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Heller, Citizenship, and the Right to Serve in the Military

ELIZABETH L. HILLMAN*

INTRODUCTION

*District of Columbia v. Heller*¹ could prove a turning point not only for the right to keep and bear arms, but for the constitutional right to serve in the military. In the wake of *Heller*, constitutional law theorists like Akhil Reed Amar have reasserted the premise that the Second Amendment might protect a right to military service.² Meanwhile, legal historians like Sanford Levinson have taken the Court to task for its lapses in historical accuracy, subtlety, and depth.³ This Essay seeks to bring those two perspectives together by analyzing *Heller* in light of military history and constitutional doctrine. It argues that the Court neglected two critical contexts: the long-recognized link between citizenship and military service, and the changes—demographic, technological, and geopolitical—that have remade the United States military since the Constitution was drafted and ratified. Ultimately, it casts *Heller* as a source of support for those who would assert a constitutional right to military service despite Justice Antonin Scalia's protests to the contrary.⁴ The right to keep and bear arms intersects with the right to serve in the military. As a result, *Heller's* holding and reasoning raise new issues relevant to the question of whether the Constitution acknowledges a right to military service. Because the Court overlooked changes in the meaning and nature of military service, it

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1. 128 S. Ct. 2783 (2008).

2. See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 188–89 (2008).

3. See, e.g., Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) (“Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources.”); Sanford Levinson, Opening Remarks at the Hastings Law Journal Symposium: The Second Amendment After *Heller* (Feb. 13, 2009) (terming the history in *Heller* “tendentious”).

4. See *infra* Part III.

unreasonably limited the reach of its Second Amendment analysis to stop short of recognizing that an individual right to keep and bear arms must, given the role of twenty-first century military service in the United States, also protect a right to serve in the armed forces. The approach that *Heller* takes to the right to keep and bear arms should lead to a reconsideration of military service as a broadly held and recognized right, and point toward a model of full, and equal, participation in the armed forces for “the people.”

By favoring a fine-grained study of the colonial and early republic periods over any substantial engagement with subsequent transformations in war-making, national defense, and citizenship, the Court compounded its mistakes in historical methodology. It also failed to reckon with how those changes implicate the now-recognized individual right to keep and bear arms. Both the Court’s opinion and Justice John Paul Stevens’s dissent detail the rationales for—and the origins of—a militia of the people. They describe the limits on those who might serve in that militia, on what sorts of weapons might therefore be protected against government seizure, and for what purposes those weapons are protected.⁵ Yet the Court does not account for either the political meaning of military service or the dramatic changes in United States military institutions since the ratification of the Second Amendment. Those profound changes matter for the meaning of the right to keep and bear arms, and for the related right to serve in the military.

I. MILITARY HISTORY ACCORDING TO *HELLER*

In an effort to establish the original intent of the Second Amendment,⁶ Justice Scalia, writing for a five-member majority, defines the “well regulated Militia” of the Amendment’s opening clause. He writes that “the ‘militia’ in colonial America consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range.”⁷ Justice Scalia later returns to this assessment. He explains that the Framers considered the militia “all males physically capable of acting in concert for the common defense,” and argues that the “militia” of the Second Amendment is much larger than the organized, federal military.⁸

5. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799–801 (2008); *id.* at 2844–46 (Stevens, J., dissenting).

6. U.S. CONST. amend. II. For one of many critiques of the Court’s originalism, see Daniel A. Farber, *Disarmed By Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167 (2000).

7. *Heller*, 128 S. Ct. at 2791.

8. *Id.* at 2799–800 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

Justice Scalia then turns to the purpose of that militia, and reads “the security of a free state” to mean “the security of a free polity.”⁹ A militia, he writes, protects that security by “repelling invasions and suppressing insurrections,” by “render[ing] large standing armies unnecessary,” and by ensuring that “the able-bodied men of a nation are trained in arms and organized,” and therefore will be “better able to resist tyranny.”¹⁰ Justice Scalia cites nineteenth century sources to stress the importance of a population of freemen trained in arms and ready to be called forth in defense of the nation,¹¹ and he stresses the Second Amendment’s role in protecting “a populace familiar with arms” in order to counter a standing army.¹²

The Court’s opinion acknowledges the limited utility of eighteenth-century handguns in contemporary national defense, but dismisses it as having little bearing on the individual right to keep and bear arms.¹³ Justice Scalia also acknowledges the gulf between the militia as conceived by the Framers of the Constitution and the professional armed forces of the United States today.¹⁴ But he denies that such a dramatic change in historical circumstances can render the Second Amendment “extinct.”¹⁵ The Court, then, makes no effort to assess the impact of those changes.

Even the dissenting voices on the Court largely disregard two centuries of military history after the Second Amendment became part of the Constitution. The two dissents, like the majority opinion, note the changes in military service, but do not draw out their implications.¹⁶ Justice Stevens’s dissent construes the history surrounding the Second Amendment very differently than does Justice Scalia.¹⁷ Justice Stevens also sees military history as much more central to the Second Amendment than does the Court. He argues that the right to keep and bear arms is a single, unitary right that describes precisely what members of an organized military, or militia, do.¹⁸ Justice Stevens also points out that the fear of a standing army was profound, as was the fear of an inadequately trained force,¹⁹ but he does not suggest that the nature of

9. *Id.* at 2800.

10. *Id.* at 2800–01.

11. *Id.* at 2811.

12. *Id.*

13. *Id.* at 2816.

14. *Id.* at 2822 (“Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem.”).

15. *Id.*

16. *See id.* at 2822–47 (Stevens, J., dissenting); *id.* at 2847–68 (Breyer, J., dissenting).

17. *See id.* at 2822–47 (Stevens, J., dissenting).

18. *Id.* at 2830.

19. *Id.* at 2831.

the contemporary armed forces matters in the legal construction of the Second Amendment right.

Justice Breyer's dissent does not rely on historical sources in the same way that Justices Stevens's and Scalia's opinions do, but it does refer to military realities in the course of dismissing policy-based arguments against gun control and regulation. Justice Breyer cites to an amicus brief filed by retired generals that asserted that military recruits with training in firearms are helpful for the armed forces because they are more easily trained.²⁰ Justice Breyer accepts this statement as accurate and points out that the regulation in question would not interfere with those who sought familiarity with firearms, because the restriction does not preclude firearms training.²¹ Justice Breyer, like Justices Scalia and Stevens, nods at the distinctions between the eighteenth and twenty-first century militaries but does not draw any conclusions from them.²²

II. THE MILITARY: THEN AND NOW

Given the importance of a "well regulated Militia" in the text of the Second Amendment, the Court might reasonably have considered the historical evolution of the American military in interpreting the right to keep and bear arms. If the Court had explored this history, it would have sidestepped the quarrel over the eighteenth century meaning of the right to bear arms in favor of comparing the early twenty-first century United States Armed Forces to the military forces of the Revolutionary War and the early republic. Such a comparison would have revealed tremendous, substantive differences, on virtually every level, between the militaries of these eras. As the U.S. military changed in response to changes in politics and technology, the culture and organization of the armed forces changed as well. Professionalization took hold of the American military in the nineteenth and early twentieth centuries,²³ and the Cold War brought an even more dramatic change: a permanent military force, sizable even in times of relative peace.²⁴ The demographics, missions, and weapons of the United States military in 2008 bear little resemblance to

20. *Id.* at 2862 (Breyer, J., dissenting) (citing Brief *Amicus Curiae* of Retired Military Officers in Support of Respondent, *Heller*, 128 S. Ct. 2387 (No. 07-290)).

21. *See id.*

22. *See id.* at 2847-70.

23. *See, e.g.*, EDWARD M. COFFMAN, *THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898*, at 96-102, 269-86 (1986) (describing the transition to military professionalism); ALLAN R. MILLETT, *THE GENERAL: ROBERT L. BULLARD AND OFFICERSHIP IN THE UNITED STATES ARMY, 1881-1925*, at 3-12 (1975) (describing professionalization); MATTHEW MOTEN, *THE DELAFIELD COMMISSION AND THE AMERICAN MILITARY PROFESSION 3-17* (2000) (providing an overview of the historiography of military professionalism).

24. *See, e.g.*, ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL 8* (2005).

those of the Continental Army, the militias that struggled to defend the young nation after that army was quickly disbanded in 1783, or the small professional army that Congress created in 1784 and expanded in the 1790s.²⁵

The Continental Army was composed only of men²⁶ (save those few women who disguised themselves²⁷) but was racially integrated, since enslaved African Americans were promised freedom in exchange for military service in the North.²⁸ George Washington served without pay as the army's commanding general;²⁹ he considered the army a temporary measure and shared the fear of many early American leaders about the dangers of a standing army.³⁰ Military leadership in Washington's era was an "art," "a pastime engaged in by men whose success in civic affairs and business encouraged, or perhaps obliged, them to serve in uniform."³¹ Officers hailed from the upper classes, often held political office as well, and were self-educated with respect to military strategy and tactics.³²

General Washington's soldiers were paid volunteers who enlisted for periods of one to three years.³³ The Continental Congress established rules for the Army that followed "the basic features of eighteenth century military administration: relatively long-term enlistments; a rigid distinction between officers and enlisted men; a strict regimen of

25. This Part does not explore the colonial militias but focuses instead on the regular armies of the young United States, since those regular armies are much closer to the contemporary armed forces in style and make-up than are the militias. See, e.g., F.W. Anderson, *Why Did Colonial New Englanders Make Bad Soldiers?*, in *THE MILITARY IN AMERICA: FROM THE COLONIAL ERA TO THE PRESENT* 36 (Peter Karsten ed., rev. ed. 1986) (detailing the colonial militias); *The Boston Press Gang Riot of 1747*, in *THE MILITARY IN AMERICA, supra*, at 55 (same); A Letter from Samuel Adams, in *THE MILITARY IN AMERICA, supra*, at 59, 59–61 (same); North Carolina Militia Act of 1774, in *THE MILITARY IN AMERICA, supra*, at 53 (same); John W. Shy, *A New Look at Colonial Militia*, in *THE MILITARY IN AMERICA, supra*, at 27 (same).

26. See generally CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775–1783* (1979).

27. See, e.g., JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 3–5 (rev. ed. 1992).

28. See, e.g., PETER M. VOELZ, *SLAVE AND SOLDIER: THE MILITARY IMPACT OF BLACKS IN THE COLONIAL AMERICAS* 389–91 (1993); JOSEPH T. WILSON, *THE BLACK PHALANX* 21–71 (Da Capo Press 1994) (1887).

29. See, e.g., EDWARD G. LENGEL, *GENERAL GEORGE WASHINGTON: A MILITARY LIFE* (2005).

30. See, e.g., ROYSTER, *supra* note 26, at 52, 200. See generally *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989* (Richard H. Kohn ed., 1991) (discussing how the Constitution has played a role in shaping the military); RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY* (Ind. Univ. Press Paperback ed., Ind. Univ. Press 1977) (1973).

31. Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and "Conduct Unbecoming,"* 26 *LAW & INEQ.* 1, 12 (2008).

32. See, e.g., *id.* at 12–15 (describing the status and integration of officers into civil society in the eighteenth century).

33. See, e.g., WILLIAM B. SKELTON, *AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784–1861*, at 4 (1992).

discipline and punishment; and specialized staff departments to handle supply and support functions.”³⁴ Yet turnover was constant, leading one historian to describe the citizen-soldiers as “Winter Soldiers and Springtime Farmers.”³⁵ The army at its peak fielded 19,000 men,³⁶ only half of whom possessed “some small approximation of regular military skill and discipline,”³⁷ and was often much smaller. Turnover was a constant problem, eventually resulting in longer enlistments as well as bounties and other incentives.³⁸ Discipline was poor and training mostly inadequate.³⁹

After the Treaty of Paris ended the Revolutionary War, soldiers were quickly mustered out, leaving only a vestigial force of a few hundred men.⁴⁰ The army was disbanded without major incident, a notable achievement in itself.⁴¹ When the few troops remaining proved themselves not up to the task (they suffered devastating defeats at the hands of allied Native American tribes on the frontier⁴²), Congress authorized additional troops;⁴³ in 1791, the authorized strength of the army was about 5400.⁴⁴ While the Continental Army sought primarily to outlast its larger, better-trained, and better-armed opponent, the first army of the United States sought to wrest territory from Native Americans⁴⁵ and defend against European interests in North America.⁴⁶ Hence, the early American military was small, nonprofessional, led by social elites, all male, and intended to promote the conquest of land.

Compare this portrait to the U.S. Army today, which is big, permanent, professional, led by a meritocratic officer corps, nearly one-seventh female, and intended to promote and protect U.S. interests all over the world.⁴⁷ By looking only at the Army, we set aside the other military services—the Navy, Marine Corps, Air Force, and at times the Coast Guard—and sharpen the focus on the distinctions between the

34. *Id.*

35. ROBERT A. GROSS, *THE MINUTEMEN AND THEIR WORLD* 3 (1976).

36. *See, e.g.*, WEIGLEY, *supra* note 30, at 4.

37. *Id.*

38. *Id.* at 4–6; *see also* CAROLINE COX, *A PROPER SENSE OF HONOR: SERVICE AND SACRIFICE IN GEORGE WASHINGTON'S ARMY* 73–118 (2004).

39. *See, e.g.*, FRANCIS D. COGLIANO, *REVOLUTIONARY AMERICA 1763–1815: A POLITICAL HISTORY* 72–73 (1999).

40. *See, e.g.*, SKELTON, *supra* note 33.

41. *See* Richard H. Kohn, *The Inside History of the Newburgh Conspiracy*, in *THE MILITARY IN AMERICA*, *supra* note 25, at 79, 90–91; *see also* RICHARD H. KOHN, *EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA 17–39* (1975) [hereinafter KOHN, *EAGLE AND SWORD*].

42. KOHN, *EAGLE AND SWORD*, *supra* note 41.

43. *Id.*

44. *See, e.g.*, SKELTON, *supra* note 33, at 5.

45. *Id.* at 5–6.

46. *Id.* at 6.

47. Elizabeth L. Hillman, *The Female Shape of the All-Volunteer Force*, in *IRAQ AND THE LESSONS OF VIETNAM* 150, 155 (Marilyn B. Young & Lloyd C. Gardner eds., 2007).

“well regulated militia” of the late eighteenth century and the army of the *Heller* era. On December 31, 2008, there were 542,565 people on active duty in the army⁴⁸—more than 100 times congressional authorization in 1791.⁴⁹ In 2008, women in the Army alone numbered more than 73,000, with more than 13,000 female army officers.⁵⁰ In June 2008, there were more army personnel (19,826) deployed in the Pacific Theater than were ever in the Continental Army;⁵¹ almost 45,000 others were stationed in NATO countries,⁵² and 117,000 more in Iraq.⁵³ The sheer size of the Army today dwarfs the military contemplated by the Framers of the Constitution. This is not a new phenomenon; the number of people in the armed forces in the United States has not dropped below one million since 1950.⁵⁴

The bureaucracy of the Army is both massive and Byzantine; it manages both a reserve (the Army Reserve and Army National Guard) and an active component.⁵⁵ The army’s official website explains that “[t]he operational Army consists of numbered armies, corps, divisions, brigades, and battalions that conduct full spectrum operations around the world.”⁵⁶ As of February 2009, it includes three headquarters commands, nine component commands, and eleven direct reporting units.⁵⁷ The Army has twenty-nine divisions,⁵⁸ twenty-six permanent camps located outside the United States,⁵⁹ forty-three forts within the United States,⁶⁰ and even fifty-five museums.⁶¹ It boasts glossy magazines, promotional

48. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A) DECEMBER 31, 2008 (2008), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/Miltop.htm>.

49. See SKELTON, *supra* note 33, at 5.

50. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE: SEPTEMBER 30, 2008 (WOMEN ONLY) (2008), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rgo809f.pdf>.

51. *Id.*

52. *Id.*

53. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A): JUNE 30, 2008 (2008), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hsto806.pdf>.

54. Military Personnel Historical Reports, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm> (last visited June 10, 2009).

55. See, e.g., GoArmy.com, <http://www.goarmy.com> (last visited June 10, 2009).

56. United States Army—Organization, <http://www.army.mil/info/organization/> (last visited June 10, 2009).

57. *Id.*

58. United States Army—Army Divisions, <http://www.army.mil/info/organization/unitsandcommands/divisions/> (last visited June 10, 2009).

59. United States Army—Camps, <http://www.army.mil/info/organization/installations/camps/> (last visited June 10, 2009).

60. United States Army—Forts, <http://www.army.mil/info/organization/installations/forts/> (last visited June 10, 2009).

61. United States Army—Museums, <http://www.army.mil/info/organization/installations/museums/> (last visited June 10, 2009).

posters, and free downloads,⁶² and pays for sophisticated advertising as well as economic incentives to boost recruiting efforts; in 2008, the Army began offering \$40,000 to high school graduates who commit to five years of service.⁶³

The U.S. Army in 2009 is integrated by race, gender, age, and occupational specialty.⁶⁴ The spectrum of military jobs has shifted considerably since the eighteenth century. In the early twenty-first century, fewer than 17% of military positions are officially “combat” jobs;⁶⁵ most are instead classified as “technical” and “administrative.”⁶⁶ Women, however, are not assigned evenly across career fields because of the rule that precludes them from participating in direct ground combat.⁶⁷ As a result, women are less than 2.5% of the dead⁶⁸ and less than 2% of the wounded in the ongoing war in Iraq.⁶⁹ Initial terms of service range from two to six years of active duty followed by a comparable length of time in the reserves;⁷⁰ the average length of service is less than ten years.⁷¹ Hundreds of thousands of civilians perform military-like functions for the U.S. government; some 675,000 civilians were employed by the Department of Defense alone in December 2008.⁷² Many have criticized this “outsourcing” as a resort to mercenaries,⁷³ yet another distinction from the military forces of the colonial era and early republic. Revolutionary War-era leaders rejected mercenaries in part because they felt citizens were obliged to perform military service for the states.⁷⁴

United States military operations have often included occupations and other non-war-fighting efforts, but the peacekeeping missions of the

62. See United States Army—Soldiers Magazine Publication, <http://www.army.mil/publications/soldiersmagazine/> (last visited June 10, 2009).

63. John McChesney, *Army Offers \$40K Recruiting Bonus to H.S. Grads*, NPR, Feb. 5, 2008, <http://www.npr.org/templates/story/story.php?storyId=18710386>. See generally GoArmy.com, *supra* note 55.

64. See David R. Segal & Mady Wechsler Segal, *America's Military Population*, POPULATION BULL., Dec. 2004, at 22 tbl.3, available at <http://www.prb.org/Source/ACF1396.pdf>.

65. *Id.*

66. *Id.*

67. See, e.g., Hillman, *supra* note 47, at 150.

68. DEP'T OF DEF., OPERATION IRAQI FREEDOM MILITARY DEATHS, MAR. 19, 2003 THROUGH JULY 4, 2009, available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-deaths-total.pdf>.

69. DEP'T OF DEF., OPERATION IRAQI FREEDOM MILITARY WOUNDED IN ACTION, MAR. 19 2003–MAY 2, 2009, available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-wounded-total.pdf>.

70. See Segal & Segal, *supra* note 64, at 10.

71. *Id.*

72. See DEP'T OF DEF., CIVILIAN EMPLOYMENT STATISTICS: DECEMBER 2008 (2008), <http://siadapp.dmdc.osd.mil/personnel/CIVILIAN/fy2009/december2008/december2008.pdf>.

73. See, e.g., FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007).

74. See, e.g., John Whiteclay Chambers II, *American Views of Conscription and the German Nation in Arms in the Franco-Prussian War*, in THE PEOPLE IN ARMS: MILITARY MYTH AND NATIONAL MOBILIZATION SINCE THE FRENCH REVOLUTION 75 (Daniel Moran ed., 2003); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 92–93 (2002).

Cold War and the post-9/11 wars have moved the armed forces in many new directions.⁷⁵ Troops and government contractors routinely perform law enforcement and governing functions rather than more traditional military missions.⁷⁶ On June 30, 2008, 280,000 U.S. military personnel were stationed in some 149 countries and onboard ships underway, including 183,000 in Iraq and 32,000 in Afghanistan.⁷⁷

The technological changes that have altered American war fighting are every bit as transformative as the shifts in military demographics and missions. The *Heller* opinions suggest the changes in small arms: the handguns of the late eighteenth century were a far cry from current handguns.⁷⁸ The technological revolutions that have altered the way in which the United States fights are far more profound, however, than the development of more reliable, more powerful pistols and rifles. The advent of nuclear weapons and aerial bombing, for example, created well-known strategic and legal challenges for military and civilian leaders.⁷⁹ Moreover, the preferred method of American war-fighting in the early twenty-first century, bombing from the air, was entirely unknown by late eighteenth century war fighters and political leaders.⁸⁰ At that time, hot-air balloons were considered a potential resource for surveillance but not for bombing, because the wild inaccuracy of bombs dropped from balloons rendered them virtually useless for that purpose.⁸¹ Note that the tactic (bombing from the air), not the target (civilians), is what changed; the intentional targeting of civilians in warfare was routine, not unfathomable, in the eighteenth century.⁸² Yet the size and power of the American military, and the pace at which it moves and

75. See generally ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005).

76. See, e.g., P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

77. See DEP'T OF DEF., *supra* note 53.

78. See, e.g., Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinal Critique*, 60 HASTINGS L.J. 1285, 1292–96 (2009); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1356–58 (2009).

79. See, e.g., ROBERT A. PAPE, *BOMBING TO WIN: AIR POWER AND COERCION IN WAR* (1996) (assessing the effectiveness of bombing in warfighting); *THE CASE AGAINST THE BOMB: MARSHALL ISLANDS, SAMOA, AND SOLOMON ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE IN ADVISORY PROCEEDINGS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS* (Roger S. Clark & Madeleine Sann eds., 1996) (presenting arguments regarding the illegality of nuclear weapons).

80. See, e.g., *BOMBING CIVILIANS: A TWENTIETH CENTURY HISTORY* (Yuki Tanaka & Marilyn B. Young eds., 2009) (exploring the popularity and consequences of aerial bombing).

81. See, e.g., TAMI DAVIS BIDDLE, *RHETORIC AND REALITY IN AIR WARFARE: THE EVOLUTION OF BRITISH AND AMERICAN IDEAS ABOUT STRATEGIC BOMBING, 1914–1945* (2002).

82. See, e.g., JOHN GRENIER, *THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607–1814*, at 5 (2005) (calling the intentional targeting of civilians a “ubiquitous albeit darker side of American military history”). See generally *THE BARBARIZATION OF WARFARE* (George Kassimeris ed., 2006) (contemplating the capacity for, and limits of, brutality in the history of warfare).

communicates in 2009, could hardly have been contemplated by the drafters of the Second Amendment. Even military uniforms have gone digital; the Army's fatigues and "battle dress uniform" have been replaced by an "army combat uniform" with a digitally generated, all-terrain camouflage pattern.⁸³

III. IMPLICATIONS FOR THE RIGHT TO SERVE IN THE MILITARY

Although the Court neglected the history of the American military in its *Heller* decision, that history bears directly on the relationship of military service to the Constitution. As Justice Scalia wrote in *Heller*, the idea that the Second Amendment protects "only those arms in existence in the 18th century" borders on the "frivolous," because "we do not interpret constitutional rights that way."⁸⁴ True enough; we do not interpret constitutional rights as if military technology or society stalled in 1791 with the single shot pocket pistol and the Corps of Artillerists.⁸⁵ Just as the right to keep and bear arms must be interpreted in light of contemporary weapons, the right to protect and defend the Constitution deserves consideration in light of contemporary military institutions and constitutional doctrine. The all-volunteer American armed forces are more powerful than ever before in terms of both their destructive potential and their function in confirming citizenship.⁸⁶ Because of that very power, the Constitution must protect the right to serve in the armed forces.

In *Heller*, Justice Scalia scolded those who might read the Second Amendment as granting a right to bear arms in military service.⁸⁷ In the course of dismissing Justice Stevens's reading of the meaning of the Second Amendment, Justice Scalia wrote that Justice Stevens's "idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed."⁸⁸ Conventional legal argument supports Justice Scalia and rejects a constitutional right to serve in the military.⁸⁹ For

83. See, e.g., *USA Contracts for New Army Combat Uniforms in ACUPAT Camo*, DEF. INDUSTRY DAILY, Feb. 2, 2009, <http://www.defenseindustrydaily.com/usa-contracts-for-new-army-combat-uniforms-in-acupat-camo-03024/#more> (describing a new contract for army uniforms).

84. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008).

85. See, e.g., SKELTON, *supra* note 33, at 25 (describing the Corps of Artillerists in the late eighteenth century army); Kates & Cramer, *supra* note 78 (discussing the pocket pistol).

86. See *infra* notes 96, 110–17 and accompanying text.

87. See 128 S. Ct. at 2794–98 & n.16; Amar, *supra* note 2, at 189.

88. *Heller*, 128 S. Ct. at 2794.

89. See, e.g., Caitlin Daniel-McCarter, Comment, *Homophobia Through The First Amendment: A Critique Of Fair v. Rumsfeld*, 10 N.Y. CITY L. REV. 199, 201 n.11 (2006) (citing OFFICE OF THE SEC'Y OF DEF., SUMMARY REPORT OF THE MILITARY WORKING GROUP (1993), which was issued by President Clinton's Military Working Group in considering the homosexual conduct policy of the military, which relied on the absence of any right to serve in the military); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 559 (1994) (citing

example, in its findings section, the “don’t ask, don’t tell” statute that bars service by openly lesbian or gay persons states explicitly that “[t]here is no constitutional right to serve in the armed forces.”⁹⁰

Yet leading constitutional theorists have hinted that the political valence of military service has made access to the military a fundamental aspect of citizenship and therefore an as-yet unacknowledged constitutional right.⁹¹ Those hints, however, have been made “hesitantly.”⁹² The last extended argument for military service as a constitutional right appeared in 1995, triggered by the controversy surrounding the crafting and implementation of “don’t ask, don’t tell.”⁹³ The issue of the right to military service has been left largely unexamined, notwithstanding frequent criticism of military discrimination on the basis of gender and sexual orientation.⁹⁴ Recognizing a Second Amendment–based right to military service would not require the armed forces to accept anyone unqualified into their ranks. It would, however, prohibit “wholesale exclusions based on stereotypical assumptions.”⁹⁵

The *Heller* Court’s reading of the Second Amendment opens the door to reassessing the right to military service. If, as *Heller* asserts and most constitutional scholars seem to agree,⁹⁶ the Second Amendment protects an individual right to keep and bear arms for the purposes of self-defense, it also protects an individual right to keep and bear arms for the purposes of collective defense—which is, after all, an uncontroversial and core purpose of the Constitution itself.⁹⁷ This argument need not rest

Nieszner v. Mark, 684 F.2d 562, 564 (8th Cir. 1982); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977)).

90. 10 U.S.C. § 654(a)(2) (2006).

91. See, e.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 219–23 (2005) (arguing that the Second Amendment supports a right to collective defense); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (arguing that the Bill of Rights protects “various intermediate associations” including service in the military); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 128 (2000) (commenting on the right to military service); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 343 (2000) (articulating “a right of the people to keep and bear arms—that is, a right to serve in the military”); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 500 (1991) (arguing that military service confirms citizenship and engenders inequality through sex discrimination).

92. Dorf, *supra* note 91, at 343 n.226.

93. See generally Carl Riehl, *Uncle Sam Has to Want You: The Right of Gay Men and Lesbians (and All Other Americans) to Bear Arms in the Military*, 26 RUTGERS L.J. 343 (1995).

94. See, e.g., NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA (2009).

95. Dorf, *supra* note 91.

96. See generally Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000).

97. See, e.g., SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA, at x–xi (2006) (construing the Second Amendment as a source of civic rights and obligations, including defense of the nation); Douglas W. Kmiec, *Observing the*

on an interpretation of the Second Amendment's original intent; it stands alone, on the undisputed grounds that the government created by the Constitution must be able to defend itself. In order to defend itself, the Constitution permitted a wide range of executive and legislative actions related to the use of military force.⁹⁸ Given how those actions, authorized by explicit constitutional provisions,⁹⁹ have grown to embrace the funding and operation of massive, permanent twenty-first century armed forces, the related power of the people to assert control over those forces must also have grown proportionately. This control can only be realized through an individual right to serve in the military.

Carl Riehl's 1995 analysis of the Second Amendment sets forth the outline of constitutional arguments in favor of a right to military service.¹⁰⁰ Riehl asserted that the Constitution's embrace of a civic republican framework requires "direct citizen control" over government force and that such control must be manifested through an individual right to military service.¹⁰¹ He also suggested that judicial deference to the military is particularly inappropriate so long as military service is not open to all citizens.¹⁰² Two sets of interpretive arguments, redefined in the wake of *Heller*, confirm the constitutional dimensions of the right to serve in the military under the Second Amendment. First, the Constitution embraces a vision of civic republicanism that links political and military participation and requires opening military service to all citizens.¹⁰³ Second, popular understanding of military service as an obligation of citizenship requires recognition of equality in military opportunity.¹⁰⁴

Together, the notion of a robust civic republic and a popular constitutionalism make a powerful case for the end of categorical distinctions based on sex and sexual orientation in eligibility for, and specific assignment to, military duty in the United States. Many Supreme Court opinions have noted the profound meaning of military service in the life of the nation and its citizens.¹⁰⁵ This is readily apparent in cases

Separation of Powers: The President's War Power Necessarily Remains "The Power To Wage War Successfully," 53 DRAKE L. REV. 851, 853-54 (2005) (pointing out the President's constitutional role in "collective defense" of the nation).

98. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 51 (2005).

99. *Id.*

100. See Riehl, *supra* note 93, at 344-45.

101. See *id.* at 344-53.

102. See *id.* at 345; see also, e.g., Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 701-41 (2002) (tracing the development of a doctrine of judicial deference that shielded legislative and executive decisions from judicial review); Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. REV. 1, 95-133 (2002) (criticizing excessive deference to the military).

103. See *infra* note 110 and accompanying text.

104. See *infra* notes 107-08 and accompanying text.

105. See *infra* notes 107-08 and accompanying text.

upholding conscription.¹⁰⁶ Perhaps most famously, Chief Justice Edward Douglass White, writing for a unanimous Court in defending the draft during World War I, stated that “[t]he highest duty of the citizen is to bear arms at the call of the nation,” and that “the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.”¹⁰⁷ In 1929, the Court, in upholding the rejection of a naturalization application by Rosika Schwimmer, a pacifist and war resister who refused to agree to “take up arms in defense” of the country, asserted that “the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.”¹⁰⁸ The statute requiring registration for the draft in midcentury stated that “in a free society the obligations and privileges of military training and service should be shared generally.”¹⁰⁹ Political theory supports these statements of legislative and judicial authorities regarding the significance of military service to full citizenship. For example, Amar refers to “the classical republican vision underlying the Second Amendment, a vision that linked military and political participation.”¹¹⁰

An approach based on popular constitutionalism also supports the right to serve in the military. *Heller* may be best understood as the triumph of the gun rights movement rather than the doctrine of originalism, making the right to bear arms dependent on a democratic model of constitutional decision making.¹¹¹ The common understanding of the right to serve in the military is at least as potent as the common understanding of the right to defend oneself with a handgun. This may be clearest in the discourse of civil rights in the United States, which has deep roots in military service.¹¹² Americans, quite apart from judicial

106. See, e.g., Jill E. Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104–05 (2008) (exploring the deep “connection between military service and full citizenship in cases upholding conscription from World War I to the Vietnam era”).

107. Selective Draft Law Cases, 245 U.S. 366, 368, 378–80, 390 (1918), cited in LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 246 (1998).

108. *United States v. Schwimmer*, 279 U.S. 644, 647, 650 (1929), cited in KERBER, *supra* note 107, at 246–47. Note that *Schwimmer* and other cases were reversed in 1946 by *Girouard v. United States*, 328 U.S. 61, 64 (1946), in which Justice William Douglas wrote for the Court: “The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. . . . Refusal to bear arms is not necessarily a sign of disloyalty”

109. Selective Training and Service Act of 1940, ch. 720, § 1, 54 Stat. 885, 885 (1940).

110. Amar, *supra* note 2, at 188.

111. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (arguing that social movements and popular constitutionalism underlie Justice Scalia’s reasoning despite his disavowal).

112. See *infra* notes 114–17 and accompanying text.

pronouncements, have long understood that the privilege of citizenship entails an obligation to serve in the military.¹¹³

The importance of military service in the history of race-based claims of political equality in the United States is well-recognized.¹¹⁴ African American military participation in every past American war was triggered in part by aspirations for full citizenship, and was a key source of support for post-war claims of equality.¹¹⁵ Frederick Douglass recruited African Americans to fight the Civil War because he, like many others, was convinced that once a black man had “an eagle on his button and a musket on his shoulder,” there was “no power on earth” that could deny him citizenship.¹¹⁶ Military service has been a centerpiece of the citizenship aspirations of groups other than African Americans as well. Other racial minorities, undocumented immigrants, women, and lesbians and gay men have pressed for access to the risks and sacrifices of military service as a means to gain the privileges and benefits of full citizenship.¹¹⁷

Official practices of the federal government promote the special role of military service in conferring the status of citizenship in the United States. For example, the military recruiting program used to attract noncitizens with language skills was expanded in February 2009 to include people living in the United States on temporary visas.¹¹⁸ The military now offers citizenship in six months to immigrants who enlist,¹¹⁹ revealing both how far the 2009 American military has ventured from its origins and how essential military service is to citizenship.¹²⁰ Far from

113. See, e.g., KERBER, *supra* note 107, at 236.

114. See, e.g., JAMES E. WESTHEIDER, *FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR 8–9* (1997) (describing African Americans’ hopes of racial equality based on shared sacrifice in the Vietnam war); James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 *HOW. L.J.* 113, 143 (2006) (noting military service as the “highest of male citizenship activities” and its role in the citizenship claims of African American men); Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 1 *SETON HALL L. REV.* 400, 473–77 (2000) (analyzing the importance of military service to African American claims of citizenship); Rebecca J. Scott, *Public Rights, Social Equality, and The Conceptual Roots of the Plessy Challenge*, 106 *MICH. L. REV.* 777, 786 (2008) (describing the importance of military service in the development of nineteenth-century claims to full citizenship).

115. See, e.g., RONALD R. KREBS, *FIGHTING FOR RIGHTS: MILITARY SERVICE AND THE POLITICS OF CITIZENSHIP 181–96* (2006).

116. Goring, *supra* note 114, at 476.

117. See, e.g., KERBER, *supra* note 107, at 221–302 (analyzing the citizenship of women and military obligation); RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* (1993) (detailing the service of lesbian and gay Americans); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467, 1495–96 (2000); William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1744 (2001) (recognizing military service as “essential to claims of equal citizenship”); Goring, *supra* note 114 (advocating military service as a path to citizenship for undocumented immigrants); Hasday, *supra* note 106.

118. See Julia Preston, *U.S. Military Will Offer Path to Citizenship*, *N.Y. TIMES*, Feb. 14, 2009, at A1.

119. *Id.*

120. *Id.*

undermining this deeply rooted tradition of the citizen-soldier, early twenty-first century intellectual and political trends alike seem to be elevating the citizen-soldier to new heights. Consider the popularity of Victor Hanson's work, often assigned in courses on military history and political science, which argues that the civic soldier is not only worthy of respect, but is in fact morally superior to other persons in social and political life.¹²¹

CONCLUSION

In 2009, we ask our standing military to undertake missions inconceivable, to use weapons with destructive power unimaginable, to train and integrate persons into a force of a size unfathomable, to the Framers of the Constitution. If there exists a clear, unassailable common understanding that the Second Amendment protects more than the muskets fired in the Battle of Bunker Hill, it must also protect an individual right to participate in the defense of the nation, a right rooted in the nature of citizenship itself. Women, and gays and lesbians, cannot be categorically excluded or restricted from full military service.

Ending discrimination based on sexual orientation and gender is critical because of the gender-based arguments that appear in *Heller*¹²² and that are repeatedly voiced in favor of a right to handguns for individual self-defense. Supporters of the Second Amendment's individual rights theory often point to guns as a means of self-defense especially appropriate for women.¹²³ Women, the argument goes, lack the physical vigor and strength to overpower attackers and are therefore in particular need of the equalizing power of a handgun.¹²⁴ This argument is a canard; it obscures the issue of equality of opportunity across distinctions of gender and sexuality. Women and homosexuals do not need guns under their pillows. They need the respect only granted to full-fledged citizens. Lifting the restrictions on women's military participation, and removing the half-hearted "ban" on service by openly gay and lesbian servicemembers, are much more significant steps toward ending gender discrimination and all of its corollaries, including sexual and domestic violence, than is protecting women's rights to use handguns in self-defense.

121. VICTOR DAVIS HANSON, *CARNAGE AND CULTURE* 440–56 (2001).

122. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2858 (2008) (Breyer J., dissenting) (describing the value of guns to women in self-defense).

123. *See, e.g.*, Kates & Cramer, *supra* note 78, at 1367 & n.167 (arguing that taking guns "deprives victims of the only means of self-defense with which the weak can defeat predation by the strong").

124. *Id.*
