citizen-Soldier Tradition in the United States: Has Its Demise Been Greatly Exaggerated?* ARMED FORCES & SOC'Y, Oct. 2009, at 153, 164 (explaining that the continued link between citizenship and service is reflected in current public policy). Krebs notes that military service is an obligation of citizenship in the United States, evidenced by the requirement that all men register for selective service. Additionally, military service continues to be a method for foreign-born citizens to become naturalized American citizens. *Id.*

²⁵ Siegel, *supra* note 9, at 237.

²⁶ See AKHIL REED AMAR, AMERICA'S CONSTITUTION, A BIOGRAPHY 512, n.34 (citing *Farland's Records* 2:210 (2006)). See generally PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010) (articulating the principles that shaped constitutional ratification).

²⁷ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.")

²⁸ See AMAR (AMERICA'S CONSTITUTION), *supra* note 26, at 16 (quoting Publius).

Tyrannical King George III and his professional standing army heavily influenced the Founders.²⁹ If the monarchy involved a standing army that invaded the colonies, then a republican government must protect against invasion within a republican tradition, not by an army of the “king’s men.” Anti-federalists particularly feared a standing army as a threat to liberty and these fears can be seen in several constitutional provisions.³⁰

While the republic would not be protected with the *king’s* men; the republic’s *men* would still protect it. The republican government guarantee clause positioned *men* as the symbiotic constituency in self-governance and self-defense. This reflected citizen-soldier traditions that “those who voted should serve in the military; and those who served should vote.”³¹

The Bill of Rights further reflected the early republic’s constitutional protection of the performative local functions of jury duty and militia service. The Bill of Rights protected the local traditions of militias and jury service from federal encroachment.³² The Second Amendment prohibited the federal government from infringing the right of the people – the early militias – to bear arms.³³ The Fifth, Sixth, and Seventh Amendments constitutionally protected the jury roles of the local citizenry.³⁴

The Commander in Chief clause centralized military command power in the executive (a citizen civilian) without any requirement of prior military ser-

²⁹ EUGENE C. MURDOCK, *PATRIOTISM LIMITED 1862-1865* 4 (1967); see also HASSLER, *supra* note 14, at 7 (noting that the Declaration of Independence said that “King George III had affected to render the military independent of, and superior to, the civil power”); see also John A. Eidsmore, *The Militia in History and Today*, 25 *THE NEW AMERICAN* 6:33 (Mar. 16, 2009) (explaining how founders had mixed feelings about militias and military bodies because, on the one hand, they were to credit largely for the continental army victory, but on the other hand, the standing army of King George had quartered troops and suppressed colonists).

³⁰ SNYDER, *supra* note 13, at 80-81. Fears of a standing professional army can be seen in several clauses. See e.g., Article I, Section 8 authorized Congress to raise and support armies, with a limited funding duration of two years. U.S. CONST. art. I, § 8 (“to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years”). The same limitation did not apply to the navy, reinforcing the pointed threat of a standing *army*. See *id.* Congress could call up the militias to execute the laws, suppress insurrections, and repel invasions. *Id.* (“[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions”).

³¹ AMAR (AMERICA’S CONSTITUTION), *supra* note 26, at 323; see also Akhil Reed Amar, *Women and the Constitution*, 18 *HARVARD J. OF LAW & PUB. POL.*, 465, 471 (1995).

³² See generally AMAR (BILL OF RIGHTS), *supra* note 16, at 81-118 (explaining that “juries were at the heart of the Bill of Rights and they were “drawn from the community; like the militia they were ordinary citizens, not permanent government officials on the government payroll”).

³³ U.S. CONST. amend. II; see AMAR (BILL OF RIGHTS), *supra* note 16, at 51-52 (1998) (explaining the contemporaneous meaning of “militia” in 1789 in which “militia” was identical to “the people”).

³⁴ U.S. CONST. amend. V, VI, VII.

vice or mandated consultation with military leaders.³⁵ The Commander in Chief power defined the presidency uniquely and centrally, presuming military competence.³⁶ Performative local militia traditions in the early republic likely ensured that presidents nonetheless had some military training. While central power presented its own risks of abuse,³⁷ the founders relied heavily on their faith in George Washington and Congressional balancing powers.³⁸

The foundational fusion linking military service, citizenship, and republican government is deep in our nation's history and the constitutional text.

B. The Stabilizing Centrality of Masculinities to Solidify the Foundational Fusion

The citizen-soldier tradition was also rooted in the dominant masculinities of the era. Dominant prevailing masculinities both birthed the revolution and stabilized the new republic.

While Jay's words may have conveyed deep historical traditions, the speaker herself likely also *challenged* normative conceptions as a woman toasting the citizen-soldier tradition. Women held an ambiguous status in the early Constitution as citizens without full political rights.³⁹ Jay, a female citizen invoking the citizen-soldier tradition, thus revealed the precise tensions that this article examines.⁴⁰ The citizen-soldier tradition fused not just military service and citizenship, but also masculinities.⁴¹

³⁵ U.S. CONST. art. II, § 2. ("The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."); see HASSLER, *supra* note 14.

³⁶ Washington first used the Commander in Chief power in 1794 to call up 12,000 state militia troops to respond to the Whisky Rebels. He set the precedent "for the Commander in Chief's power to mobilize and use the militia to suppress domestic insurrection." *Id.* at 28-29.

³⁷ HASSLER, *supra* note 14, at 8 (George Mason expressed fears that a single commander "without any restraint, [] might make bad use" of the army).

³⁸ HASSLER, *supra* note 14, at 7-9 (The basis for this design came from the Founders' experience with Royal Governorships, which experienced success with "coupling" the control of armed forces with the governor role, when local assemblies had oversight power).

³⁹ Kirk Porter, A HISTORY OF SUFFRAGE IN THE UNITED STATES 235 (1969) (asserting that women in representative government has always been "troublesome"); see SALLY GREGORY McMILLIAN, SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT, 13-14 (2008) (explaining that while some women and men considered that women should have equal rights in the new American republic ultimately the government established in 1787 did not grant women citizenship or political authority); see also CAROL BERKIN, FIRST GENERATIONS: WOMEN IN COLONIAL AMERICA, 195-206 (1996).

⁴⁰ SNYDER, *supra* note 13, at 93. Classical republican theory invoked women's morality. The Ancient Greeks linked women's public role with her sexual availability and lack of virtue. KERBER, *supra* note 1, at 33.

⁴¹ SNYDER, *supra* note 13, at 2.

The word “republic” itself derives from the Latin word *res publica*, and *publica* comes from the word *pubic*, which means manhood or maturity.⁴² Military service in the early republic allowed men to become citizens and boys to become men.⁴³ Deep political theory roots base the citizen-soldier tradition in constructions of masculinities. Machiavelli posited that participation in military practices constructed masculinity, soldiers, and citizens.⁴⁴ Rousseau positioned ritual male participation in civic and martial practices as “central to masculinity, to citizenship, and to civic life in general.”⁴⁵ Machiavelli’s civic republicanism explained further that the construction of masculinity involved the denigration of femininity because it threatened the essence of armed masculinity.⁴⁶

The Revolutionary War was “preeminently a crisis of authority” with masculinity undertones.⁴⁷ It was at its core a revolt of the American sons against their father, England and its King.⁴⁸ American masculinities scholar, Michael Kimmel explained that “the white colonists felt enslaved by the English father, infantilized, and thus emasculated.”⁴⁹ American men had come to seek self-control and autonomy over life, liberty and property.⁵⁰

While destabilized masculinities were part of the war, they also stabilized the new republic after the war. Masculinities are distinctly a relational concept.⁵¹ They are fluid and characteristically dependent on the “other” to define itself.⁵² It is the framing of the “other” to define masculinities that positions masculinities theory as so informative to understanding the foundational fusion and its historical and modern relevance. The citizen-soldier tradition distinctly acted as a stabilizing agent of dominant masculinities.⁵³ Manliness and honor

⁴² Langley & Fox, *supra* note 24, at 36 (quoting Forrest McDonald responding to the question of whether women gained from the revolution).

⁴³ SNYDER, *supra* note 13, at 89.

⁴⁴ See *id.* at 22-23; J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*, 201 (1975) (“[I]t may be through military discipline that one learns to be a citizen and to display civic virtue”).

⁴⁵ SNYDER, *supra* note 13, at 56.

⁴⁶ SNYDER, *supra* note 13, at 26; Wendy Brown, *MANHOOD AND POLITICS*, 88 (1988) (stating Machiavelli’s “construction of manliness . . . entails not mere opposition to but conquest of woman”).

⁴⁷ KERBER, *supra* note 1, at 12.

⁴⁸ KIMMEL, *supra* note 6, at 14 (describing the Declaration of Independence as a “declaration of manly adulthood”).

⁴⁹ KIMMEL, *supra* note 6, at 14.

⁵⁰ KIMMEL, *supra* note 6, at 14.

⁵¹ REESER, *supra* note 3, at 20.

⁵² REESER, *supra* note 3, at 38.

⁵³ Dominant and marginalized masculinities are a hallmark characteristic of Western masculinities – notably, the use of marginalization as an intergroup dynamic to sustain dominant masculinities. Cliff Cheng, *Marginalized Masculinities and Hegemonic Masculinity: An Introduction*, 7 J. OF MEN’S STUD. 3: 295 (1999). As Cheng explains, “one’s membership in either the dominant group or a marginalized group is based on our conformity to hegemony: you either conform or

were sharply and ritually contrasted with effeminacy and dishonor.”⁵⁴ American men stabilized their new American masculinities, in part, by marginalizing British men as effeminate,⁵⁵ and by marginalizing women and black men. Historian Linda Kerber summarized that American men “stabilized” the political and social order after the Revolution by “minimi[zing] differences between white men “relative to before the war, but heightening differences between free women and men.”⁵⁶ Kerber explained, “It was white men who offered military service, white men who sought its honor, white men who dueled in its defense.”⁵⁷

In that sense, militias hold a complicated place in our nation’s history in terms of both citizenship and masculinities, revealing valuable legal and societal lessons about constitutional principles, citizenship, and status.⁵⁸ David Williams summarized that “[t]he best publicized and most malign militia theme is overt racism” and he positioned nativism as another predominant strand.⁵⁹ From the beginning, militias played a role in enforcing nativism and maintaining racism as militias divided sharply along ethnic grounds in the North and South and were used to suppress slave insurrections in the South.⁶⁰ For example, in the South local militias were linked to maintaining white supremacy and policing slave insurrections, reflecting a “white male political fraternity.”⁶¹ Thus, dominant masculinities of the era were maintained, in part, through militia service.

belong to the dominant group or you do not conform and you are marginalized because you threaten the dominant hegemonic strand.” *Id.* at 295. Dominant masculinities refer to the “most common, celebrated powerful and/or widespread types” of masculinities. JAMES MESSERSCHMIDT, *HEGEMONIC MASCULINITIES AND CAMOUFLAGED POLITICS* 159 (2010). Marginalization is the term used to describe “the relations between the masculinities in dominant and subordinated classes or ethnic groups.” R.W. CONNELL, *MASCULINITIES* 81 (2005). Marginalization is thus always relative to the “authorization of hegemonic masculinity of the dominant group.” *Id.* (noting that these terms “such as hegemonic masculinity and ‘marginalized masculinities’ name not fixed character types but configurations of practice generated in a particular situation in a changing structure of relationships”). The exclusion of marginalized and threatening groups has long been a “masculine retreat” in our nation’s history as dominant masculinities have long espoused consistent sentiments of nativism and fears of feminization. *See e.g.*, ARMANDO NAVARRO, *THE IMMIGRATION CRISIS, NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT* 20 (2009) (“Nativism the fear of foreigners was embedded in the country’s immigration experience.”); KIMMEL, *supra* note 6, at 62.

⁵⁴ Kerber, *supra* note 1, at 241.

⁵⁵ KIMMEL, *supra* note 6, at 14.

⁵⁶ KERBER, *supra* note 1, at 12.

⁵⁷ KERBER, *supra* note 1, at 33.

⁵⁸ DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT* 191 (2003).

⁵⁹ *See* WILLIAMS, *supra* note 58, at 203, 207.

⁶⁰ *See* STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT* 128 (2008) (explaining the power that militias had to apprehend slaves and search their homes).

⁶¹ SNYDER, *supra* note 13, at 93-94. The Fugitive Slave Act positioned some white male fraternity in the north to rounding up slaves. *Id.* Some states explicitly disarmed blacks “to maintain their servile condition,” for example, one state statute penalized slaves 39 lashes for being armed

C. *Enfranchisement Expansions Necessarily Challenged the “Foundational Fusion”*

Given the masculinity underpinnings of the foundational fusion, early suffrage movements implicitly challenged far more than the vote. Indeed the institution of slavery was not just about the denial of citizenship, but also about the denial of manhood to black men.⁶² Kenneth Karst explains that “for most of our national history, [meanings of masculinity and eligibility for citizenship] have been intertwined. . . . a competence identified with masculinity has seemed a condition of full citizenship, and active participation in the community’s public life has offered men reassurance of their masculinity.”⁶³

The women’s suffrage movement also necessarily required it to overcome the absence of women’s direct military participation, conceptions of men as representative governors of women, and the gendered divide between public and private.⁶⁴ Women were sharply, normatively, and unequivocally excluded from the citizen-soldier tradition. Indeed prevailing conceptions of gender, citizenship, and public roles were so widely held that the Constitution did not need to expressly exclude women.⁶⁵ Thus, while the citizen-soldier republican ideology abandoned English traditions of monarchies and professional armies, the Framers *retained* critical underpinnings of American society in common law coverture. Republican government challenged the King’s tyranny over men, but left untouched men’s common law governance (or tyranny) over women in the home.⁶⁶ Reflecting the republican government tradition in the home, men often bore both the privileges of governance and the responsibilities of it.⁶⁷ Early coverture traditions were rhetorically depicted as “privileging women rather

with a gun. HALBROOK, *supra* note 60, at 97 (noting that a few states took the view that only citizens could have arms). Some states disarmed blacks to “maintain their servile condition.” *Id.* The disarmament of blacks was done through state legislation notwithstanding use of the term “people” in the second amendment, rather than the term “citizen.” *Id.*

⁶² Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991).

⁶³ *Id.* at 503.

⁶⁴ See e.g., Linda Kerber, *Ourselves and our Daughters Forever in ONE WOMAN ONE VOTE* 35 (Marjorie Spruill Wheeler ed., 1995).

⁶⁵ See e.g., AMAR (AMERICA’S CONSTITUTION), *supra* note 26, at 19 (2006) (explaining that in republican theory “the rights of collective self-government stood shoulder to shoulder with the responsibilities of collective self-defense,” a principle that explains why women were not enfranchised; rather men represented their interests); see also Kerber, *supra* note 64 (noting, however, that this sweeping logic should not have excluded unmarried women with property).

⁶⁶ KERBER, *supra* note 1, at 11-12 (The law was called The Law of baron et feme” meaning Lord and woman.)

⁶⁷ Husbands could be liable for their wife’s crimes under certain circumstances and bound to fulfill their wife’s contractual obligations. KERBER, *supra* note 1, at 14.

than oppressing them,” “shield[ing] [women] from the stresses of public life, from the need to risk property and reputation in political encounter.”⁶⁸

To the extent that women sought rights in the early republic, they notably positioned their arguments within the republican government traditions that had shaped the early republic. Women’s suffrage challenged the democratic nature of “virtual government” by challenging the premise that republican government ordered around male-run households units, rather than individual representation, was consistent with republican government.⁶⁹ Abigail Adams famously wrote to John Adams asking him to “remember the ladies” and restrain the power of husbands to limit tyranny and explaining that rebellion will be necessary without protections from tyranny.⁷⁰ This line of argument leveraged the precise fusion of republican government theory and dominant masculinities that had fostered the revolution.

From the founding, women’s lack of military service underscored their exclusion from self-governance. John Adams summarized the argument opposing women’s suffrage in his famous 1776 letter to James Sullivan, stating that “men are fit for the hardy enterprises of war, as well as the arduous cares of state,” while women’s “attention is so much engaged with the necessary nurture of their children that nature has made them fittest for domestic cares.”⁷¹ Thus, long before the women’s suffrage movement, the political framing of suffrage fused military service and political life and polarized military service and family life.

In this framework, women accordingly had to carve out a form of civic participation in the early republic that carefully navigated this “foundational fusion.” They defined roles as “mothers of citizens of the republic.”⁷² In the “republican mother” tradition, women leveraged indirect principles of service, such as allegiance and loyalty,⁷³ but women’s direct citizenship remained tenuously constructed.⁷⁴ Gradually “republican mothers” moved into public reforms that fostered and cultivated the health of the republic through social and benevolent work.⁷⁵ Women advocated for aid to widows, orphans, health care,

⁶⁸ KERBER, *supra* note 1, at 15.

⁶⁹ Siegel, *supra* note 9, at 150.

⁷⁰ Siegel, *supra* note 9, at 20-22 (citing a letter from Abigail Adams to John Adams, Braintree March 31, 1776).

⁷¹ Langley & Fox *supra* note 24, at 23 (writing to James Sullivan about representative government).

⁷² *Id.* at 35-36 (quoting Elizabeth Fox-Genovese commenting on whether women gained from the Revolution).

⁷³ KERBER, *supra* note 1, at 241.

⁷⁴ See e.g., Kerber, *supra* note 64, at 29 (explaining the gender ambiguity in the constitution).

⁷⁵ Dennis W. Johnson, *The Laws that Shaped America, Fifteen Acts of Congress and their Lasting Impact* 108 (2009).

and other social reforms,⁷⁶ positioning women to support the survival, longevity, and health of the republic.⁷⁷

It was not until 1848 that the formal women's suffrage movement began and women pressed for political rights directly.⁷⁸ Women's suffrage was the "longest contained grassroots effort in American history," spanning seventy years.⁷⁹ To win the vote, women needed to convince men to give up their representation of women, risk the demographic upheaval of women's suffrage, and reconcile women's role in the public sphere.⁸⁰ The Civil War catalyzed the seismic shifts that transformed suffrage for both women and black men.

III. SEISMIC SHIFTS IN MILITARY SERVICE, CITIZENSHIP, AND MASCULINITIES REBIRTHED REPUBLICAN GOVERNANCE, YET ENTRENCHED MASCULINITIES PERSISTED

The Civil War seismically shifted masculinities, military service, and citizenship. It destabilized southern masculinities and it shifted military service to a duty of national citizenship, largely dissolving the citizen-soldier tradition.⁸¹

⁷⁶ Johnson, *supra* note 75, at 108.

⁷⁷ Langley & Fox, *supra* note 24, at 39. These social reforms gradually moved from philanthropic work to politically oriented agitation. For example, many women in the nineteenth century became active in the abolitionist movement. See Siegel, *supra* note 9, at 146. Suffrage reforms emerged from the more evangelical temperance and slavery movements as women learned to "turn the cause of women's rights into a political movement." See *id.*

⁷⁸ The formal woman's rights movement began in 1848 with a Call to a Women's Rights Convention discussing "the social, civil, and religious conditions of women." Johnson, *supra* note 75, at 110. Approximately three hundred women convened and published the "Declaration of Sentiments and Resolutions." *Id.* (convened over two days). Regarding suffrage, it "Resolved, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise." Langley & Fox, *supra* note 24, at 82-85. Frederick Douglass responded to the Declaration, expanding on women's conceptions of equality to reflect full male political rights: "We go farther, and express our conviction that all political rights which it is expedient for man to exercise, it is equally so for woman." *Id.* at 85-86.

⁷⁹ Women did not get the vote for another seventy years, following 56 referendum campaigns, 480 state campaigns to put the amendment in front of voters, 47 state constitutional amendment campaigns, 277 fights to put suffrage on party platforms, 30 political party platform fights in presidential elections, and 19 congressional campaigns over 38 years. Johnson, *supra* note 75, at 108.

⁸⁰ See Siegel, *supra* note 9, at 143, 152 (explaining that our modern understanding of women's suffrage obscures its radical nature because it is separated from the historical and constitutional narrative history and historical accounts "ignore" its broader significance).

⁸¹ This trajectory was well underway before the Civil War. As American masculinities changed in the 1800s, the centrality of performative military service and the local traditions it fostered had softened too. As the citizenship base expanded in the early 1800s including more poor, working-class white men, challenges grew to compulsory participation in military practices. The War of 1812 was fought with manpower 88% derived from local militias. MURDOCK, *supra* note 29, at 5. A formal national draft system was proposed in 1812, but it was still bitterly challenged as "Napoleonic." *Id.* at 5. As a result, more volunteer militia companies replaced compulsory militia roles in the Jackson-era to restore homogeneity. SNYDER, *supra* note 13, at 93. By

A. *Nationalizing Military Service Transformed Both the Citizen-Soldier Tradition and Citizenship Itself*

The Civil War presented dire shortages in manpower that forever changed military service and citizenship. Military need catalyzed these seismic shifts. Lincoln first attempted to man the Union army with voluntary enlistment. These efforts were initially quite successful⁸² and then quickly proved inadequate.⁸³ Congress then took the unprecedented step of compelling national male military enlistment and Lincoln signed the first American draft act on July 17, 1862.⁸⁴ The first compulsory national draft was still notably local in nature, relying on the then-antiquated local militia systems.⁸⁵ It authorized the President to call able-bodied men between 18-45 into service for a nine-month period on a state-based quota system.⁸⁶ Implementation troubles, protest, and fraud quickly dominated the first iterations of the national draft.⁸⁷ The exemptions quickly undermined the efficacy⁸⁸ and the first draft yielded relatively few men.⁸⁹ While it was characterized by rampant fraud and protest,⁹⁰ the first national draft nonetheless transformed military service and citizenship in enduring ways.

the Mexican War in 1848, the fighting force would draw much more heavily on volunteers. MURDOCK, *supra* note 29, at 4-5.

⁸² After the 1861 battle at Fort Sumter some 700,000 men answered Lincoln's call and enlisted voluntarily. MURDOCK, *supra* note 29, at 5. Indeed the initial volunteer surge was so sizeable that the Secretary of War closed up its recruiting offices. *Id.* Historians differ on the meaning of this strategic decision: was it to save money or did it reflect a sense that this would be a short and successful war. *Id.*

⁸³ Only months after initial successes in voluntary enlistment, Lincoln's call for enlistment was renewed and, this time, only meager numbers responded, necessitating more aggressive measures. *See id.*

⁸⁴ *See* Act of July 17, 1862, ch. 201, 12 Stat. 597. This extraordinary step came just two weeks after meager numbers of volunteers responded to Lincoln's renewed call for enlistment. MURDOCK, *supra* note 29, at 5.

⁸⁵ *See* Act of July 17, 1862, ch. 201, 12 Stat. 597 ("the President of the United States shall call forth the militia of the States, to be employed in the service of the United States").

⁸⁶ *See* Act of July 17, 1862, ch. 201, 12 Stat. 597 ("he may specify in his call the period for which such service will be required, not exceeding nine months. . . and the enrollment of the militia shall in all cases include all able bodied male citizens between the ages of eighteen and forty-five, and shall be apportioned among the States, according to representative population").

⁸⁷ MURDOCK, *supra* note 29, at 10.

⁸⁸ A vast system of exemptions authorized a \$300 commutation fee to avoid service and a substitute mechanism to replace a draftee. *Id.* at 9-10.

⁸⁹ For example, the first draft called 292,441 men of whom only 9,881 were held to service and 26,002 used a substitute. 52,288 men paid the commutation fee. The exemptions subsumed efficacy. *Id.* at 10. This was indeed a huge work in process, utilized four times to meager results and amended three times in a one-year period. *See generally id.* at 12-14 (providing a comprehensive chart of draft statistics).

⁹⁰ *See id.* at 14.

Deploying the Commander in Chief power in unprecedented ways,⁹¹ Lincoln's next war measure to field the Union Army was the historic Emancipation Proclamation.⁹² The Emancipation Proclamation freed slaves in the South, investing them in a Union victory, and empowering Southern freed slaves to fight for the Union Army.⁹³ Over 200,000 black men responded to Lincoln's call for arms, undermining Southern power and tipping demographics to the North.⁹⁴

Importantly, the Emancipation Proclamation freed slaves in the seceded states only, excluding Northern slaves and loyal border state slaves.⁹⁵ In so doing, it set the stage to dramatically transform black male citizenship and shifted the war momentum and ideology.⁹⁶ Yet as historically momentous as arming blacks in the militia tradition was, Northern states still segregated blacks in the militias,⁹⁷ suggesting that it was military necessity that drove the seismic shifts described here, not paradigm shifts in citizenship or military service directly.

⁹¹ Ellen Carol DuBois, *Taking the Law Into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s* in *ONE WOMAN ONE VOTE* 85 (Marjorie Spruill Wheeler ed., 1995). In these war measures, Lincoln also dramatically changed the role of the presidency as military command. In 1850, the Supreme Court had interpreted the Commander in Chief clause as a "purely military" one. HASSLER, *supra* note 14, at 10 (citing *Fleming v. Page*, 50 U.S. 603, 615 (1850)). It was described as the "forgotten clause." *Id.* Lincoln issued the Emancipation Proclamation and suspended the writ of habeas corpus under his commander in chief power, dramatically strengthening the power of the presidency and expanding the scope. *Id.* at 111. This was an interesting contradiction. With the state militias dissolving, presidents would no longer necessarily hail from citizen-soldier military traditions, yet presidency was emboldened under the commander in chief clause after the war.

⁹² See e.g., GREEN B. RAUM, *THE EXISTING CONFLICT BETWEEN REPUBLICAN GOVERNMENT AND SOUTHERN OLIGARCHY* 38 (1969) (explaining that inviting blacks to fight for the Union was a necessity).

⁹³ The Emancipation Proclamation (Jan. 1, 1863) available at http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/ (President Lincoln issued this in the third year of the Civil War).

⁹⁴ *Id.*

⁹⁵ *Id.* ("I do order and declare that all persons held as slaves within said designated States, and parts of States ["Arkansas, Texas, Louisiana, (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New Orleans) Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia, (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth[]], and which excepted parts, are for the present, left precisely as if this proclamation were not issued."], are, and henceforward shall be free.")

⁹⁶ *Id.*

⁹⁷ John Hope Franklin, *Jim Crow Goes to School: The Genesis of Legal Segregation in the South*, in *NEGRO IN THE SOUTH SINCE 1865* 135 (Charles E. Wynes ed. 1968).

These war measures forever changed the terms of citizenship and military service. After the Civil War, Congress formally repealed the Militia Act and shifted to a nationalized militia system. The 1903 Dick Act asserted a national role over state militias, and created a “reserve militia” (the modern National Guard).⁹⁸ The national military was further empowered by 1908 legislation expanding federal control over organized militias (the National Guard) outside the United States.⁹⁹ The National Defense Act of 1916 further expanded the National Guard and empowered the president to institute a wartime draft.¹⁰⁰ The 1917 Selective Service Draft Act required all men to register for the national draft.¹⁰¹

These measures formalized the disempowerment of local militias that had begun even before the civil war, transforming the citizen-soldier tradition and masculinities. State guards tenuously still existed after the Civil War, but in marginal function.¹⁰² They are the successors to the militias that the founders established.¹⁰³ Yet the traditions endured in debate and in practice. While Northerners, as reformers and industrialists, generally favored a modern and professional military,¹⁰⁴ Southerners generally preferred the citizen-soldier local tradition.¹⁰⁵ As R. Claire Snyder explained, after the Civil War, “the new ideals of nationalism, expertise, and professionalism ran up against the deeply rooted traditions of volunteerism, federalism, and republicanism embodied in the institutions of the state militia.”¹⁰⁶

The Civil War changed military service and its relationship to citizenship dramatically. It solidified a shift from local militia functions to national compulsory registration and draft obligations. This ended the citizen-soldier local performative tradition and significantly weakened its linkage to citizenship. Yet, the foundational fusion still endured in other ways.

⁹⁸ See Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775 (“That the militia shall consist of every able-bodied male citizen of the respective States, Territories and the District of Columbia,. . . shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given to them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia.”)

⁹⁹ SNYDER, *supra* note 13, at 99; see Militia Act of 1903 (Dick Act), ch. 204, 35 Stat. 399 (amendment to Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775).

¹⁰⁰ SNYDER, *supra* note 13, at 99.

¹⁰¹ *Id.* at 100. With nationalized military service came wide-scale benefits, beginning with an 1884 Massachusetts state preference in civil service hiring, and ultimately including massive federal GI benefits and privileges episodically. See KERBER, *supra* note 1, at 251.

¹⁰² See Eidsmore, *supra* note 29, at 38.

¹⁰³ *Id.*

¹⁰⁴ SNYDER, *supra* note 13, at 97.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

B. Post-Bellum Masculinities Destabilized

The Civil War destabilized longstanding masculine power structures by both the war itself and each of the Reconstruction Amendments, yet the entrenched masculinities of the foundational fusion endured and re-emerged as a stabilizing force.

Post-bellum masculinities were heavily destabilized by both the war itself and the Reconstruction Amendments.¹⁰⁷ The masculinity of white southern plantation owners, in particular, was shaped around the legal, economic, and social dominion over plantations.¹⁰⁸ The war dramatically tore apart this system for plantation owners.¹⁰⁹ It provoked a mass exodus of adult white men to fight, leaving women to run plantations and de-mooring the plantation owner from his property.¹¹⁰ The post-bellum Congress required Southern states to enfranchise free blacks to fulfill republican government guarantees.¹¹¹ This was a distinct challenge to Southern male governance because Northern states did not universally enfranchise blacks. Thus, plantation owners “struggled to maintain control over their dominions and their subjects, [] they felt their grip weakening.”¹¹² Blacks had fought a “double battle” for the Union for both manhood and citizenship.¹¹³

¹⁰⁷ See JAMES ROARK, *MASTERS WITHOUT SLAVES* 157 (1977) (concluding that the south was “nothing less than a world turned upside down”).

¹⁰⁸ See e.g., ROARK, *supra* note 107, at 35:

The plantation was the heart of the master’s world. It was the source of wealth, status, power, and often identity itself. The plantation was for the master the concrete expression of what was for many others an elusive abstraction – the “Southern way of life.” ‘Each large estate presented in itself all the features common to the whole system, and was in itself a reflection in miniature of the entire civilization of the Southern States.’

Id. (acknowledging that the speaker exaggerates the claim somewhat).

See generally ROARK, *supra* note 107, at 35 (articulating the class tensions in the South).

¹⁰⁹ ROARK, *supra* note 107, at 36 (“The whirlwind of revolution descended upon the South. It disrupted and transformed lives, relationships, and values; it crushed old institutions and created new ones; it produced economic catastrophe and political impotence; and it introduced into every home the miseries of destruction and death.”). This disrupted the solidarity that many white men had constructed and produced deep class tensions. *Id.* at 55. Roark concludes that the war created such competition and scarcity of resources in the South that “before the war . . . but free labor threatened to splinter them” *Id.* at 135.

¹¹⁰ See ROARK, *supra* note 107, at 46 (concluding that “by the end of the first year of war, much of the rural South approached a matriarchy”).

¹¹¹ See e.g., ANTHONY COOPER, *THE BLACK EXPERIENCE 1865-1978, A DOCUMENTARY READER* 12 (1995) (explaining how ratifying the Fourteenth Amendment was condition of southern states readmission to the union by congress).

¹¹² ROARK, *supra* note 107, at 85.

¹¹³ Karst, *supra* note 62, at 510.

Just as plantation life structured dominant white masculinities, the condition of slavery marginalized black masculinities. The Honorable John Mercer Langston explained that:

As a slave he has been denied himself, his wife, his children, and his earnings. And when emancipated his freedom has been, in some sense, a mockery, because he has been deprived of those civil and political rights and powers which render enfranchised manhood valuable and dignifies a blessing.¹¹⁴

The Reconstruction Amendments destabilized white southern masculinities by undermining patriarchal governance in the home and male representative governance in the public sphere.¹¹⁵ The Thirteenth Amendment freed male and female slaves, transforming gender politics and white male governance in the private and public spheres. The Thirteenth and Fourteenth Amendments pulled black men and women out from under Southern male patriarchal governance and effectively gave them the same civil rights that married white women had before the War.¹¹⁶

Removing white slaveholders' power over slaves had critical gender implications too. Many slaveholders had exercised "sexual privileges" over female slaves.¹¹⁷ Reconstruction "threatened Southern manhood by subjecting male-female relations to considerable strain."¹¹⁸ Karst explained that "the abstract image of pure southern womanhood became identified with a vision of white supremacy. The white woman, as the 'perpetuator of [white] superiority's legitimate line,' had to be kept remote from any sexual approach of the black man."¹¹⁹

Post-bellum militias were used distinctly in the South as a destabilizing and stabilizing tool. Post-war, armed black freedmen were positioned in the symbiotic constituency of self-governance and self-defense. Yet the self-defense components of armed citizenry clashed with the lingering vestiges of the exclusionary local militia rooted in dominant and marginalized masculinities.

¹¹⁴ JOHN MERCER LANGSTON, *FREEDOM AND CITIZENSHIP* (1969) (reprinting the lectures and addresses of Hon. John Mercer Langston, LL.D.)

¹¹⁵ See ROARK, *supra* note 107, at 77 ("The legal destruction of the South's peculiar institution was the product of presidential proclamation, congressional action, state legislation, and constitutional amendment, but the practical destruction of slavery was the product of war. Between Sumter and Appomattox, enormous changes took place within the institutions of slavery. Military defeat finally ended slavery, but vital relationships – that of master to slave and of slave to plantation – were everywhere strained, and sometimes snapped, by the time Federal troops arrived to compel emancipation.").

¹¹⁶ Amar (*Women and the Constitution*), *supra* note 31, at 468.

¹¹⁷ Karst, *supra* note 62, at 511.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 516.

ties.¹²⁰ Southern militias had become oppressive forces of racist violence leaving the black citizenry “at the mercy of the policeman and the men of the State Guard.”¹²¹ The militias were exclusively white and were generally soldiers, often in confederate uniforms, seeking to disarm freedmen.¹²² Senator Trumbull reported, for example, that “[n]early all of the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia. Rather than restore order, the militia would typically, ‘hang some freedman or search negro houses for arms.’”¹²³

These militia abuses led to proposed legislation from 1866-1869 seeking to disband the southern militias that were disarming and terrorizing the freedmen.¹²⁴ The marginalization and dissolution of state militias aligned with the emergence of private militias. Thus, state militias were largely marginal after the Civil War, but private militias took over some of the oppressive racial function that local militias had previously played in the South.¹²⁵ Disbanding and marginalizing formal state militias during Reconstruction shifted attention to the Ku Klux Klan (KKK), an organization functioning in a quasi-militia role¹²⁶ and grounding its actions in the performative republican government tradition.¹²⁷ The “white rifle companies” that responded to black military participation after the Civil War bred the KKK, which emerged as a militia-like reac-

¹²⁰ HALBROOK, *supra* note 60, at 110.

¹²¹ *Id.* at 149.

¹²² OTIS A. SINGLETARY, NEGRO MILITIA & RECONSTRUCTION 4-5 (1963)

¹²³ HALBROOK, *supra* note 60, at 110.

¹²⁴ HALBROOK, *supra* note 60, at 135-37 (stating that “all militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forth-with disarmed and disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited under any circumstances whatever until the same shall be authorized by Congress”). The word “disband” was later removed. *Id.* The resolution passed the house and the senate. *Id.* It was described as an obscure rider to the Reconstruction Act. *See* SINGLETARY, *supra* note 122, at 6. President Johnson himself questioned the constitutionality of the provision. HALBROOK, *supra* note 60, at 135-137 *see* SINGLETARY, *supra* note 122, at 6 (noting that some governors also had to take steps to disband state militias because of violence). This ban was repealed for most states two years later. SINGLETARY, *supra* note 122, at 8 (repealing the ban on militia activities in North Carolina, South Carolina, Florida, Alabama, Louisiana, and Arkansas).

¹²⁵ *See generally* NAVARRO, *supra* note 53, at 158 (defining unorganized militias as “members of the militias not members of the national guard or state guard”).

¹²⁶ A post-bellum description of the KKK explained that “their weapons are often new and of improved patterns; and however poor may be the individual member he never lacks for arms or ammunition . . . In many respects the Ku Klux Klan was an army, organized and officered, and armed for deadly strife.” HALBROOK, *supra* note 60, at 147.

¹²⁷ NAVARRO, *supra* note 53, at 153-155. Some have explicitly described the KKK as a militia. *Id.*; *see also* RAUM, *supra* note 92, at 59 (explaining how the Klan sought to organize in the republican tradition of performative civil duty; it “pledged to defend the Constitution of the United States, and all laws passed in conformity thereto; and to protect the states and people thereof from all invasion, from any source whatsoever; and to assist in the execution of all constitutional laws”).

tion to black citizenship.¹²⁸ In Mississippi, for example, local clubs organized into armed “irregular militia companies” where they paraded through the black population as an intimidation strategy.¹²⁹ Yet these tactics vastly perverted anything any legitimate public militia had ever deployed, relying on rape, torture, beatings, and arson to compel white power in the South.¹³⁰

The destabilization of masculinities can be seen keenly through the Ku Klux Klan activities. Masculinities scholar, Michael Kimmel, summarized that the Klan’s goal was distinctly the “reclamation of Southern manhood”:

Klan rhetoric was saturated with images of heroic and chivalrous southern manhood. Members were required to demonstrate ‘manly’ character and courage, and initiation rituals were punctuated by prayers that ‘god, give us men’ . . . Playing on traditional images of the emasculated southern gentleman and his fears of rapacious blacks and conniving northern reformers, the Klan mobilized southern white men into its ‘invisible empire’ for many decades . . . the new and powerful fear of the black rapist revealed more about southern white men’s fears of lost manhood than about any propensity on the part of black men.¹³¹

Militias fostered destabilized masculinities as white men sought to re-moor their masculinities.¹³²

C. *The Endurance of the Foundational Fusion and its Entrenched Masculinities*

Despite the seismic shifts of military service and citizenship and the destabilization of masculinities, the post-war amendments revealed that “bullets for ballots” endured as a catalyst for citizenship for black men. This in turn revealed that vestiges of the foundational fusion and its entrenched masculinities persisted.

The Fifteenth Amendment was a response to the Emancipation Proclamation’s call to arms distinctly leveraged within the foundational fusion. The

¹²⁸ SNYDER, *supra* note 13, at 94-95.

¹²⁹ KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* 51 (1967).

¹³⁰ NAVARRO, *supra* note 53, at 154.

¹³¹ KIMMEL, *supra* note 6, at 66-67; *see also* SINGLETARY, *supra* note 122, at 3 (observing the south in 1875, observer Charles Nordhoff “expressed amazement in finding that not only the men but even bots of fourteen were frequently armed and that ‘every trifling dispute’ was ‘ended with the pistol’”).

¹³² *See e.g.*, ROARK, *supra* note 107, at 107 (explaining how “southern planters were particularly ill prepared for the revolution of emancipation” because abolition occurred “lightening-fast compared with abolition in other countries,” leaving slaveholders with no “common, workable set of ideas to replace their old beliefs”).

Emancipation Proclamation led black men to fight for the Union and for citizenship. “They believed that military service would allow them to be seen as men, as citizens. Once Northern blacks put on the uniform, they believed, it would be hard to deny them the vote.”¹³³ Notably, the *Dred Scott* decision had specifically cited the exclusion of black men from military service as evidence to support the exclusion of slaves from citizenship.¹³⁴ Black military service made citizenship conceivable and vindicated their claims.¹³⁵ The Fifteenth Amendment revealed that “bullets for ballots” was still the dominant citizenship paradigm after the Civil War.

Yet notably, the struggle for the vote coincided with efforts to disarm blacks, suggesting vestiges of the foundational fusion whereby voting, citizenship, and military service remained intertwined around masculinities.¹³⁶ Indeed suffrage arguments for black men expressed a keen understanding of the endurance of the foundational fusion. In stating the black man’s claim for voting rights, John Mercer Langston relied on the foundational fusion, stating that voting is an “inseparable and essential element of self-government” and a “constituent element of manhood” and basing the claim for voting rights on the claim that:

[O]ur arms are victorious . . . As the Government has, for the last four years, needed loyal and earnest men to handle the musket in war, so it to-day needs men of the same character to wield the ballot in sustaining its principles. The ballot is no less potent than the musket.¹³⁷

Critically, however, the suffrage victory for black men was short-lived in any meaningful sense as history revealed a century plus struggle for black

¹³³ Karst, *supra* note 62, at 512.

¹³⁴ *Dred Scott v. Sanford*, 60 U.S. 393, 420 (1857).

¹³⁵ RAUM, *supra* note 92, at 38 (explaining that after the Union victory [black men] “felt, and had a right to feel, that the mighty and victorious people who had given them their freedom would fully protect them in the enjoyment of it”); *see also* Karst, *supra* note 62, at 513.

¹³⁶ *See* RAUM, *supra* note 92, at 19, 28 (explaining how South Carolina and Mississippi enacted “black codes” that codified the exclusion of blacks from the state militia and prohibited arms-bearing outside the “purposes of war”).

¹³⁷ LANGSTON, *supra* note 114, at 110, 120 (reprinting the lectures and addresses of Hon. John Mercer Langston, LL.D.). Langston stated that:

[W]e claim the elective franchise in the name of our manhood, our nativity, and our citizenship, in the name of the doctrine that taxation, protection, and representation are naturally inseparable, and in the name of that loyalty under the promptings of which we have performed for the country and the government, in the army and the navy, such brave and manly deed.

Id. at 119-21 (“as military necessity brought us emancipation and arms, political necessity may yet bring us enfranchisement and the ballot”).

men to exercise the right to vote free from discrimination, violence, and harassment.¹³⁸ Black women voters would later face these obstructions as well.¹³⁹

Because black male suffrage was achieved within the foundational fusion tradition, even in its dramatic rebirth,¹⁴⁰ women necessarily were expressly excluded. Women's loyalty and indirect support were inadequate alone. While the women's suffrage movement was largely in abeyance during the Civil War,¹⁴¹ suffragists seized the apparent opportunity created by the Emancipation

¹³⁸ See e.g., COOPER, *supra* note 111, at 39 (explaining how voting conditions quickly deteriorated for black men). The language of the Fifteenth Amendment "left the states free to evade the intent of the amendment as long as the barriers they devised against Negro suffrage were not overtly racial." STEVEN LAWSON, BLACK BALLOTS, VOTING RIGHTS IN THE SOUTH 3 (1976). While the 1867 Military Reconstruction Acts had required southern states to permit black men to frame state constitutions and serve in the legislatures, oppressive discriminatory forces quickly prevailed in the south. *Id.* at 1-2, 7-9. By 1885, A Report of the Committee of the Senate Upon the Relations Between Labor and Capital concluded that black men were generally denied the right to serve on juries, and that "because of open intimidation and violence and fraud, they hold very few [positions in government] through the suffrage of their fellow citizens." *Id.* While voting rights remained a national priority after ratification of the Fifteenth Amendment, this national attention gradually dissipated and obstructionist, violent forces took over. LAWSON, *supra* note 138, at 7-9, 15 (concluding that the "racist caste structure that hardened with the agreement on white supremacy during the 1890s contributed to the erosion of the Negro suffrage). For example, Klan activity in the 1868 elections in Louisiana killed, wounded, and injured over 2000 people. RAUM, *supra* note 92, at 61-68. For a detailed account of the myriad obstructionist techniques and intimidation tactics deployed against black voters see generally LAWSON, *supra* note 138; see also STAMPP, *supra* note 129, at 199 (describing organized terrorism orchestrated by the Klan and similar groups).

¹³⁹ The suffrage "victory" was deeply compromised by racism toward black women. Black women faced the discriminatory burdens of race and gender and were quickly subjected to the same violence, intimidation, and harassment that black men experienced. See e.g., ROSALYN TERBORGH-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 160 (1998) (explaining how there were two fractures in the suffrage movement – first when black women had unique historical burden of racial and gender discrimination as a barrier to vote – and second when black women lost it and white women did not); Rosalyn Terborg-Penn, *African American Women and the Woman Suffrage Movement* in ONE WOMAN ONE VOTE, REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT 151-52, 154 (Marjorie Spruill Wheeler ed. 1995) (chronicling how black women were quickly disenfranchised in the South by property taxes and literacy test and how white women largely abandoned activism on these issues).

¹⁴⁰ See generally HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION 42 (2001) (explaining how "both democratic and republican concerns about black voting lay in the American theory of republican government").

¹⁴¹ Fort Sumter brought the direct women's suffrage movement to a near halt, yet suffragists still understood that they might leverage their military service to political advantages. See Andrea Moore Kerr, *White Women's Rights, Black Men's Wrongs* in ONE WOMAN ONE VOTE 63 (Marjorie Spruill Wheeler ed., 1995). Susan B. Anthony wanted to continue the suffrage movement during the war, but she was overpowered by others who convinced her to put the issue aside and contribute to the war effort. See BILL SEVERN, FREE BUT NOT EQUAL, HOW WOMEN WON THE RIGHT TO VOTE 74, 77 (1967) (noting that women contributed to the war efforts in many ways, including managing households and affairs previously tended to by men).

Proclamation and pressed Lincoln to extend the same freedoms to the loyal, patriotic women who were actively serving in the Union army.¹⁴²

Indeed the war had allowed women to prove that they were “capable of performing work and duties commonly identified as masculine, and thus it stood to open up new rights and opportunities in public life.”¹⁴³ Yet women had to maneuver their service carefully within the masculine paradigm of the military and its gender-performative citizenship functions.¹⁴⁴ Women keenly understood their morally tenuous role in the paradigmatically public male institution. One recruiting ad notably called for women who were “plain looking,” so as to not arouse men or create moral peril.¹⁴⁵ Women in service carefully positioned themselves as “redemptive women.”¹⁴⁶ Many women navigated military service by transferring the family paradigm into the military to justify their roles. Many soldiers called nurses “mothers” and many nurses called their patients “sons or boys.”¹⁴⁷ Yet even in this gendered paradigm, women conceived of themselves as active participants in the war efforts.¹⁴⁸ Women’s military service marked the beginnings of women transcending gender in the public sphere; women retained their moral and nurturing values, while acquiring a taste of the heroic bravery of male military service.¹⁴⁹

After the Emancipation Proclamation, Elizabeth Cady Stanton sought to leverage women’s war efforts, writing to Lincoln on behalf of the Women’s National Loyal League to ask him to “finish the work by declaring . . . justice

¹⁴² Women supported the war effort by nursing the wounded. See e.g., BARBARA CUTTER, *DOMESTIC DEVILS, BATTLEFIELD ANGELS, THE RADICALISM OF AMERICAN WOMANHOOD 1830 – 1865* 159-62 (2003) (describing the heroine images of battlefield nurses described as “angels of the battlefield”). More than 20,000 northern women nursed during the Civil War. *Id.* at 172. Women even rarely contributed to military strategy. On November 30, 1861, Anna Ella Carroll wrote to the Assistant Secretary of War, Thomas A. Scott, and advised him of a weakness in Union military strategy. She explained how military operations focusing on the Mississippi should be shifted to the Tennessee River to split the confederacy. This plan was taken seriously and sent to the President. The strategy worked. Some military historians describe this as crucial. Langley & Fox, *supra* note 24, at 123 (reprinting Recognition of Anna Ella Carroll’s Military Contribution to the Civil War (1881)). Her identity was originally secret, but was revealed and recognized by the House Committee on Military Affairs in 1881. *Id.* Other women engaged in forms of espionage or disguised themselves as men to serve. Approximately 500 – 1,000 women disguised themselves as men and served in union and confederate armies. See CUTTER, *supra* note 142, 183.

¹⁴³ CUTTER, *supra* note 142, 156.

¹⁴⁴ Louisa May Alcott famously declared: “I’ve often longed to see a war, and now I have my wish. I long to be a man; but as I can’t fight, I will content myself with working for those who can.” *Id.* at 172.

¹⁴⁵ *Id.* at 185.

¹⁴⁶ *Id.* at 188.

¹⁴⁷ *Id.* at 189.

¹⁴⁸ Many letters home reflected a “nursing soldier” narrative. *Id.* at 190.

¹⁴⁹ CUTTER, *supra* note 142, 193.

and protection” for women.¹⁵⁰ Stanton explained that she too was “inspired by true patriotism” and was working under the “national flag.”¹⁵¹

Yet importantly – this paper posits – entrenched masculinities within the persistent foundational fusion posed underlying obstacles to women’s suffrage. Women did not fulfill the dire *manpower* shortages and thus the same conditions for women’s suffrage were not planted as a strategic war measure . . . at least not in this war. The “woman question” was deferred for another day, another war.¹⁵²

The largest setback for women’s suffrage was the word ‘male’ inserted for the first time in relation to voting apportionment.¹⁵³ This *buttressed* universal principles of *male* governance, supporting this entrenched masculinities thesis over broader equality principles.¹⁵⁴ One editorial described the Fourteenth Amendment as a “spider-crab walking backwards,” laying “legal disabilities” on women.¹⁵⁵

The word male revealed the changing political paradigm regarding citizenship and sex.¹⁵⁶ While implied disenfranchisement of women was enough in the founding era, increased agitation for public roles necessitated careful drafting after the Civil War to *avoid* enfranchising women.¹⁵⁷ The Fourteenth and Fifteenth Amendments worked together to accomplish this.¹⁵⁸

¹⁵⁰ Langley & Fox, *supra* note 24, at 125 (citing *The Loyal Women of the Country to Abraham Lincoln* (1863)).

¹⁵¹ *Id.* at 125 (“By a mere stroke of the pen you have emancipated millions from a condition of wholesale concubinage. We now ask you to finish the work by declaring that nowhere under our national flag shall the motherhood of any race plead in vain for justice and protection.”).

¹⁵² Kerber, *supra* note 64, at 31. This reality was troubling for suffragists in the backdrop of the divisive question at the outset of the war of whether to get involved in the war effort or continue suffrage activism. *See generally* Kerr, *supra* note 141, at 63 (Marjorie Spruill Wheeler ed., 1995) (articulating the competing claims of race and sex).

¹⁵³ *See* U.S. CONST. amend. XIV; *see also* SEVERN, *supra* note 141, at 83-89 (detailing suffragist efforts to keep “male” out of the Fourteenth Amendment).

¹⁵⁴ Suffragists launched a “New Departure” strategy to test the Fourteenth Amendment, but this campaign was unsuccessful. *See e.g.*, Kerber, *supra* note 64, at 32. Success was unattainable because Section 2 ensured that states would not “abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV. Susan B. Anthony’s historic voting prosecution rejected the argument that voting was a privilege and immunity within the meaning of the Fourteenth Amendment. *Id.* The Supreme Court confirmed this interpretation when it held that the Fourteenth Amendment did not confer the vote on women, upholding women’s exclusion from Missouri voting legislation in *Minor v. Happersett*. *See Minor v. Happersett*, 88 U.S. 162 (1874) (explaining that this proposed interpretation of the Nineteenth Amendment cannot come from the court, but rather needs a constitutional amendment or federal statute).

¹⁵⁵ Langley & Fox, *supra* note 24, at 127 (reprinting an editorial by Theodore Tilton of the *New York Independent*, *Regarding Women’s Suffrage and the Fourteenth Amendment* (1865)).

¹⁵⁶ *See e.g.*, COOPER, *supra* note 111, at 12 (redefining citizenship in masculine terms as it relates to voting).

¹⁵⁷ *See* DuBois, *supra* note **Error! Bookmark not defined.**, at 84.

¹⁵⁸ Siegel, *supra* note 9, at 147.

While it was not the “woman’s hour” after the Civil War, the Fifteenth Amendment became the structural parallel to the Nineteenth Amendment. Indeed many southerners viewed the Nineteenth Amendment as “an extension” of the Fifteenth Amendment, an amendment they deeply resented.¹⁵⁹ The Fifteenth Amendment was distinctly about political rights yielded directly by military service.¹⁶⁰ The Fourteenth Amendment at that time was distinctly framed around civil rights, separate from political rights (the right to vote, hold office, serve on a jury, and serve in a militia).¹⁶¹ Black men’s enfranchisement was notably not just about voting; it was about attaining the full rights and responsibilities of the political domain.¹⁶² Parallel statutes worked in harmony with the Fifteenth Amendment to position blacks to serve on juries and to stand for political office.¹⁶³ Because the Fifteenth Amendment was about *male* political rights, overt discussion of the military service obligations it imposed was mooted. This obscured questions of women’s full political citizenship after the Nineteenth Amendment.

Even the arguments used to oppose women’s suffrage after the Civil War also reinforced the endurance of the foundational fusion. Opponents framed the debate by adapting the same republican government traditions and separate spheres arguments that had normatively excluded women since the founding. Men protected women and represented them; white men did not protect or represent black (men) consistent with republican government guarantees. Therefore black men needed self-governance to protect their political rights. Frederick Douglas articulated the distinction in powerful terms:

With us, the matter is a question of life and death, at least, in fifteen States of the Union. When women, because they are women, are hunted down through the cities of New Orleans; when they are dragged from their houses and hung upon lamp posts; when their children are torn from their arms and their brains dashed out upon the pavement; when they are objects of

¹⁵⁹ See e.g., Wheeler, *supra* note 167. A South Carolina Senator said in 1919, “here is exactly the identical same amendment applied to the other half of the Negro race. The southern man who votes for the Susan B. Anthony Amendment votes to ratify the Fifteenth Amendment.” Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARVARD L. REV. 947, 951 (2002).

¹⁶⁰ Amar (*Women and the Constitution*), *supra* note 31, at 471.

¹⁶¹ *Id.* at 467 (noting that today when we talk about civil rights we mean voting, but when the Fourteenth Amendment was ratified it meant to own property, to contract, to sue, to pursue a career, to inherit, to worship, to assemble, etc.).

¹⁶² *Id.*

¹⁶³ *Id.*

insult and outrage at every turn . . . then they have an urgency to obtain the ballot equal to our own.¹⁶⁴

Another Civil War veteran explained that “memories of the violence” supported the argument that those “who had not been vulnerable to cannon fire were not politically equal.”¹⁶⁵ Contemplating woman suffrage, the New York World published that:

[W]omen, being exempted by her sex from military duties and responsibilities, holds all her rights by sufferance . . . The capacity of men for political life does not depend upon their ability to drink tea . . . or spout speeches, but on the hardihood and strength of character which nerves them for military service at the call of the state . . . it is female soldiering, not public tea-drinking, that must efface this distinction.¹⁶⁶

Reflecting the growing fracture in the suffrage movement,¹⁶⁷ suffragists divided sharply over the enfranchisement of black men; some agreeing that it was “the Negroes’s hour” and others believing that women’s suffrage demanded constitutional redress.¹⁶⁸ Some suffragists were outraged because they had devoted themselves to the abolitionist movement and the war effort only to be excluded from the resulting rights expansions, betrayed by abolitionist arguments that this was not the woman’s hour for suffrage, and fearful of exactly how long it would take to undo the setbacks. (Indeed it would take over half of a century.)¹⁶⁹

The women’s post-bellum suffrage arguments failed – this paper argues – in part, because of the endurance of the foundational fusion that entrenched masculinities within the republican government tradition of the citizen-soldier. Women were excluded from the Fifteenth Amendment (and the proposed Six-

¹⁶⁴ Johnson, *supra* note 75, at 113-14 (speaking to a congregation of American Equal Rights Amendment delegates).

¹⁶⁵ KERBER, *supra* note 1, at 243.

¹⁶⁶ KERBER, *supra* note 1, at 243 (citing Women’s Journal, Apr. 2, 1870 reprint of New World Article).

¹⁶⁷ See generally Marjorie Spruill Wheeler, *A Short History of the Woman Suffrage Movement in America in ONE WOMAN ONE VOTE 9* (Marjorie Spruill Wheeler ed., 1995).

¹⁶⁸ See e.g., Terborg-Penn (African American Women and the Woman Suffrage Movement), *supra* note 139, at 135-145 (documenting the fierce fracture in the women’s suffrage movement over the Fourteenth and Fifteenth Amendments and the suffrage movement’s organizational splits). Some suffragists exacerbated the segregationist sentiment of the Jim Crow in their advocacy. *Id.* at 135-36.

¹⁶⁹ Langley & Fox, *supra* note 24, at 125, 127.

teenth Amendment failed)¹⁷⁰ because exclusive male governance remained consistent with entrenched masculinities within the republican government tradition and because “bullets for ballots” remained the predominant paradigm for rights.

IV. POSITIONING THE NINETEENTH AMENDMENT WITHIN THE FOUNDATIONAL FUSION TO RESURRECT ITS RELEVANCE TO MILITARY INTEGRATION

After seventy years of grass-roots activism, women won the right to vote when the Nineteenth Amendment was ratified on August 18, 1920.¹⁷¹ Two aspects of suffragists’ Nineteenth Amendment strategy inform its relevance to women’s military integration: the shift from state to federal suffrage campaigns and leveraging the foundational fusion and its entrenched masculinities.

A. *The State Suffrage Victories Bypassed the Military Integration Question Directly*

Because the suffrage movement maneuvered from a state to a federal campaign at transformative times in military history, the suffrage debate subdued and bypassed the *direct* question of military integration. In the late 1800s, suffrage trudged through the Western states at a glacial pace.¹⁷² It lacked the momentum and support for a full-fledged federal campaign.¹⁷³ Importantly, during this tedious progress of the state suffrage movement, the state militia function was largely dissolved – it certainly no longer played a performative citizenship function locally.

¹⁷⁰ In February 1869, Representative George W. Julian (Republican – Indiana) submitted a proposed woman suffrage amendment, primarily on the grounds of women’s political literacy. See generally Johnson, *supra* note 75, at 113-14.

¹⁷¹ Melvin I. Urofsky & Paul Finkelman, *A MARCH OF LIBERTY, A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (2d ed. Oxford Univ. Press 2002) (The Nineteenth Amendment was approved on 08-18-1920 after Tennessee became the thirty-sixth state to ratify it). This democratic achievement nearly doubled the number of eligible voters. It was a “capstone of a multigenerational effort to change the terms of the original constitutional compact that women might count, equally with men, among the ranks of “we the people.” Siegel, *supra* note 9, at 152.

¹⁷² In 1890, Wyoming came into the union as the first state to enfranchise women. CHRISTINE LUNARDI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS 2* (New York Univ. Press, 1986). Colorado and Utah followed in 1893 and 1896, respectively, then Idaho. *Id.* at 2. It was another fourteen years before Washington enfranchised women (1910) and fifteen until California (1911). *Id.* at 2-3.

¹⁷³ Women needed state victories to catapult and catalyze their call for suffrage to a national level. An 1887 Washington Post article bluntly stated that women were wasting their time at the federal level. Rather, women should be active in the states to show Congress that this was a plausible and politically tenable movement. Johnson, *supra* note 75, at 116. The New York Times reported that “[i]t is, with all due respect to the advocates of woman suffrage, absurd to ask Congress to propose an amendment on this point requiring the assent of three-fourths of the states, when not a single State has adopted unqualified woman suffrage.” *Id.* Political leaders on the national level strongly believed that suffrage was appropriately a matter of state politics. *Id.* at 126 (Wilson certainly thought this).

Absent compulsory state militia service, women's enfranchisement at the state level bypassed any discussion of the correlating obligations of citizenship through military service. Indeed women's suffrage did yield their right to serve on juries in many state suffrage victories. Women were integrated on juries in Utah in 1898, Washington in 1911, Kansas in 1913, California in 1917, New Jersey in 1917, and Michigan in 1918, all just years after women got the vote.¹⁷⁴ Given the transformative shift from local militias to the national military discussed above, these states never had to consider women's corollary commitments to state militias.

B. The National Suffrage Campaign Leveraged the Foundational Fusion and its Entrenched Masculinities

Viewing the Nineteenth Amendment through the foundational fusion informs its relevance to military integration today legally, historically, and politically. Part of the national suffrage victory entailed women's successful deployment of the foundational fusion and its entrenched masculinities as advocacy strategies.

1. Challenging the Protectionist Underpinnings that Excluded Women from the Foundational Fusion

Suffragists ultimately won the vote by successfully leveraging their loyalty and military service within the foundational fusion and prevailing masculinities. Importantly, the suffrage battle exploded on a viable national stage at precisely the same time that Congress and the President were codifying national draft obligations.¹⁷⁵

From 1913 - 1920 the suffrage movement experienced a "revitalization of dramatic proportions," shifting from the state to the national level.¹⁷⁶ This shift followed the momentum of state suffrage victories, the progressive era reforms,¹⁷⁷ and critical new framings of suffrage arguments within a national¹⁷⁸

¹⁷⁴ Johnson *supra* note 75, at 137.

¹⁷⁵ See Robert Booth Fowler, *Carrie Chapman Catt, Strategist* in ONE WOMAN ONE VOTE 303 (Marjorie Spruill Wheeler ed., 1995) (pinpointing 1916 as the suffrage shift to the national stage).

¹⁷⁶ LUNARDI, *supra* note 172, at viii.

¹⁷⁷ The Progressive era reforms that begin in the early 1900s strengthened the national government and helped shift suffrage to the national stage. The late nineteenth century was a time of rapid social and economic change. Women championed wide-scale social reforms in literacy, poverty, homelessness, working conditions, fair wages, and temperance. Langley & Fox *supra* note 24, at 125. In these reform activities, women engaged the government directly, positioning women to use social rights as a platform for women's political activism. *Id.* These reform efforts benefited women because women were often the victim of social ills such as drunkenness and licentiousness. *Id.* While women often agitated on moral and local grounds, they invoked the protectionist role of the federal state politically in new ways.

and international lens¹⁷⁹ as existing legal and historical accounts document. This article adds new accounts within the context of the foundational fusion.¹⁸⁰

From the founding, republican government traditions positioned men as the representatives of women distinctly framed in a protectionist role.¹⁸¹ Suffragists carefully challenged the protectionist ideologies of national leaders to undermine this prevailing assumption. This implicitly challenged the foundational fusion and prevailing masculinities. For example, Alice Paul and NAWSA staged the famed March 3, 1913 suffrage parade that upstaged Wilson's inauguration to shift the suffrage movement to a national stage, yet it played a much bigger role than anticipated.¹⁸² The parade was a "near-riot" as police stood idly by as hostile onlookers antagonized and attacked marchers, doing nothing to restore order.¹⁸³ Paul and NAWSA strategically used this event to challenge the protectionist assumptions that supported separate sphere ideologies and republican government.¹⁸⁴ Harriot Stanton Blanch of the Women's Political Union, wrote to Wilson:

¹⁷⁸ Alice Paul and other suffragists keenly understood how Roosevelt's "bully pulpit" had changed the office. She understood that the presidency was a strong national and party leader in the progressive era. "Win the President and you win the battle." See LUNARDI, *supra* note 172, at 25. The suffrage movement also strengthened its national base as the country celebrated its centennial. As the early suffragists had done in the Declaration of Sentiments, women seized on the democratic founding principles and the Founder's own words. Tennie Claflin powerfully claimed at the nation's centennial in Philadelphia: "The aristocracies of the old world are based upon birth, wealth, refinement, education, nobility, brave deeds of chivalry; *in this nation, on sex alone*; exalting brute force over moral power, vice above virtue, ignorance above education, and the son above the mother who bore him." Langley & Fox, *supra* note 24, at 163. See generally Alexander Tsesis, *Representative Self-Government and the Declaration of Independence*, draft available on SSRN abstract=1855230 (positioning the Declaration of Independence as a document relevant to collective self-governance and chronicling its use as an advocacy tool in suffrage campaigns).

¹⁷⁹ One particularly famed moment of suffragists' protest included the banner in front of the white house stating: "Kaiser Wilson: Have You Forgotten Your Sympathy With the Poor Germans Because They Were Not Self-Governed? 20,000,000 American Women Are Not Self-Governed. Take the Beam Out of Your Own Eye." Suffragist Banner Outside the White House (1918). These tactics marked dramatic transformations in women's political activity – from the highly deferential strategies of early suffragists to direct personal challenges undermining male authority within the republican government tradition.

¹⁸⁰ See e.g., Valorie Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARVARD WOMEN'S L. J. 5 (1996) (explaining how litigation regarding integrating single-sex military educational institutions "excluded from their narrative any mention of the history of these military institutions or their role in Southern history and culture").

¹⁸¹ Johnson, *supra* note 75, at 126 (noting that President Wilson held traditional views about women's place in the home framed around protectionist arguments).

¹⁸² LUNARDI, *supra* note 172, at 21-22, 25.

¹⁸³ *Id.* at 29-30.

¹⁸⁴ *Id.* at 9, 29 (crediting Alice Paul with critical tactical shifts in the suffrage movement as she brought a dynamic force that "propelled American suffragism to its successful end"). Paul sought to hold the political leaders directly "responsible for the fate of a federal suffrage amendment." *Id.* at 20.

[T]he Government, which is supposed to exist for the good of all, left women, while passing in peaceful procession in their demand for political freedom, at the mercy of a howling mob on the very streets which are at this moment so efficiently officered for the protection of men.¹⁸⁵

Suffragists successfully used this imagery and the protectionist contradictions to stir national support for a federal amendment.¹⁸⁶ Paul and others continued this campaign by publicizing widely their later arrests and the brutality of their state confinements.¹⁸⁷ These tactics successfully challenged protectionist assumptions, which simultaneously challenged the republican government principles that historically justified women's exclusion from political citizenship.

In so doing, suffragists were simultaneously tapping into the exclusionary ideologies of the foundational fusion in troubling ways. One historian chronicles this fracture, explaining that women secured the vote by "embrace[ing] the white, middle-class, nativist, racist sentiments, prevalent during the progressive era under the guide of expediency."¹⁸⁸ Troubling tales emerged from the suffrage movement as suffragists excluded black women¹⁸⁹ and revealed pervasive prejudices in their advocacy and ideologies.¹⁹⁰ Indeed southern legislators even attempted to limit the Nineteenth Amendment to white women.¹⁹¹

The Nineteenth Amendment advocacy, when read through a masculinities lens, reveals the invocation of entrenched masculinities to advocate for suffrage in important ways that expand the relevance of the Nineteenth Amendment today.

¹⁸⁵ Johnson *supra* note 75, at 106-07.

¹⁸⁶ LUNARDI, *supra* note 172, at 30-31. Within days, NAWSA's Congressional Committee met with the White House in delegations. *Id.* See generally Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, J. OF L. & POLITICS 24:4, 339-422 (2008).

¹⁸⁷ *Id.*

¹⁸⁸ See generally Wanda A. Hendricks, *Ida B. Wells-Barnett and the Alpha Suffrage Club of Chicago in ONE WOMAN ONE VOTE 270* (Marjorie Spruill Wheeler ed., 1995).

¹⁸⁹ *Id.* at 268-270 (chronicling racism within the woman suffrage movement and detailing the movement to exclude Ida Wells-Barnett from the famous suffrage parade in March 1913 because NAWSA sought to "keep our delegation entirely white").

¹⁹⁰ Terborg-Penn (*African American Women and the Woman Suffrage Movement*), *supra* note 139, at 147-149 (explaining how suffragists tried to seize the vote by advocating that white women would "counter the negro vote in the South"). Terborg-Penn chronicles the deep racism within women's clubs, organizations, etc. *Id.* at 147-48.

¹⁹¹ *Id.* at 149.

2. The Unavoidable Intersection of Military Service and Women's Suffrage

The suffrage movement also successfully leveraged women's military contributions and service to win suffrage.¹⁹² Suffragists understood – within the foundational fusion and its entrenched masculinities – that women's service and loyalty created “opportunity” for women's enfranchisement and they successfully cast suffrage as a war measure.¹⁹³

The pinnacle of the federal suffrage debate occurred contemporaneous with the first national draft legislation and within a distinct “war measure” frame that successfully leveraged the foundational fusion. On May 17, 1917, Wilson sent the draft law to Congress.¹⁹⁴ The National Defense Act of 1916 had further nationalized the National Guard and empowered the president to institute a wartime draft.¹⁹⁵ The 1917 Selective Service Draft Act required all men to register for the national draft.¹⁹⁶ This inextricably intertwined national citizenship and military service.¹⁹⁷

Wilson successfully invoked his Commander in Chief power to declare suffrage a vital war measure. Wilson advocated in December 1918 in his State of the Union address that “women were important in the war effort and ‘the least tribute we can pay them is to make them the equals of men in political rights.’”¹⁹⁸ Wilson spoke on thirty minutes notice to the Senate chamber, declaring the amendment “vital to the winning of the war.”¹⁹⁹ Americans had to “give justice to women.”²⁰⁰ “I tell you plainly that this measure which I urge

¹⁹² See e.g., SEVERN, *supra* note 141, at 167 (explaining how suffragists paraded mothers of enlisted soldiers and nurses visibly in the 1917 suffrage parade). See generally Lt. Col Kristal L. Alfonso, *Femme Fatale 2010*, AIR & SPACE POWER J. 59 (Fall 2010).

¹⁹³ See generally Fowler, *supra* note 175, at 301 (explaining how Carrie Chapman Catt recognized the value of “patriotic service” and cast the suffrage movement in such terms to position women to be “repay[ed]” for service with the vote).

¹⁹⁴ This provoked a legal challenge. In January 1918, the Supreme Court upheld the draft as constitutional under Congress's Article I power to raise and support armies, to provide and maintain a navy, and to declare war. See *Arver v. U.S.*, 245 U.S. 366 (1918); see also Urofsky & Finkelman, *supra* note 171, at 601-02.

¹⁹⁵ SNYDER, *supra* note 13, at 99.

¹⁹⁶ *Id.* at 100.

¹⁹⁷ Urofsky & Finkelman, *supra* note 171, at 602.

¹⁹⁸ Johnson *supra* note 75, at 134. The historic moment that triggered Wilson's famed speech to the Senate was Senator Benet's switch to oppose woman suffrage. Senator Benet squarely challenged Wilson's war measures argument first raised in his State of the Union Address. In Senator Benet's high-profile about-face, he stated: “I do not think woman suffrage is necessary at this time, I cannot regard it as a war measure. I fail to see how politics can have anything to do with it. I put principle above party interests and I put war measures against anything else.” Johnson *supra* note 75, at 132.

¹⁹⁹ LUNARDI, *supra* note 172, at 132, 145..

²⁰⁰ *Id.*

upon you is vital to the winning of the war and to the energies alike of preparation and of battle.”²⁰¹ Wilson critically positioned women as loyal partners central to the war effort. In doing so, he invoked the long-standing American tradition of military service catalyzing enfranchisement and leveraged the new national tenor of military service within his commander in chief power.

Many anti-suffrage arguments accordingly positioned their opposition squarely within the male citizen-soldier republican government tradition, positioning the “bullets for ballots” paradigm front and center. Consider some of the following opposition arguments distinctly invoking the foundational fusion:

- “Women they cannot bear their proportion and share of the public burdens. Men represent them in the Army and in the Navy; men represent them at the polls and in the affairs of the Government.”²⁰²
- “[W]hen the women of this country come to be sailors and soldiers . . . then it will be time to talk about making [them] voters; but until that time, the question is not fairly before the country.”²⁰³
- “[They] are not called upon to serve the Government as the men of America are. They do not bear the bayonet, and have not that reason why they should be entitled to the ballot; and . . . the God of our race has stamped upon them a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life.”²⁰⁴
- “[T]o extend the rights of suffrage to the negroes in this country I think is necessary for their protection; but to extend the right of suffrage to women, in my judgment, is not necessary for their protection.”²⁰⁵

Some suffragists responded to questions of women’s military obligations directly. At least some sought the vote on fully equal political terms, as expressed by Tennie Claflin: “[T]hough women can never be like man, she can be his equal in all the rights and privileges of life.”²⁰⁶ This would include women’s military service. Claflin’s response invoked directly the citizen-soldier

²⁰¹ Johnson, *supra* note 75, at 132.

²⁰² Langley & Fox *supra* note 24, at 140 (citing Senator George H. Williams of Oregon on suffrage).

²⁰³ *Id.* at 140-41 (citing Senator Frederick T. Frelinghuysen of New Jersey).

²⁰⁴ Langley & Fox *supra* note 24, at 139 (citing Senator George H. Williams of Oregon on suffrage).

²⁰⁵ *Id.* (citing Senator George H. Williams of Oregon on suffrage).

²⁰⁶ TENNIE C. CLAFLIN, CONSTITUTIONAL EQUALITY A RIGHT OF WOMAN 9 (1871).

republican government tradition, carefully emphasizing women's volunteer service and their inclination toward governing for the collective good:

[I]t is frequently advanced as an argument or rather set off against giving woman the right of the ballot, that if she votes she should be subject to draft for military duty. Well, we have no objection. All we would ask is that when the conscription is made, none may be accepted save those who are really physically competent. . . . But in the case of a call for volunteers, there is not a doubt if women were permitted to serve, a great many more would come forward at their country's call than would be found able to carry arms. Let women do as they please. Restrict them by no laws that would not equally bind men. Give to both men and women the guide of a properly educated and developed conscience, and there will be no need of arbitrary laws binding either to their separate duties If women should not vote because they are non-combatants, then all non-combatants should be deprived of the ballot.²⁰⁷

Understanding the persistence of the foundational fusion reveals new dimension of women's modern military exclusion, explored in Section V.

V. BROADENING THE FRAME ON MILITARY INTEGRATION FROM EQUAL PROTECTION TO TRANSCENDING MASCULINIZED CITIZENSHIP

The rights and obligations of military service have historically been reciprocal to citizenship.²⁰⁸ In a symbiotic context, even today, depriving women of full access to collective self-defense inherently undermines their role in self-governance. This troubles women's political participation in war, frames citizenship in masculine terms, and undermines women's presidential candidacies.

This article suggests that the Nineteenth Amendment is a tool for women's military integration when understood in the context of the foundational fusion. As Akhil Amar explained, the Nineteenth Amendment works as "a kind of estoppel argument."²⁰⁹ Because the Nineteenth Amendment affirms women's political equality, certain arguments using sex-based differences to support differential treatment are impermissible.²¹⁰ This estoppel argument applies both to women's jury service and to women's military integration. Just as the Fifteenth Amendment was not just about voting; it was about attaining the full rights and responsibilities of the political domain, so too could the Nineteenth Amend-

²⁰⁷ *Id.* at 44-45.

²⁰⁸ KERBER, *supra* note 1, at 304.

²⁰⁹ Amar (*Women and the Constitution*), *supra* note 31, at 472.

²¹⁰ *Id.*

ment. Because the Fifteenth Amendment was about *male* political rights, overt discussion of the military service obligations it imposed was mooted.

Indeed after the Nineteenth Amendment, women's jury service became the next question of political equality. Former suffrage activists, such as the League of Women Voters waged expansive and expensive movements for women's jury service.²¹¹ Several states accordingly amended their codes to make women eligible for jury service by construing the Nineteenth Amendment's broader equality mandate:²¹² "the spirit of equality of the sexes which [the Nineteenth Amendment] breathes moved the legislature of New Jersey in 1921 to amend our act concerning jurors so as to include women as well as men."²¹³ Linda Kerber positioned this jury integration argument as relevant to military service too: "The doubled significance of arms-bearing is in some respects analogous to the doubled edged-meaning of jury service. In both, individual vulnerability to an obligatory service simultaneously functions as the empowerment of the citizen and a constraint on government power."²¹⁴

Opponents of women's jury service challenged women's capabilities relative to male intellectual norms. One Washington State Supreme Court dissent argued, for example, that "the labor and responsibility which [jury service] imposes [is] so onerous and burdensome, and utterly unsuited to the physical conditions of females" that the legislature could not have intended to impose such an obligation.²¹⁵ Women could not have the "masculine will and self-reliant judgment of man."²¹⁶

Modern military integration opposition arguments are also grounded in the same protectionist arguments that were estopped by the Nineteenth Amendment. Justice Sutherland's opinion in *Children's Hospital v. Adkins*, broadly noted that "in view of the great – not to say revolutionary – changes . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point . . . Woman is accorded emancipation from that old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships."²¹⁷ Rhetorically depicting women as privileged by the *right* to serve without the *obligation* to

²¹¹ Johnson *supra* note 75, at 139, 143 (noting that the League of Women Voters particularly championed women's jury duty: "getting the word 'male' out of jury statutes is requiring something very like a second suffrage campaign – laborious, costly, and exasperating").

²¹² Johnson *supra* note 75, at 137 (explaining that after the Nineteenth Amendment was ratified many state statutes automatically triggered women's jury service).

²¹³ Siegel, *supra* note 9, at 162.

²¹⁴ Kerber, *supra* note 1, at 240.

²¹⁵ Aaron H. Caplan, *The History of Women's Jury Service in Washington*, 59 WASH. STATE BAR NEWS 3, 5, 12 (2005).

²¹⁶ *Id.* at 5.

²¹⁷ Siegel, *supra* note 9, at 153 (citing *Adkins v. Children's Hosp. of DC*, 261 U.S. at 525, 553 (1923)).

serve is “residue of the old system of domestic relationships, the system of coverture.”²¹⁸ As the historical and structural framing presented in Sections I through VI of this article revealed, when revived from its “historical erasure,” the Nineteenth Amendment is a powerful modern weapon for women’s full political equality.

Before the Equal Rights Amendment was proposed some courts and legislative bodies also interpreted the Nineteenth Amendment to support full political equality.²¹⁹ Reva Siegel’s groundbreaking Nineteenth Amendment work uncovered early expansive interpretations of the Nineteenth Amendment,²²⁰ revealing its relevance to political equality more broadly and suggesting elements of historical erasure. The Equal Rights Amendment (“ERA”), introduced just four years after the Nineteenth Amendment, may have ironically muted the impact of the Nineteenth Amendment’s broader mandate.²²¹ The National Women’s Party sought to position the ERA as implicitly enshrined in the Fourteenth and Nineteenth Amendments.²²² This argument was a tricky one for the women’s movement – simultaneously demanding a necessary constitutional amendment yet arguing that it implicitly existed anyway. Yet the ERA debate addressed the complexities of women’s military service in ways that might have sidelined the Nineteenth Amendment’s relevance. ERA advocates emphasized the existence of motherhood exemptions and other exclusionary practices of military recruitment to soften political fears of full military integration.²²³

²¹⁸ Kerber, *supra* note 1, at 304.

²¹⁹ See Siegel, *supra* note 9, at 161. Siegel’s work reveals how the Supreme Court and Congress sporadically interpreted the Nineteenth Amendment “as reflecting and embodying a commitment to disestablish the gender-status norms of the common law.” *Id.* at 141.

²²⁰ Immediately after Nineteenth Amendment was ratified, some courts read it to convey the “normative commitments leading to its adoption and so concluded that it had constitutional significance in matters other than voting.” *Id.* at 154. For example, Maine interpreted the Nineteenth Amendment to overturn a state constitutional provision prohibiting women from serving as Justice of the Peace, holding that “every political distinction based upon consideration of sex was eliminated from the Constitution by the ratification of the amendment. Males and females were thenceforth, when citizens of the United States, privileged to take equal hand in the conduct of government.” *Id.* at 161-62. In 1922, women lobbied for the Cable Act to allow women to keep their citizenship if they married foreign nationals. Congress, one year before the ERA, understood the Nineteenth Amendment’s relevance. One congressman said: “in my judgment there was no particular force in the demand for this bill until the Nineteenth Amendment became part of the organic law of the land . . . At that moment the doctrine of dependent or derived citizenship became as archaic as the doctrine of ordeal by fire.” *Id.* at 160-61.

²²¹ Langley & Fox, *supra* note 24, at 137 (The ERA was introduced in 1923).

²²² Siegel, *supra* note 9, at 165. Ginsburg has said “there was always a view that once the 19th amendment was passed and it made women full citizens, that was, in effect, an Equal Rights Amendment . . . Many people thought that you could put the 14th amendment together with the 19th amendment and that was essentially the ERA. But it didn’t happen.” *Id.* (citing Comments on Ruth Bader Ginsburg in *John Marshall Law School Alumni News* December 1994, 45).

²²³ Langley & Fox, *supra* note 24, at 292-93.

By the time that women's military integration emerged on the feminist agenda in the 1970s, "an act of historical erasure" had excluded the Nineteenth Amendment's deeper historical roots from its modern functional understanding.²²⁴ By the 1970s, dramatic strides in racial discrimination – achieved largely through court interpretations of the Fourteenth Amendment's equal protection clause – transformed women's rights advocacy. With a rich body of race-based discrimination cases emerging, courts considering sex discrimination never seriously examined the history of the Nineteenth Amendment.²²⁵ For example, Justice Brennan in *Frontiero* presented the historical discrimination of women as relevant only as the discriminatory history relates to blacks, never citing the Nineteenth Amendment, despite a constitutional challenge to a military benefit.²²⁶ Nor did Justice Ginsburg explore the Nineteenth Amendment's relevance to the Virginia Military Institute's quest to turn men into citizen-soldiers. As Siegel concludes, this "effaces the history of women's treatment in the American legal system."²²⁷

Bearing arms for one's nation has long been recognized as the highest duty a citizen can provide.²²⁸ Ninety years after the Nineteenth Amendment was passed, women remain excluded formally from fully participating in this "fundamental civic obligation"²²⁹ voluntarily and they bear no *obligation* to serve. For over two hundred years women's military exclusion has been rooted in the foundational fusion of citizenship, military service, and masculinity. This reality suggests that military integration is about more than individual rights, but cuts to the core of political citizenship entirely.

If the Nineteenth Amendment offered women full political equality, perhaps we have eulogized the Nineteenth Amendment prematurely.²³⁰ Women have played a role in every war since our country's founding. Moreover they

²²⁴ Siegel, *supra* note 9, at 166, 168 ("By 1970, there was a sketchy body of precedents that viewed the Nineteenth Amendment as recognizing women's equal civic status.").

²²⁵ Siegel, *supra* note 9, at 168.

²²⁶ Siegel, *supra* note 9, at 171 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

²²⁷ Siegel, *supra* note 9, at 170-71.

²²⁸ Kerber, *supra* note 1, at 246 (citing Chief Justice Edwards Douglas White).

²²⁹ Langley & Fox *supra* note 24, at 306 (citing dissent in *Rostker v. Goldberg*, 453 U.S. 57 (1981)).

²³⁰ Women routinely vote in federal, state, and local elections, run for all political offices, sit on juries, and generally experience unencumbered access to politics. The recognized voting "gender gap" shows that women do not just cast votes, but wield real political power. Statistics from the 2008 election show that women accounted for more than half of votes nationwide and female voters outvoted their male counterparts by over 10 million votes. *Women's Voting Power: The Facts*, Voting Women <http://www.votingwomen.org/votingpower.html#navigation>. In addition, the 2008 election featured an exceedingly viable female presidential contender in Hillary Rodham Clinton and Vice Presidential candidate Sarah Palin. These points might suggest that the Nineteenth Amendment is a celebratory relic of the nineteenth and twentieth centuries' women's suffrage movement, seemingly irrelevant today in a functionalist sense. We might well hoist the Nineteenth Amendment "mission accomplished" flag on these accounts alone.

have maneuvered within the complex and pervasive gender norms of the prevailing citizen-soldier traditions of the era and found a way to voluntarily participate in every war “outside the boundaries of reciprocity and entitlement.”²³¹

Yet formal and substantive discrimination still pervades the military.²³² Women are still formally excluded from many combat positions in the military.²³³ Women are not compelled to register for the draft under the Military Selective Service Act.²³⁴ Women still comprise only fifteen percent of military personnel, making the military a clearly male-dominated organization.²³⁵ Ground combat restrictions effectively and legally exclude women from approximately twenty percent of all military occupations.²³⁶ Women still occupy heavily gendered roles in the military²³⁷ and experience relatively low enlistment

²³¹ KERBER, *supra* note 1, at 223.

²³² Office of the Assistant Sec’y of Def. for Pers. and Readiness, *Table C-25: FY 2009 Selected Reserve Officers by Occupational Area, Component, and Race/Ethnicity*, POPULATION REPRESENTATION IN THE MILITARY SERVICES 2009 (last visited July 12, 2011), http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2009/appendixc/c_25.html (showing that white military personnel hold more positions than minority military personnel in all occupational areas).

²³³ Scott E. Dunn, *The Military Selective Service Act’s Exemption of Women: It’s Time to End It*, 1 ARMY LAW 1, 18-19 (2009) (“As a matter of DOD policy promulgated by Secretary of Defense Les Aspin in 1994, women are currently restricted “from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.”); *see also* Women’s Research & Educ. Inst., *Chronology of Significant Policy Changes Affecting Women in the Military: 1947 – 2003* (last visited July 12, 2011), available at <http://www.wrei.org/Women%20in%20the%20Military/Women%20in%20the%20Military%20Chronology%20of%20Legal%20Policy.pdf>; *but see* Alfonso, *supra* note 192, at 64-69 (explaining how women soldiers are nonetheless in combat positions in Iraq and Afghanistan despite military policy).

²³⁴ Military Selective Service Act, 50 U.S.C. §§ 451-73 (2006) (applying to “every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six”).

²³⁵ IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT 215 (James E. Gruber & Phoebe Morgan, eds., 2005); *see also* Women’s Research & Educ. Inst., *Active Duty Service Personnel by Branch of Service, Officer/Enlisted Status & Sex as of 30 September 2007*, available at www.wrei.org/Sept_2007_Active.pdf (showing women make up 6%-20% of military personnel across all branches of the military).

²³⁶ Women in the Army and Marines are prohibited from serving in units of battalion size or smaller, particularly in units where the primary mission is ground combat; similarly woman are prohibited from working the following occupational fields: infantry, armor, Special Forces, ranger units, ground surveillance radar platoons, combat engineer line companies, and short-range air defense. Women in the Navy are excluded from working on submarines, SEALs (special forces); working as fire control technicians, missile technicians, and sonar technicians. David R. Segal & Mady Wechsler Segal, *Population Reference Bureau, America’s Military Population*, POPULATION BULL., Dec. 2004, at 28, available at <http://www.prb.org/source/ACF1396.pdf>.

²³⁷ *See e.g.*, Kathryn Abrams, *Women and Antiwar Protest: Rearticulating Gender Citizenship in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 133 (Grossman & McLain eds., 2009); Office of the Assistant Sec’y of Def. for Pers. and Readiness, *Table B-20: FY 2009 Active Component Enlisted Members by Occupational Area, Service, and Gender*, POPULATION REPRESENTATION IN THE MILITARY SERVICES 2009 (last visited July 12, 2011), available at

rates.²³⁸ Even when women have filled the military in historic numbers, women have tended to hold these positions during times of excessive need caused by shortages of “manpower.”²³⁹ No woman has ever served as President of the United States (the Commander in Chief) or Secretary of Defense.²⁴⁰

Even where women are serving in the military in meaningful numbers, the military remains a paradigmatically masculine institution.²⁴¹ Men can construct their masculinities both by military service itself and by the formal exclusion and marginalization of women and gays.²⁴² The landmark Virginia Military Institute case revealed the extent to which citizen-soldiers are still entirely masculine and still constructed on the same notion of “the other” as our early militias within the foundational fusion.²⁴³ As the Virginia Military Institute’s Public Relations Director said: “We know how to train young men to be men. We don’t know how to train young women to be men.”²⁴⁴ Our modern military still trains men to be masculine citizens, despite the Nineteenth Amendment’s implicit command for women’s full political equality and despite all of the changes to our modern military institutions.

Women’s exclusion from full combat roles distorts modern understandings of military service. Modern warfare has largely eroded traditional under-

http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2009/appendixb/b_20.html (showing that nearly 50% of female officers and enlisted servicewomen fill administrative and support roles often in health care and administration (while approximately 20% of male servicemen fill these roles). Only 7% of women officers are in tactical operations occupations, compared with 37% of male officers); see also Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?* 29 WOMEN’S RTS L. REP. 99, 101-02 (Winter/Spring 2007-2008); see generally Catherine Toth, *Women and the Military*, in THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW 329 (Andrea Barnes ed., 2005).

²³⁸ Segal, *supra* note 236, at 66.

²³⁹ See Toth, *supra* note 237, at 329-30 (highlighting the Spanish-American War and the World Wars as examples of women’s military involvement); see also MATTHEW J. MORGAN, THE AMERICAN MILITARY AFTER 9/11: WOMEN IN THE MILITARY 48 (2008) (explaining that women’s roles in the military have evolved from women’s limited participation along gender lines to more substantive military service as manpower shortages necessitated more involvement, such as the Vietnam War).

²⁴⁰ See *Histories of the Secretaries of Defense*, DEP’T OF DEF. http://www.defense.gov/specials/secdef_histories (last visited July 12, 2011); *The Presidents*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents> (last visited July 12, 2011).

²⁴¹ See e.g., Kenneth Clatterbaugh, CONTEMPORARY PERSPECTIVES ON MASCULINITY, MEN, WOMEN, AND POLITICS IN MODERN SOCIETY 61 (1990); Helena Carreiras, GENDER AND THE MILITARY: WOMEN IN THE ARMED FORCES OF WESTERN DEMOCRACIES 41 (2006); Toth, *supra* note 237, at 329.

²⁴² Karen O. Dunivin, *Military Culture A Paradigm Shift*, MAXWELL PAPER NO. 10, AIR WAR COLLEGE 1, 18 (Feb. 1997), available at <http://www.au.af.mil/au/awc/awcgate/maxwell/mp10.pdf>.

²⁴³ See Vojdik (*At War*), *supra* note 180, at 19 (“By constructing women as “the other,” the VMI decisions perpetuate the myth that women are fundamentally and naturally different from men.”).

²⁴⁴ SNYDER, *supra* note 13, at 137 (quoting 1994 public relations director).

standings of the “citizen-soldier.”²⁴⁵ Modern soldiers are no longer training in the town square with muskets and bayonets. Male military obligations create a “valorization of male violence” that extends beyond the military to broader cultural masculine norms.²⁴⁶ “Simply inserting ‘women’ into a misogynistic warrior culture does not eliminate the conflation of soldiering with ‘masculinity,’ but rather produces sexual harassment and rape, as evidenced by the broad array of recent scandals within the American military. Because of traditional dichotomous constructions of gender, female individuals are viewed not as ‘soldiers,’ but as ‘women.’”²⁴⁷

Women’s political rights were shaped by contemporaneous contextual limitations. While it certainly cannot be said that women’s seventy year campaign for suffrage was affirmatively seeking military integration, read in historical, structural, and rhetorical context, women were advocating sweeping reforms rooted in challenging the foundational fusion of citizenship, military service, and masculinities. Given the radicalism of suffrage itself,²⁴⁸ even if the suffrage movement was not waged directly for military integration, that does not foreclose its deep relevance now.

Framing women’s military integration within the Nineteenth Amendment’s historical and structural context reveals a more sustainable and tenable advocacy strategy than equal protection alone. Siegel explores how modern advocates’ frame women’s rights arguments within the equal protection clause through its nexus to race discrimination. This approach is inherently limited for all of the constitutional and historical narrative reasons that Siegel raises and for two additional ones when applied to military integration. The equal protection clause is about individual rights. To frame advocacy around individual rights positions the advocacy movement for military integration at the margins. It leaves advocates and courts to resolve the claims of the minority of women who affirmatively seek combat or to respond to the minority of men who challenge obligatory service.

²⁴⁵ See e.g., KERBER, *supra* note 1, at 301.

²⁴⁶ KERBER, *supra* note 1, at 300. See Valorie Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALABAMA L. REV. 303 (2005) (explaining that the ground combat exclusion is better framed as “an institutional practice that constructs warriors as male and masculine while demeaning women”).

²⁴⁷ SNYDER, *supra* note 13, at 7.

²⁴⁸ See e.g., Wheeler, *supra* note 167 (explaining that suffrage was “a symbol of women’s equality and individuality and a means of improving women’s legal and social condition”); Patricia Grimshaw, *Women’s Suffrage in New Zealand Revisited: Writing from the Margins in SUFFRAGE AND BEYOND*, INTERNATIONAL FEMINIST PRESCRIPTIVES 10 (Caroline Daley & Melanie Nolan eds. 1994). (“This new history of suffrage must acknowledge suffragists’ unstable speaking positions and embrace the discontinuities in their texts, rather than seek to iron out ambiguities in the interests of a smooth linear narrative.”).

Suffrage activists once believed that their greatest obstacle to the vote was not male opposition, but female indifference.²⁴⁹ The same might be said today about women's military integration.²⁵⁰ Kerber compared it directly to women's exclusion from jury service, "It took nearly a century to develop a precise understanding of the behaviors required of jury service and to arrive at a general consensus that jury service is an obligation that rests equally on constituents regardless of gender. But on arms bearing there is still nothing resembling a consensus."²⁵¹ Yet military service is every bit as essential to our civic society as jury service, indeed perhaps more so.²⁵² To not agitate or obtain the obligations of military service undermines women's full political participation.

Scholar Valorie Vojdik keenly argued for the conceptualization of gender as something that is produced at the institutional level, not just the individual level, "a social process of exclusion that distinguishes persons based on their sex, simultaneously reinforcing a hierarchy that privileges the male and masculinity, and subordinates women."²⁵³ This article suggests that we should layer on additional understandings of how the state endorses and enforces institutional gender even as it transforms historically. This article reveals that masculinities – and the state's construction of masculinities within the foundational fusion – have persisted as a tool of women's military exclusion.

The implications of military integration are further relevant to women's war related activity and presidential candidacies, suggesting broader concerns of political citizenship. Women's war-related political activity must still navigate gendered landmines, just as it has since our founding. Consider, for example, Kathryn Abrams's study of three groups of women who mobilized around gender in war resistance.²⁵⁴ Abrams explained that women's political voices are suppressed during war as "bearings arms" becomes the fundamental obligation of citizenship.²⁵⁵ In war, male citizens have privilege to mount a political protest, because they "are the paradigmatic citizens whose obligation extends to dying for their country, whereas women are almost never subject to mandatory

²⁴⁹ See Sarah Hunter Graham, *The Suffrage Renaissance in ONE WOMAN ONE VOTE* 161 (Marjorie Spruill Wheeler ed., 1995); SEVERN, *supra* note 141, at 66 ("[M]ost of America's women showed little interest at first in the crusade to win them the right to vote.").

²⁵⁰ See generally DIANE MAZUR, *A MORE PERFECT MILITARY*, 190 (2010) (explaining how we have a growing "civil-military gap" that pushes solutions "farther out of reach").

²⁵¹ Kerber, *supra* note 1, at 299.

²⁵² Military historian Walter Milis explains, "Military institutions and their consequences are as essential elements of our social and political history as are religious, economic, legal or partisan political institutions." HASSLER, *supra* note 14, at 17.

²⁵³ Valorie Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 *BERKELEY WOMEN'S L. J.* 68, 75 (2002).

²⁵⁴ Abrams, *supra* note 237, at 131.

²⁵⁵ *Id.* at 132-33.

military service.”²⁵⁶ To gain political legitimacy, women have to invoke their moral and gendered experiences, just as the suffragists did to secure the vote. They speak as actual mothers who lost sons or as metaphorical mothers who give life and preserve it, rather than approaching the state as a citizen with a vested interest in collective self-governance.²⁵⁷

Notably, the only exception to Abrams’ conclusions regarding “moral mother” war protests are the “women in black” who protest Israeli occupation of the West Bank and Gaza in Palestine. These women uniquely invoke no gendered family connection (as mothers, sisters, or daughters); in fact they detach themselves from their family roles, and invoke their role as citizens to demand equality and accountability.²⁵⁸ Although Abrams did directly examine how they are uniquely able to invoke a citizenship protest without gender, it seems that these Gaza women have more political legitimacy in war protest because the perceived “burdens” they bear are related more directly to military service. All persons in the Gaza region are subject to the violence of war daily. The Israeli army conscripts both male and female soldiers and has some fully integrated combat units. While Palestinian women are not drafted, some engage in highly publicized martyrdom and many more have been the direct victims of attack. The relative differences in “front line” engagement that these protesting women experience, may very well support their political legitimacy as citizens, absent the moral authority that women might otherwise need to invoke.

The implication of women’s military exclusion likewise undermines their presidential candidacies. Given the unique framing of our commander in chief presidency, it may very well be a primary reason why women have not been consistently viable political candidates for this highest office. Consider, for example, the television show featuring Geena Davis as a woman president. The show’s title *Commander in Chief* suggests that a female presidency is most notably defined by the perceived novelty of a woman commanding troops. Presidential qualifications have always involved qualifications to command.²⁵⁹ If we cannot conceive fully of women soldiers yet, it is hard to conceive fully of women commanding soldiers. This leaves women presidential candidates to navigate the same delicate waters of “equal” and “difference” equality, positioning women to run as mothers and moral leaders, unable to assert full political

²⁵⁶ *Id.* at 133. See generally DIANE MAZUR, A MORE PERFECT MILITARY, 4 (2010) (explaining how public policy debates are stifled by sentiments that nonveterans “have not earned the right to speak because, in an era of voluntary service, they made the choice to let others carry the burden for them”).

²⁵⁷ Abrams, *supra* note 237, at 134 (studying Cindy Sheehan’s war protest, the unapologetically angry mother of a son who was killed in service who established the highly-publicized Camp Casey Vigil outside President Bush’s house demanding to know the “noble cause” for which her son died).

²⁵⁸ *Id.* at 152.

²⁵⁹ Of the thirty-six presidents between Washington and Nixon, for example, eighteen had military experience. HASSLER, *supra* note 14, at 14. Ten of the thirty-six were generals. *Id.*

equality. In a paradigmatically framework of male military service, women's military integration remains deeply relevant to effectuating full political citizenship and equality.

Yet enlisting the Nineteenth Amendment to frame military integration reveals a more holistic and inclusive battle for political equality.²⁶⁰ Kimmel explained this vision that:

[W]e need a different sort of manhood, a "democratic manhood." The manhood of the future cannot be based on obsessive self-control, defensive exclusion, or frightened escape. We need a new definition of masculinity in this new century . . . a definition that is capable of embracing differences among men and enabling other men to feel secure and confident rather than marginalized and excluded.²⁶¹

The prospect of diffusing military service (even violence) from masculinities produces a more inclusive citizenship model that benefits men and women.²⁶² It does not just respond to women's equal protection arguments seeking inclusion, but it also responds to masculine imperatives and dominant gender conformity pressures.²⁶³

VI. CONCLUSION

The historical fusion of citizenship, military service, and masculinity has persisted in critical ways that are troubling to modern political citizenship. While the Nineteenth Amendment has historically been eulogized as the finale of the women's suffrage movement, this paper positions the Nineteenth Amendment within a broader historical narrative about republican government traditions and masculinities that suggests a broader relevance. Women's military integration is about fulfilling the founding visions of republican govern-

²⁶⁰ See e.g., Vojdik (*Beyond Stereotyping*), *supra* note 246, at 57 (explaining how the ground combat exclusion "rests upon the military's desire to define and preserve the identity of the warrior as male and masculine"). See generally Bettina Aptheker, *Directions for Scholarship* in AFRICAN AMERICAN WOMEN AND THE VOTE 1837-1965 207 (Gordon, Collier-Thomas, Bracey eds. 1997) (proposing that we think in "broader and more interdisciplinary ways, in more conceptual and, if you will, more artistic terms" about scholarship).

²⁶¹ KIMMEL, *supra* note 6, at 256 ("All through American history, men have tried to resolve their problems by excluding others, by bulking up, or by running off to some pastoral Eden. And all through history, those strategies have failed. One measure of that failure, in fact, is that we keep trying them over and over again.").

²⁶² See Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 Seattle Univ. L. Rev. 17, 49 (2010) (explaining how men also "lose by being constrained to the role of oversexed aggressors, on pain of losing their identity as men").

²⁶³ See e.g., Vojdik (*At War*), *supra* note 180, at 5 (explaining how the female litigants in VMI and Citadel integration cases were "demonized as gender outlaws," as "aberrations from traditional norms of femininity," even as acting on a "selfish desire for equal treatment").

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ment,²⁶⁴ effectuating women's full political citizenship, and removing the masculinity constructions that surround and define citizenship.

²⁶⁴ See e.g., SNYDER, *supra* note 13, at 7 ("I am interested in reconstructing republican citizenship so that *all* individuals, regardless of gender, can be included as republican citizens.").