

***Sacrifice and Civic Membership: Who Earns Rights, and When?*¹**

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“The Negro is a man!”

Senator Daniel Clark, R-New Hampshire, February 14, 1866 (Epps 2006: 118)

In 1927, the US Supreme Court decided *Buck v. Bell*, considering Virginia’s policy of compulsory sterilization for those deemed unfit to reproduce by the state. In the ruling, the Court cleared the state to sterilize Carrie Buck, described by Justice Oliver Wendell Holmes in his opinion as “a feeble minded white woman” (*Buck v. Bell* 1927: 205). Holmes’ infamous quip in the ruling was that “three generations of imbeciles are enough” (Id. at 207), but the opinion of this former soldier hints at an interesting theory of the relationship between sacrifice and citizenship.

Holmes is best known among us as a Supreme Court Justice, fighting on the bench to bring his pragmatic and realist visions into the backward-looking jurisprudence of the *Lochner* era. But Holmes the soldier – the man who was wounded and whose friends died beside him at Antietam and Fredericksburg – preceded Holmes the law professor and then judge. And this soldier saw military service as the pinnacle of a citizen’s service to the state. In justifying Virginia’s sterilization policy, Holmes explained:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. [Id.]

Masculine citizenship thus implicitly entails the potential for the sacrifice of life in war, the greatest and noblest sacrifice that can be provided to the state as an earnest token of the citizenship of free men. The demand of this noble sacrifice renders other less noble sacrifices – particularly reproductive sacrifices – justifiable.

Holmes’s reasoning on this issue went back far before his service on the bench. In an address delivered to graduating seniors at Harvard College on Memorial Day in 1895, he situated participation in military conflict (and its proxy, dangerous sport) as a divine educational experience fitting men for worthiness as leaders. Military brotherhood was, for Holmes, the antidote to cynical individualism and undisciplined consumption; he argued that “high and dangerous action teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof. Out of heroism grows faith in the worth of heroism”

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(Holmes 1895). The death and carnage of war (and dangerous sport) were not necessarily tragic, but rather, “a price well paid for the breeding of a race fit for headship and command” (Id.). These values appeared to be particularly necessary as the Civil War generation was aging and passing into political and civil twilight, leaving the mantle of leadership to fall to the Gilded Age generation.

Holmes’ 1895 vision was deeply gendered. He recognized the rising impulses toward reform in the United States and informed the young putative leaders he was addressing, “Behind every scheme to make the world over, lies the question, What kind of world do you want? The ideals of the past for men have been drawn from war, as those for women have been drawn from motherhood” (Id.). Of the masculine ideals, honor stood at the top, an ideal for the sacrifice of one’s life was an acceptable bargain. The value of this bargain hallowed the state. While women, too, could serve the state, the feminine ideals of reproduction and caring were not ideals that facilitated noble leadership. This speech’s powerful invocation of manhood was allegedly what convinced Theodore Roosevelt, who was present, to nominate Holmes for a seat on the US Supreme Court when he became President.

In an earlier speech, also delivered on Memorial Day, Holmes had expressed women’s wartime nobility and sacrifice as contingent upon those of men: “There are those still living whose sex forbade them to offer their lives, but who gave instead their happiness” (Holmes 1884). The sight of these sorrowful widows, “set apart” from society and even friends, was uplifting for the men who witnessed them. Holmes proposed two models through which such women had transformed their grief into valuable contributions: “I think of one whom the poor of a great city know as their benefactress and friend. I think of one who has lived not less greatly in the midst of her children, to whom she has taught such lessons as may not be heard elsewhere from mortal lips” (Id.). Yet, both public and private nurturing were not fit topics for public or political discourse, in Holmes’ view, as he admonished that their stories be passed over “in reverent silence” (Id.). The men who performed the primary sacrifices, however, were not only to be thought of silently, but rather to be spoken of and rendered publicly historic (Id.).

Holmes was tapping into an important dynamic that has operated through the span of American history – the dynamic link between military service and sacrifice and citizenship. In light of the US’s current engagement in warfare, many scholars have turned to re-examine this dynamic, thinking through the significance of an all-volunteer military and the nature of the National Guard’s citizen-soldiers (see, in particular, Feldman 2008). This focus on citizenship and its meaning has been productive in advancing our theorizing on the factors that contribute to state actors’ and individuals’ attributions of citizenship in times of war. But at the same time, civil libertarians have cautioned about the tendency of the government to restrict rights during wartime. Focusing on abuses in Guantanamo Bay, domestic surveillance, and the creeping use of torture by the US military and other individuals acting through or for the United States, academics and lawyers have raised consciousness about the erosion of rights and ethical and humane standards of conduct in this war, but by extension in wartime generally. This extension encompasses the severe limits on freedom of speech and expression cropping up at various points when the US was involved in wars, but particularly during and after the Civil War and World Wars I and II, and also highlights the restrictions on due process pursued by Lincoln during the Civil War.

Historical institutionalist scholars, however, have noted an interesting anomaly. While generally scholars correctly perceive wartime as a time of rights curtailment, in the wake of at least some military conflicts, people of color have seen advances in their rights and in their

access to full citizenship. Mary Dudziak presented a comprehensive historical argument for her claim that African Americans saw significant gains in their access to rights because of their crucial rhetorical and political situation in the Cold War ideological struggles (Dudziak 2000). Daniel Kryder has built off of that argument, showing that the political and military imperatives of building up the United States' arsenal and securing reelection led Roosevelt to embrace racial reform during World War II (Kryder 2001). Philip Klinkner and Rogers Smith have argued that African Americans have generally gained rights in the context of their civic participation as key contributors in moments of crisis in the United States, identifying the advances of Reconstruction and of the post World War II era as the primary examples (Klinkner and Smith 1999). And Mark Graber has developed this insight further in a piece arguing explicitly that wars have generally provided opportunities for extending equality rights to racial minorities (Graber 2006).

While these scholars disagree on the precise mechanism and the causal chains that have led to the expansion and extension of rights to people of color during wartime, they agree that some relationship exists. They also agree that, whether the relationship between service and sacrifice in times of crisis and the granting of rights is based in ethics, political pragmatism, or power relations, it is the service and sacrifice that set the dynamic into motion. In a sense, they argue Holmes' position in reverse: rather than citizenship's receiving its highest and noblest expression through military service and sacrifice, serving as a crucial component in a time of military crisis provides the groundwork for extending the scope of citizenship. Reading race into the discussions of civic membership thus provides a useful opportunity to reexamine the common belief that national crises generally produce curtailments in civil liberties and rights.

But how far does this revision extend? In particular, what happens if gender is read into the analysis? Cynthia Enloe (2001) has argued that masculinity, particularly as expressed through military ideology, is related to civic membership. Carl Stychin (1998) likewise articulates a vision of ideal citizenship that strongly privileges heterosexual and masculine service to the state through the military, drawing connections between this ideal and the American military's intermittent efforts to frame homosexuals as security threats. And Gretchen Ritter has highlighted how, despite women's expanded opportunities in the workplace during the military mobilization of World War II, women generally experienced constrictions of their social and civic capacities to act as public members of the state in the wake of the war (Ritter 2006).

This paper considers two moments that scholars generally agree featured advances for African Americans' citizenship – the end of the Civil War and Reconstruction, and World War II and its immediate aftermath – and reads these moments through lenses of race and gender. I consider the conjunction of acknowledged sacrifices and contributions to the state, the rights advances achieved, and the gendered and racialized conceptions of citizen service emerging out of both post-war periods. This conjunction suggests that the kind of citizenship that people of color gained during and after wartime crises depended upon gendered and racialized hierarchies that valued the masculine service of soldiering by African American men but provided no parallel framework for valuing feminine service – because the path of producing and rearing children for the state was closed to women of color as a form of valued and desired civic service. Both in the Civil War and post-Civil War period and in the World War II and post-WWII period, the expansion of citizenship rights to incorporate African Americans took place at the intersection of race and gender through their connection to civic service.

The Civil War, Emancipation, and Contract Rights

When the Civil War began, the major conflict over slavery was more connected to the expansion of slavery into the territories than about emancipation directly. Various scholars have situated the significance of emancipation differently, but the imperatives of war drove the north toward emancipation as the war progressed. Emancipation related to military objectives in two primary ways: as an incentive to African Americans to contribute to the union effort and as a foreign policy tool to maintain British neutrality. Lincoln's initial response to blacks who crossed the front and demanded freedom was not encouraging; when General John Fremont issued an order freeing every slave owned by a Confederate in rebellious Missouri, Lincoln countermanded it (Bickers 2006: 77). But soon thereafter, Massachusetts General Benjamin Butler devised the legal framing that would govern the question of escaped slaves for much of the war. He reasoned that, if these slaves were considered by their seceding owners to be property, the Union could lawfully take possession of them and consider them to be seized contraband under the conventions of warfare (Id.). Contraband camps soon flourished in multiple locations, and generals in command over them argued over what to do with the former slaves. In at least two instances, the freed slaves were given substantial land holdings to work and were encouraged, in one case with substantial paternal oversight, to develop agricultural settlements that would be on a path toward self governance (Id. at 79-80). In these instances, the former slaves were treated as citizens in training.

In the process of transforming slaves from property into emergent citizens, those running the contraband camps and setting up the new experiments in self governance showed great concern with establishing formal and legally recognizable familial bonds among the slaves (Franke 1999). Divisions among generals over how to manage the problem of human contraband in part led to formal congressional study of the issue in 1863, and the establishment of the Bureau of Abandoned Lands, Refugees, and Freedmen (rather than the Bureau of Emancipation recommended by the congressional commission) (Bickers 2006: 81). The freedmen and their advocates now had a formal avenue through which they could press their top priorities: demands for land, education, and civil protection under the law (Id.).

But freed slaves and blacks who had been free before the outbreak of war could often frame their engagement with the United States in terms different than as supplicants for rights. In 1862, Congress, recognizing the major threat posed by military manpower shortages, passed the Militia Act, which empowered the president to call up 300,000 more men from the state militias. The act specifically authorized the states to call up blacks for use in any military capacity, breaking with the long-term practice of limiting state militia service to white men alone (Klinkner & Smith 1999: 59). General Butler and Kansas General John Lane pushed forward despite Lincoln's ambivalence, and began to organize black units primarily composed of free blacks, but including some fugitive slaves. The Emancipation Proclamation, issued after the Union's bloody victory at Antietam, not only announced the end of slavery in the non-rebellious states, but also cleared the way for the full enlistment of blacks as soldiers. After the Republicans' losses in the 1862 midterm elections, tapping into this source of willing recruits was vital to continuing the war effort, and only a year after emancipation, the black ranks of the Union army had swelled to more than 50,000 (Id. at 61-63).

The admission of large numbers of black soldiers into the Union ranks soon precipitated another crisis; however, as these men realized that they were not being paid equally with white soldiers of the same rank. Records from a court martial proceeding involving Massachusetts'

Fifty-fifth Regiment indicate that, after the black soldiers refused to accept their paychecks, the tensions between them and their white officers exploded into a full-scale brawl (Samito 2007: 170-171). Black soldiers pushed for equal pay but also for the expansion of their civic rights. In doing so, they highlighted their status as soldiers; as one soldier explained, they “could not accept anything except equal pay from the federal government if they were to stand as American citizens and assured that ‘we have been tried in the fire both of affliction and of the rebels, and nothing remains but pure metal’” (Id. at 171). These statements implied or clearly stated that black soldiers had earned rights through their military sacrifices. At the same time, the soldiers and their advocates invoked the soldiers’ responsibilities as husbands and fathers to support their wives or partners and children (Id.).

The process of dealing with disciplinary issues in the Civil War also provided some black men with their first experience of being recognized as civic rights holders. Ironically, while facing courts martial for serious offenses many soldiers received scrupulously correct process and fully adversarial hearings, leading to their severe punishment on the same kinds of terms provided to white soldiers (Id. at 172-74). In one trial, an abolitionist advocate argued on the behalf of his client that freed slaves were still emerging from the savagery that their captivity had engendered and could not be held to the same moral standards as whites. The judge advocate in the case responded that freeing and arming blacks raised them to a level of full civic membership, responsibility and accountability (Id. at 174-75). The provision of a gun, continued the judge, rendered the Negro a man and a citizen, and left him in a position of fatal responsibility for his own offenses. The defendant in the case was hanged alongside a white civilian in June of 1865 (Id.).

The formal participation of blacks in the Union Army was visible and provided a site for the struggle over the meaning of black citizenship. But this visibility and struggle overshadows even more substantial informal contributions to the war effort performed by free blacks and fugitive slaves, who conducted reconnaissance, spied out terrain, maintained supply lines, and generally contributed their intimate knowledge of the territory on which the battles were being fought as the lines moved south. And some informal participation came in the form of fighting as irregular forces. Perhaps the best known example is Harriet Tubman’s leadership of a raid on the Combahee River. Commanding 150 black troops, Tubman and (white) Colonel Montgomery traveled down the river through the region of a major ferry, routing Confederate troops and freeing approximately 800 slaves (Conrad 1863). Despite the press coverage given to Tubman’s raid, these irregulars largely remained unrecognized and unheralded.

As the war was winding down, the Freedmen’s Bureau sought to equip the emancipated slaves with the tools for citizenship. A few radical experiments with land reform were pursued, as noted above. But another major agenda for both the federal government and the reconstituted southern states was the encouragement or coercion of the freed persons to organize their family lives to conform with accepted norms of family organization and daily living. Marriages between freedmen and freedwomen were aggressively pressed, especially in circumstances in which freedwomen had children (Onwuachi-Willig 2005, Yamin 2008, Cott 2000). The freedmen were encouraged to find wage labor and, if possible, to use their earnings to support their wives and their wives’ children. And the struggles over extending rights to the newly freed slaves relied upon an implicitly gendered order.

Immediately after the end of the war, debates began nationally to decide how to manage the transition to freedom in a formal and legal sense as well. In an address delivered to Congress at the end of 1865, Andrew Johnson proposed a vision relating the freedmen’s rights to their

growing capacity for civic membership, but advocated for allowing the states to make these determinations:

In my judgment, the freedmen, if they show patience and manly virtues, will sooner obtain a participation in the elective franchise through the States than through the general government, even if it had power to intervene. When the tumult of emotions that have been raised by the suddenness of the social change shall have subsided, it may prove that they will receive the kindest usage from some of those on whom they have heretofore most closely depended. . . . I have no doubt that now, after the close of the war, it is not competent for the general government to extend the elective franchise in the several States [Johnson 1865:15]

Yet within this vision, Johnson privileged particular rights as the most important to fit the freedmen for the training and protections necessary to guarantee the good exercise of civic membership. He implied that, for these rights, the federal government would have a role to play: it is equally clear that good faith requires the security of the freedmen in their liberty and their property, their right to labor, and their right to claim the just return of their labor. I cannot too strongly urge a dispassionate treatment of this subject, which should be carefully kept aloof from all party strife” (Id.). He remained agnostic about the possibility for whites and blacks to live together “in a state of mutual benefit and good will,” but advocated for whites and the federal government in particular to “encourage them to honorable and useful industry, where it may be beneficial to themselves and to the country; and, instead of hasty anticipations of the certainty of failure, let there be nothing wanting to the fair trial of the experiment” (Id.). Johnson saw the fundamental difference between the freedman and the slave explicitly as a “substitution of labor by contract for the status of slavery” (Id.). But freedmen could not gain the responsibility for agreeing to honest labor as long as doubts remained about their capacity to choose their work and be certain to recover fair wages for their work. This, for Johnson, had clear legal implications: “And if the one ought to be able to enforce the contract, so ought the other. The public interest will be best promoted if the several States will provide adequate protection and remedies for the freedmen” (Id.). But what would the southern states do when entrusted with the responsibility to guarantee freedmen’s capacity to make and enforce contracts?

The southern states responded to emancipation and defeat by reconstituting their state legislatures and immediately passing black codes to restrict the emancipated slaves in such severe terms that many observers characterized these acts as reimposing slavery in all but name. Congress responded by passing the Civil Rights Act of 1866, which situated as its centerpiece the right to make contracts and the obligation of individuals to respect validly formulated contracts. This dual right and obligation, while framed in neutral terms, would protect the capacity of black individuals to make contracts with whites and hold them to these contracts’ terms. Given the comprehensiveness and depth of former Confederates’ efforts to limit the scope and meaning of emancipation, contract rights may appear to be an odd choice as the centerpiece of a new egalitarian order. But, when read through lenses of gender and status, contract rights emerge as a logical choice for the men who had either fought for the union or who were represented by those who had fought against the confederacy.

The right to make enforceable contracts depended upon status. Individuals possessing comparatively subordinated status in formal terms had great difficulty in forming legally meaningful contracts, and if contracts were formed, their enforceability was questionable at best.

Children could not make enforceable contracts with parents, servants could not make enforceable contracts with masters, and one of the badges of slavery was slaves' inability to make binding contracts with their masters or with anyone else, for that matter. These legal debilities all derived from the structurally subordinated status of the putative contract maker, implying a structural incapacity for the subordinated individual to negotiate and achieve the meeting of minds that was the hallmark of a valid contract. But the other major class of individuals who had problematic or incomplete access to contract due to their status was women.

Congress' aim in guaranteeing contract rights for the emancipated slaves is disputed, but could be seen as an effort to prevent southern state legislatures from reconstructing the status of slavery through specific limiting legislation. Contract rights would protect the capacity to bargain for labor and the wages to be paid to laborers. They would also serve to protect freed persons in a myriad of potential commercial interactions with whites (and secondarily with each other). Thus, they could situate emancipated individuals as fuller citizens, as equal in formal terms to others who could exercise contractual power as an inherent part of their civic membership. Contract rights were key markers of agency and civic membership. They implied that the contractors were equal in power in abstract terms, that they had the capacity to make binding agreements, and that they had automatic access to the legal system to arbitrate disputes and to enforce performance or damages if one of the contracting parties did not acknowledge the validity of a properly formed contract.

In addition to guarding against the reimposition of slave status, though, contract rights' connections to autonomous individualism and citizenship rendered their possessors citizens in gendered forms. The contracts that the passage of the 1866 Civil Rights Act encouraged blacks to form were contracts for wage labor, for land leasing or perhaps ownership, and for the purchase and control of other real and personal property. Another type of contract – the marriage contract – was more controversial and differently configured, as in some cases it was practically coerced (particularly between freedmen and freedwomen) and in others it was legally forbidden (between blacks and whites). A legal struggle eventually settled that, despite the use of the language of contract without reservation or modification, the marriage contract was not one that fell under the ordinary rules for interpreting contractual equality (Novkov 2008).

The contract rights gained were consciously rights that recognized black men as citizens and reinforced their autonomous standing as men. In exchange for their invaluable service as warriors, they gained the right to act as heads of household, negotiating in meaningful and enforceable ways to perform the masculine tasks of laboring for wages and owning personal and real property to support the household. While these rights could extend to women, black women along with white women faced significant ambiguities relating to their status as women, particularly if married – and remember that many black women were very strongly encouraged to marry, especially if they had children.

The Fourteenth Amendment demonstrated the desire to expand civic membership in response to the crisis of the Civil War, but it also reinforced the contract rights guaranteed in the Civil Rights Act. The debates over the amendment covered a range of issues, but did not address the potential implications of privileges or immunities, due process, or equal protection for women. While discussions of the freedmen generally were assumed to incorporate the freedwomen, the freedwomen implicitly became free women, not full citizens.

Nowhere was this tension – and the distinction – more evident than in the process behind and adoption of the Fifteenth Amendment. The achievement of the right to vote poses another example of this dynamic in practice. Adding suffrage to the constitution was controversial not

just generally, but within circles of activists seeking social transformation. The anti-racist and feminist movements split off from each other over whether suffrage generally should be pursued or only suffrage for African Americans.

The amendment ratified in February of 1870 guaranteed that “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 race, color, or previous condition of servitude.” This language was not reached, however, without an extensive debate inside and outside of Congress over whether female suffrage should be federally extended and protected. When extending suffrage to the emancipated slaves came up for debate in the Senate in 1866, several Democrats and moderate Republicans used the issue of female voting to attempt to derail the entire discussion. James Brooks, a Representative from New York, presented a letter from Elizabeth Cady Stanton and a petition from Susan B. Anthony asking for an amendment prohibiting discrimination on the basis of sex (Epps 2006: 111; 216).² Kansas Senator Samuel Pomeroy presented petitions to Congress from citizens of Michigan, New York, Massachusetts, Kansas, New Jersey, Ohio, Maine, Pennsylvania, Missouri, and Indiana “praying that in any amendment to the Constitution of the United States to extend or regulate suffrage no distinction be made between men and women” (Senate Journal, 2/15/1868: 46; 1/20/1869: 122; 1/6/1869: 74; 12/17/1868: 54). Another Senator presented a petition from Rhode Island advocating for women’s votes (Senate Journal, 3/23/1869: 73). And the Senate’s president pro tempore presented a petition from Massachusetts asking for suffrage to be extended to women in the District of Columbia and all United States territories (Senate Journal, 1/18/1869: 109).

Outside of Congress, feminists and abolitionists who had struggled together to advance rights for African Americans and women in the antebellum era split bitterly over suffrage. Feminism as an active movement had grown out of abolition, but as the movement expanded, it began to incorporate women’s advocates who were not necessarily committed either to abolition or to the cause of achieving black equality (Ritter 2006).³ During the war, Susan B. Anthony had advocated for continuing the struggle for women’s rights, but her long-term friend and collaborator, Elizabeth Cady Stanton, disagreed, and Stanton’s viewpoint won the day.⁴

After the war, Stanton and Anthony rejoined the battle for women’s rights, which quickly turned into a racialized struggle. Advocates for women were enraged at reports about quiet discussions in the joint Senate-House committee charged with harmonizing the language for guaranteeing suffrage in which one member allegedly objected to “enfranchis[ing] all the Southern wenches” and another claimed that black male suffrage “will be all the strain the Republican party can stand” (Epps 2006: 215). Leading feminists convened and an ugly debate erupted over whether women or blacks needed, deserved, or would make better use of the vote. Frederick Douglass, infuriated by Stanton’s inflammatory rhetoric and use of the word “Sambo,” publicly attacked her in the late 1860s, charging:

² Brooks was first a Whig, and then a Democrat.

³ Not all abolitionists were in favor of full equality for African Americans, and some favored abolition as part of a strategy to remove blacks from the United States to Liberia, rendering the United States a white nation. Still others opposed slavery but did not envision black equality as a necessary result of abolition.

⁴ Stanton later regretted this decision, writing in 1897: “When they asked us to be silent on our question during the War, and labor for the emancipation of the slave, we did so, and gave five years to his emancipation and enfranchisement. . . To this proposition my friend, Susan B. Anthony, never consented, but was compelled to yield because no one stood with her. I was convinced, at the time, that it was the true policy. I am now equally sure that it was a blunder, and, ever since, I have taken my beloved Susan’s judgment against the world” (Epps 2006: 215).

I do not see how any one can pretend that there is the same urgency in giving the ballot to woman as to the negro When women, because they are women, are hunted down through the cities of New York and New Orleans; when they are dragged from their houses and hung on lamp-posts; when their children are torn from their arms, and their brains dashed out upon the pavement; when they are objects of insult and outrage at every turn; . . . when their children are not allowed to enter schools; then they will have an urgency to obtain the ballot equal to our own .[Douglass, quoted in Epps 2006: 218]

Ironically, neither Douglass nor his white female antagonists acknowledged that some of the negroes about whom Douglass was speaking and to whom the ballot would continue to be denied by the Fifteenth Amendment were also women.

The Fifteenth Amendment went through and was ratified without the addition of gender. Some advocates for woman suffrage promoted the New Departure, a strategy based on arguing that women as national citizens had been granted the vote as the logical implication of the Reconstruction Amendments taken as a whole, but focusing particularly on the Fourteenth Amendment. Leaders Anthony, Stanton, and Virginia Minor argued that birthright national citizenship clearly included women, that women were entitled to all of the rights and privileges of citizenship by virtue of the Fourteenth Amendment, and that voting was covered as a privilege under the privileges or immunities clause (Ritter 2006: 19). Despite their work in Congress, cultural spheres, and the courts, this standpoint was definitively rejected by the U.S. Supreme Court in *Minor v. Happersett* in 1875, with the Court following *Slaughter-House's* narrow interpretation of privileges or immunities as non-transformational and noting that female citizenship alongside denial of suffrage had been commonly accepted at the founding and afterward (88 U.S. 162). Voting remained – temporarily – a privilege of black male citizenship.

As the wave of progress slowed for black men, women's rights moved further into retrograde around roiling cultural tensions over sexuality. In 1873, Anthony Comstock's crusade reached its apogee in Congress, with the national legislature passing the Comstock Act banning the transport of any "obscene, lewd, and/or lascivious" materials through the US mails. The act was intended to target the distribution of information about contraception and abortion as well as to close down a booming mail-order abortifacient and contraceptive provisioning industry. Comstock and his allies combined race and gender productively, invoking the need to protect white women from dangers to their health alongside panic about fertility rates among white Protestants. This combination situated white women as worthwhile civic members for their reproductive labor while simultaneously heightening anxieties about the reproductive labor of women of color and recent immigrants. Reading the passage of the Comstock Laws alongside *Minor* suggests strongly that women's primary and most valued civic contribution was the production of white children. This contrasted starkly with black men's dynamic: the active engagement with the machinery of governance earned through military sacrifice and through the Republican Party's need for black (male) investment.

[add here a discussion of Sullivan's analysis of Married Women's Property Acts, judicial retrograde, and how property rights looked for women in contrast with the 1866 Civil Rights Act]

The years between approximately 1863 and 1875 thus saw a fascinating divergence between the rights extended to blacks both to maintain and enhance their vital support for the United States in the military conflict and for the Republican Party afterward on the one hand, and the rights limited for and withdrawn from women, particularly black women, who could not

make a parallel gendered bargain with the state. The crisis of the Civil War and the mobilization of hundreds of thousands of black men led to the nation's reliance on them and recognition of them as men. As a reward, the freedmen gained masculinized rights intended simultaneously to transform their status and reinforce their access to protection for this new status. These rights, however, were both masculinized rights and were extended on implicitly and explicitly gendered grounds. Rights for women remained static or went retrograde during the same period, relating significantly to women's civic relationship to the state. Whereas men's access to "first-class citizenship"⁵ came through military service, women's highest civic responsibility remained as wives and mothers. This civic responsibility then played out across racialized lines. White women who were not disfavored immigrants or their recent descendants were cabined within a social and legal machinery encouraging their fulfillment of this duty. Black women were disciplined through the production of a regime designed to reinforce their status as second-class wives and mothers whose potential racial and social contamination would be contained within the bonds of intraracial marriage and individual dependence upon their new citizen-husbands.

World War II Civil Rights

As Franklin D. Roosevelt was increasingly seeing the United States' involvement in World War II as inevitable, he faced growing tensions over race from the civilian labor force as it geared up into wartime production mode. He had lines of communication to black leaders, reflecting black voters' overwhelming realignment away from the party that had ended slavery to the party of the New Deal in the 1930s. In 1941, A. Philip Randolph, leader of the influential Brotherhood of Sleeping Car Porters, proposed a march on Washington to protest racial discrimination among defense contractors, in the federal government, and in the armed forces and garnered the support of Walter White, head of the NAACP. When Roosevelt was informed, he issued executive order 8802, which made changes in governmental hiring practices and, most importantly, established the Fair Employment Practices Commission to reinforce this mandate (Estes 2005: 16-17).

The order itself declared the official policy of the United States to be to "encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin." Gender was not mentioned in the order, and purpose of the order was clearly linked to national defense. The order went on to declare that the successful defense of "the democratic way of life within the Nation" could be conducted only "with the help and support of all groups within its borders" (Executive Order 8802). The order cited the clear evidence that defense contractors were discriminating and declared this behavior to be detrimental both to the workers' morale and to national unity. Executive policy and administrative efforts thus situated black labor and military mobilization as crucial to the war effort and discrimination as potentially threatening to national defense, but ignored the issue of women's mobilization. In 1943, Roosevelt strengthened the FEPC's mandate by requiring all defense contractors to include a non-discrimination clause in their contracts and subcontracts.

As military mobilization geared up, African Americans enlisted. More than one million served in the armed forces, despite the humiliations of basic training in the segregated south and the initial rules and customs barring blacks from combat duty. Historian Steve Estes argued that "there was a sense among African American men that participation and valorous service in war

⁵ See Enloe's analysis of this idea in *Maneuvers* (2000).

could uplift their race and gain them respect and recognition as men” (Estes 2005: 13). This sense was heightened when the first reports began to circulate about black mess attendant Dorie Miller, who reacted to the chaos wrought by the Japanese attack on Pearl Harbor by manning a 50 mm Browning anti-aircraft gun that he had never been trained to operate and firing at the Japanese planes until his ammunition was exhausted and he was ordered to abandon ship (Navy Historical Service, n.d.). The black press picked up on Miller’s heroism and lionized him, and after significant pressure from these journalists and the NAACP, Miller was awarded the Navy Cross in 1942 (Estes 2005: 12-15). Many young black men, reading or hearing about Miller’s story, enlisted with enthusiasm to fight for their country and implicitly for their own freedom and manhood. Recruiters for the armed forces understood the dynamic of heroic, masculine service to the nation operating, and tapped into it with great success in their efforts to enlist African Americans.

Once these men were serving, many began to think of themselves as men and citizens who were entitled to be treated with the respect and dignity owed to soldiers risking their lives for the nation. As historians have documented, the Tuskegee airmen struggled against both direct animus and low expectations, ultimately convincing many white observers of their mettle through their stellar training and combat records. Other black soldiers and veterans increasingly got involved in scuffles with whites that occasionally escalated to mass violence. One such incident was the racial trouble at Camp Stewart, Georgia, detailed by Daniel Kryder (2000). By the beginning of 1943, many recruits chafed under formal policies and informal practices based in racial degradation, and over the course of six months, relations between white officers and black recruits deteriorated. George Nesbitt, an NAACP member who had worked with the Race Relations Branch of the U.S. Housing Authority prior to enlisting, wrote to his former colleagues regularly, describing white discrimination and tensions between northern and southern blacks. As the situation developed, the black recruits and officers unified against white disrespect, and the NAACP began to receive a flood of complaints about specific incidents, some accompanied by warnings that the situation would become violent (Kryder 2000: 168-76).

The camp exploded that summer when a rumor spread among the black soldiers that white soldiers or MPs had murdered a black soldier and raped and murdered his wife. While the exact facts of the rumor were never confirmed, there were numerous accounts of harassment and physical violence being exercised against black soldiers’ wives. After an apparently calm day, about 100 black soldiers assembled in military formation at 9:30 at night and were ordered to disperse. The crowd of black soldiers grew, however, and when the MPs confronted them and began to arrest people, some shots were fired. While that crowd then partially dispersed by about 10 PM, other groups congregated, and more exchange of fire between black troops and white MPs took place. Investigators could not agree about how many shots were fired, but estimates ranged from between six and eight hundred rounds to between five and six thousand rounds. One MP was killed and four wounded (Id. at 186-95). The resulting investigation came close to seeing the tensions as a result of segregation and discrimination, but did not completely endorse this explanation. And Kryder notes that this incident demonstrates an increased willingness among blacks to seek change through direct and violent action rather than through formal or legal means (Id. at 206).

Throughout the state courts in the south, soldiers and veterans were turning up as criminal defendants in racial conflicts and victims of racialized violence. In a case from Alabama, a twenty two year old veteran who had seen combat in Europe objected strenuously when a male, partially disabled courthouse janitor in his seventies confronted him over his use of

the wrong toilet. Their verbal struggle escalated into a physical altercation, and the feeble janitor's reliance on the power of Jim Crow to enforce his will against a 6' combat veteran left him stunned on the floor, beaten down by his own mop handle. But the Alabama appellate court hearing the case upheld the soldier's fine for assaulting the janitor (Novkov 2008). Numerous other scattered incidents occurred, underlining a new ethos of resistance to the daily humiliations of segregation and anxieties among racist whites confronted by black soldiers and veterans (Id.).⁶

Black soldiers increasingly found themselves moving out of supporting roles and into combat as combat losses increased. Service in Europe provided experience in a more racially tolerant environment, but also presented risks, as Leroy Henry, a black GI convicted of raping a British farmer's wife, discovered. Henry was sentenced to death by a U.S. military tribunal, although he was exonerated after a fuller investigation prompted by an outcry in the liberal British press. Anxieties about sexual misconduct among black soldiers ran high among white officers; while black troops were less than 10 percent of military personnel serving in the European theatre, they composed 42 percent of those convicted of sexual assault, most of these convictions involving accusations of assault against white women (Estes 2005: 32-33). But both the Black Panther tank battalion⁷ and the Tuskegee Airmen distinguished themselves in battle, and media reports of their exploits dispelled myths that blacks were intellectually, psychologically, or physically unfit to defend the nation through arms (Id.).

Many veterans became politically activated through their experience in fighting a war against fascism and for democracy and freedom. Black veterans joined the NAACP, but also worked as organizers to bring in other veterans. National membership in the NAACP had been 50,556 in 1940. By 1946, the numbers had reached nearly 450,000 (Estes 2005: 36). President Truman, faced with the internal political activism of blacks and the external pressures beginning to arise from the incipient Cold War, issued Executive Order 9981 on July 26, 1948. The order initiated the full desegregation of the U.S. armed forces, declaring "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." In language prescient of the wording in *Brown v. Board of Education II* though not in concrete implementation, the order dictated that desegregation should take place "as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale" (Truman 1948). Truman's justification for the order invoked holding the United States to the "highest standards of democracy," which he defined as providing "equality of treatment and opportunity for all those who serve in our country's defense" (Id.). While Truman's bold act, followed by Hubert Humphrey's advocacy for a civil rights plank in the Democratic Party platform at the national convention, sparked the public revolt of the Dixiecrats and electoral losses in the south, he and northern Democrats reaped the electoral benefit in the west and in northern cities (Estes 2005: 37).

Truman was reelected on November 2, 1948. On November 19, the United States Supreme Court heard oral arguments in the first case specifically addressing regulation of women's labor for more than a decade.⁸ The issue in the case, *Goesaert v. Cleary*, was the constitutionality of a Michigan statute that prohibited women from serving as bartenders in cities

⁶ NOTE: follow up and look for low level legal trouble involving WACs, WAVES, WASPS, etc.

⁷ NOTE: follow up and figure out if this ever had any connection to the BPP.

⁸ The most recent previous case was *West Coast Hotel v. Parrish*, which upheld a minimum wage for women on ambiguously gendered grounds, overturning *Adkins v. Children's Hospital*, in which the Supreme Court had used the Nineteenth Amendment as evidence that women were equal to men and therefore no longer entitled to special protections (see Novkov 2001).

unless they were the wives or daughters of the male owner. While so-called dram shop laws had been a long-term feature of cultural anxieties about women and alcohol, and had been previously litigated and found to be acceptable by state supreme courts (see Novkov 2001), the law in question was no aged relic of a bygone era. Rather, the statute had been passed in 1945 and operated by denying bartending licenses in cities with populations of 50,000 or more⁹ to any woman not identified as “the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises” (*Goesaert v. Cleary* 1947: 736). The law provoked at least two class action suits, one brought by the Goesaerts from Dearborn, a mother who owned a bar and her daughter, who was also employed there,¹⁰ and a second brought by a barmaid and female bar owner in Detroit. The cases, both of which addressed the plaintiffs’ requests for an injunction against the law on equal protection grounds, were consolidated and tried before a three-judge panel (*Id.* at 737).

The district court panel brushed aside the equal protection claims, explaining that the Michigan legislature “may have reasonably concluded that the need for regulation of women bartenders was much more urgent in larger cities” and that “a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it” (*Id.* at 738). Specifically, the legislature could reasonably conclude that the credible grave social problem of female bartenders could be mitigated if a male licensee was “ultimately responsible for the condition and decorum maintained in his establishment” and if that responsibility were heightened by the “self interest of male licensees in protecting the immediate members of their families.” Further, the legislature could conclude that a man “could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee to provide for herself or her daughter” (*Id.* at 739).¹¹

The U.S. Supreme Court’s opinion, written by Frankfurter, was lighthearted and, in Gretchen Ritter’s analysis, condescending. Invoking the “historic calling” of the “sprightly and ribald” alewife, the court nonetheless emphasized the long-term authority of governing authorities to regulate liquor traffic and absolved the legislature from bearing any responsibility to “reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards” (*Goesaert v. Cleary* 1948: 465). The court dismissed out of hand the possibility that “the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling” and declared the recitation of the relevant equal protection precedents to be too tiresome to conduct: such a review would produce either an “idle parade” or a “sterile inquiry” (*Id.* at 467). Three justices dissented from this reasoning, explaining simply that the concrete results of the legislation belied its alleged grounding in “legislative solicitude for the moral and physical wellbeing of women” (*Id.*, Rutledge dissenting at 468).¹²

As Ritter explains, *Goesaert* was no outlier. Rather, it reflected the legal, political, and social ethos developing at the end of the war and carrying over into the post-war era. This set up

⁹ NOTE: population boundary drawn specifically to incorporate Dearborn due to large Arab influx for auto industry?

¹⁰ *Goesaert* was represented by a female attorney from Detroit, Anne Davidow, both at trial and before the U.S. Supreme Court. Davidow, a lifelong feminist, had been an active suffragist prior to the passage of the Nineteenth Amendment. Retaining her name after marriage, she established her legal practice, Davidow & Davidow, with her brother in Detroit; they served as counsel to the Reuther brothers and the UAW (Michigan Supreme Court Historical Society, n.d.).

¹¹ NOTE: dissent is fascinating, particularly with back history of *Goesaert*’s situation – figure out how much to write up and include.

¹² NOTE: possibly contrast tone/seriousness of *Korematsu*??

a situation in which, after the war, “women were seen in dualistic terms as both rights-bearing individuals and family dependents” (Ritter 2006: 173). The international engagement and agenda of worldwide democratization that rebounded in favor of advancing black masculine rights had a doppelganger in the form of “isolationism and a celebration of what was distinctive about American political culture” – and this isolationism and celebratory energy rebounded against the expansion of women’s rights to participate fully as citizens on the same terms as men (Id.). For many women, this dynamic played out in increasing labor restrictions (framed as clearing the field for male workers as well as protection for women), upholding limits on women’s jury service, an increased tendency on the part of courts and legislatures to acknowledge women’s differences, and an erasure of the significance of women’s service during the war (Id., 156-211).

As in the Civil War, women provided vital support to the war effort. But unlike the Civil War, World War II saw women formally incorporated into the military. Approximately 350,000 women served in gender-segregated units connected to each of the branches of the U.S. military, and these women, except for those serving in the Women’s Airforce Service Pilots (WASPs), were granted full military rank, though generally barred from being placed in command positions over men (Id. at 180). After the war, these women were rapidly demobilized. Although Congress passed the Women’s Armed Services Integration Act on June 12, 1948 (more than a month before Truman’s desegregation order) and thereby established a means for women to become permanent members of the U.S. military, the Army responded in 1949 with an order that women with dependent children were ineligible for service, discharging all women in the Army with children under the age of 18. Thus, as the Cold War was gearing up and the U.S. armed forces were rapidly rebuilding, a former WAVE testified to Congress that the more than 8500 officers and nearly 74,000 enlisted WAVES at the end of World War II had shrunk to fewer than 1000 officers and just over 7000 enlisted women by June 1952 (Hearings 1953).

[Discuss Wynn’s analysis of labor/employment]

But the cultural forces driving women back into the home, supported through policies and governmental interventions, did not only map across gender. When the *Ladies Home Journal* identified the nation’s top priority at the war’s end as “mak[ing] it better, easier, cheaper, and safer to have at least three babies a piece” (Wynn 1996: 475), the magazine was not speaking to or about black women. Historian Wendy Kline has argued that eugenics, after falling into disfavor as a consequence of the Nazis’ enthusiasm, re-entered the cultural, social, and policy arena in the 1950s with a new, positive spin. Rather than discouraging or preventing the unfit from reproducing, the emphasis would turn to encouraging the fit to reproduce profligately (Kline 2001). This tied into the long-term ideological configuration of feminine citizenship’s highest form of service as the production and raising of future citizens, but 1) valued and reinforced women’s citizenship by encouraging their retirement from the public and civic spheres, and 2) affected African American women by simultaneously purging them from the public sphere and reinforcing the very marker of citizenship to which they could not aspire.

Black women would go on to be crucial leaders in the civil rights movement, but, as Estes and numerous other scholars have demonstrated, did much of this work in less visible or invisible ways and venues, both allowing and reinforcing black masculine bids for full citizenship. The unambiguous extensions of rights on racial grounds that took place during and after World War II related to masculinity and in particular to militarily masculinized conceptions of rights to which women only had uneasy access: equal employment opportunities in the defense contracting industry and desegregation of the armed forces.

Further, while no policies parallel to the stringent pressures to marry and to refrain from sexual relations with white men were imposed upon black women in the late 1940s and 1950s, anxieties about black family structure and black reproduction focusing squarely and critically upon black women were not long in coming. As welfare programs expanded access beyond their initial clientele of white widows and some single mothers, policy makers fretted about black hyper-reproduction and imposed policies designed to discourage and control black fertility and to pressure single black women into monogamous marital relationships (Mink 1996, Williams 2000). Benefits were conditioned upon compliance with standards of sexual conduct, which led to such policies as the notorious “man in the house” rules common in the south that resulted in denial of benefits to thousands of women and children (Id.).

Conclusion

Mark Graber, drawing from the work of Philip Klinkner and Rogers Smith, has proposed the following four conditions as determining when protection and expansion of civil rights and liberties will take place during international conflict:

1. “A large-scale war requires extensive economic or military mobilization of the beneficiaries of a rights protective policy for success.”
2. “The nature of America’s enemies prompts American leaders to justify such wars and their attendant sacrifices by emphasizing the nation’s inclusive, egalitarian, democratic traditions” or, at least, the national commitment to particular civil rights and liberties.
3. The beneficiaries of the civil right or liberty are, for reasons of race, ethnicity, or ideology, identified as loyal Americans, as aligned with American allies or countries whose support the United States is seeking, or at least as enemies of America’s enemies.
4. Powerful political actors inside and outside government see the military conflict as an additional reason for advancing existing commitments to particular civil liberties and rights. Other crucial government actors can be persuaded or pressured to support those rights or liberties. [Graber 2005: 97]

These factors do well in explaining rights advances for African Americans generally, but the nature of the dynamic is more complex than they would indicate. Bringing in concepts of masculinity, militarization, and sexuality provides more explanatory leverage that can parse out how the rights advances are configured, to whom they primarily apply, and where and how they are limited.

One way to think through what adding these factors contributes is, in the case of whites and African Americans, to think about the divergence in terms of generating a triple brake on rights advances. In both periods near the wars’ end and afterwards, masculine spaces and institutions were opened up to African Americans, and state institutions made commitments to respect and enforce their access to these spaces and institutions. These advances were achieved through the invocation of black men’s roles as soldiers who were now entitled to first class citizenship – or at least to something closer to it, and the rights that were provided were simultaneously designed to reward men’s vital contributions to the war on the front lines and as supporters and to reinforce their capacity to perform the gendered and sexualized function of head of household. In sum, rights were granted in gratitude and recognition for military service, extracted based on the necessity of black mobilization for the war effort, or extended through the

discontinuities between patriotic rhetorics of freedom and democracy and the real situation of some of the soldiers who had fought to advance or preserve these ideas, but all of these forward-moving engines were intimately interlinked with both masculinity and militarization and thus were subject to three gendered and sexualized brakes.

The first braking element was the direct effect of retrogrades in women's rights. Of course, black women suffered the same legal limits as women as the white women who were the primary targets of post-war policies and legislation. Alongside the prominent white suffragists who saw their dream fading in the face of the political realities that drove the gendered compromise in the passage of the Fifteenth Amendment were black feminists like Sojourner Truth and Frederick Douglass who chose to remain quiet about their losses or openly advocated for black men's votes in order to maintain the nation's uncertain commitment to black suffrage. After World War II, black women were hounded out of the military and purged from the factory labor force with equal, if not greater, vigor than their white female comrades-in-arms, commanders, co-workers, and supervisors.

The second braking element, however, arose from the tension around the divergence in the trajectories of rights for blacks and women. This was particularly acute in the post-Civil War era, as white feminists' bitter resentment over the provision of suffrage on gendered grounds generated a split between rights advocates who had previously been so closely aligned as to be the same movement. The desperate struggle quickly became framed as a zero-sum conflict between black men and white women, and the intemperate and racist language of movement leaders like Anthony and Stanton reverberated for generations. Even sixty to seventy years after, when white feminists were still fighting for suffrage and middle-class advocates were advancing a broad-based social agenda of helping and seeking rights for immigrant women, poor women, Native Americans, and children, the suffrage movement remained rigidly segregated, and black rights remained off the agenda for white reformers.¹³ While this dynamic was not so stark during and immediately after World War II, tensions did exist, and were frequently expressed in the south through increased and sexualized anxieties about black men's newly acknowledged masculine power in conjunction with the newly exaggerated "cult of white womanhood."

The third braking element was the effect of the activation of the womanly side of citizenship in response to the heightened attention to masculinized citizenship relating to military mobilization. In both post-war periods, cultural messages about women's primary service to the state as wives and mothers, as the keepers of the home and the bearers and rearers of the next generation intensified, but as countless feminist scholars have demonstrated, these cultural messages were racialized as well as gendered. Black women could be pressured or coerced into keeping stable homes, discouraged from working outside the home (unless they were working in white homes), and marrying and remaining married. But because black children were devalued, black women were problematically situated with regard to the cultural messages and their expressions through law and policy. Pressures were placed on white women to reproduce responsibly, but to reproduce. Black women were pressured not to reproduce so much, and if they were to reproduce, to do so 1) within the bonds of marriage, 2) with a man who would support them and their children sufficiently so that they would never request or require assistance from the state, 3) in ways that would not interfere with their availability as low cost domestic

¹³ The anti-lynching movement was a major exception to this; while the movement was led by African Americans, particularly Ida B. Wells and W.E.B. DuBois, some white feminists contributed energy to the movement, and experiences in the anti-lynching movement was crucial in sparking a quiet but important indigenous, moderate, coalition of reformist white women exemplified by individuals like Loula Dunn.

workers, and 4) ideally only with black men, but definitely never with white men. As Paula Giddings has famously observed, all African Americans' access to equality was ultimately bounded by the barriers to black women's entry (Giddings 1984).¹⁴ The inability of black women to engage in full civic service and sacrifice for the state resulted from their barring on racial grounds from the feminine ideal of childbearing and mothering and from their barring on gendered grounds from the masculine ideal of military service and its accompanying access to first-class citizenship.

The first brake operated in both eras, the second brake more strongly in the post-Civil War era, and the third brake slightly more strongly in the post-World War II era. But all three combined in both postwar periods not just to limit black women's access to rights advances, but ultimately to bound and to stall out progressive momentum for the rights of all African Americans. I would not be surprised to find that the same dynamic has operated with respect to other subordinated racial groups, and would encourage scholars studying the relationship between wartime sacrifice and opportunity and rights advances not to forget to incorporate an analysis of gender and sexuality.

¹⁴ Giddings' book takes its title from a quotation from black feminist Anna Julia Cooper (1858-1964): "Only the BLACK WOMAN can say 'when and where I enter, in the quiet, undisputed dignity of my womanhood, without violence and without suing or special patronage, then and there the whole . . . race enters with me.'"

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