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Elizabeth L. Hillman

UC Hastings College of the Law, hillmane@uchastings.edu

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

ELIZABETH L. HILLMAN*

INTRODUCTION

District of Columbia v. Heller1 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

* Professor of Law, University of California, Hastings College of the Law. I am grateful to Professor Calvin Massey, the editors of the Hastings Law Journal, and the participants in the Journal’s Symposium. All errors are my own.

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. 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, 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." 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.

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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." Justice Scalia writes 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." 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, and he stresses the Second Amendment's role in protecting "a populace familiar with arms" in order to counter a standing army.

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. 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. But he denies that such a dramatic change in historical circumstances can render the Second Amendment "extinct." 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. Justice Stevens's dissent construes the history surrounding the Second Amendment very differently than does Justice Scalia. 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. Justice Stevens also points out that the fear of a standing army was profound, as was the fear of an inadequately trained force, but he does not suggest that the nature of
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. 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. 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.

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, and the Cold War brought an even more dramatic change: a permanent military force, sizable even in times of relative peace. The demographics, missions, and weapons of the United States military in 2008 bear little resemblance to

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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.
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.  

The Continental Army was composed only of men (save those few women who disguised themselves) but was racially integrated, since enslaved African Americans were promised freedom in exchange for military service in the North. George Washington served without pay as the army's commanding general; he considered the army a temporary measure and shared the fear of many early American leaders about the dangers of a standing army. 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." Officers hailed from the upper classes, often held political office as well, and were self-educated with respect to military strategy and tactics.

General Washington's soldiers were paid volunteers who enlisted for periods of one to three years. 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 makeup 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).


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

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

After the Treaty of Paris ended the Revolutionary War, soldiers were quickly mustered out, leaving only a vestigial force of a few hundred men. The army was disbanded without major incident, a notable achievement in itself. 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 frontier), Congress authorized additional troops; in 1791, the authorized strength of the army was about 5400. 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 Americans and defend against European interests in North America. 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. 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.
36. See, e.g., W.EIGLEY, 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).
40. See, e.g., SKELTON, supra note 33.
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.
"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 army—more than 100 times congressional
authorization in 1791. In 2008, women in the Army alone numbered
more than 73,000, with more than 13,000 female army officers. In June
2008, there were more army personnel (19,826) deployed in the Pacific
Theater than were ever in the Continental Army; almost 45,000 others
were stationed in NATO countries, and 117,000 more in Iraq. 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.

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. 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." As of February 2009, it includes three headquarters commands,
nine component commands, and eleven direct reporting units. The
Army has twenty-nine divisions, twenty-six permanent camps located
outside the United States, forty-three forts within the United States,
and even fifty-five museums. It boasts glossy magazines, promotional

48. DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY
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
51. Id.
52. Id.
53. DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY
history/hsto0806.pdf.
309hist.htm (last visited June 10, 2009).
10, 2009).
57. Id.
divisions/ (last visited June 10, 2009).
visited June 10, 2009).
60. United States Army—Forts, http://www.army.mil/info/organization/installations/forts/ (last
visited June 10, 2009).
(last visited June 10, 2009).
posters, and free downloads, 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.

The U.S. Army in 2009 is integrated by race, gender, age, and occupational specialty. 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; most are instead classified as “technical” and “administrative.”

Women, however, are not assigned evenly across career fields because of the rule that precludes them from participating in direct ground combat. As a result, women are less than 2.5% of the dead and less than 2% of the wounded in the ongoing war in Iraq. Initial terms of service range from two to six years of active duty followed by a comparable length of time in the reserves; the average length of service is less than ten years.

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. Many have criticized this “outsourcing” as a resort to mercenaries, 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.

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

65. Id.
66. Id.
67. See, e.g., Hillman, supra note 47, at 150.
70. See Segal & Segal, supra note 64, at 10.
71. Id.
73. See, e.g., FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007).
Cold War and the post-9/11 wars have moved the armed forces in many new directions. Troops and government contractors routinely perform law enforcement and governing functions rather than more traditional military missions. 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.

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. 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. 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. 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. 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. Yet the size and power of the American military, and the pace at which it moves and...
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

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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.


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.”

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. Those hints, however, have been made “hesitantly.” 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.” 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. 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.”

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, 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. This argument need not rest...
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. Given how those actions, authorized by explicit constitutional provisions, 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. 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. He also suggested that judicial deference to the military is particularly inappropriate so long as military service is not open to all citizens. 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. Second, popular understanding of military service as an obligation of citizenship requires recognition of equality in military opportunity.

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. This is readily apparent in cases

99. Id.
100. See Riehl, supra note 93, at 344-45.
101. See id. at 344-53.
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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{110}

An approach based on popular constitutionalism also supports the right to serve in the military. \textit{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.\textsuperscript{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.\textsuperscript{112} Americans, quite apart from judicial

\begin{footnotesize}
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\item \textsuperscript{106} See, e.g., Jill E. Hasday, \textit{Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change}, 93 \textit{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”).
\item \textsuperscript{108} United States v. Schwimmer, 279 U.S. 644, 647, 650 (1929), cited in \textit{KERBER, supra note 107}, at 246–47. Note that \textit{Schwimmer} and other cases were reversed in 1946 by \textit{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 . . . .”
\item \textsuperscript{109} Selective Training and Service Act of 1940, ch. 720, § 1, 54 Stat. 885, 885 (1940).
\item \textsuperscript{110} Amar, \textit{supra note 2}, at 188.
\item \textsuperscript{111} See, e.g., Reva B. Siegel, \textit{Dead or Alive: Originalism as Popular Constitutionalism in Heller}, 122 \textit{HARV. L. REV.} 191 (2008) (arguing that social movements and popular constitutionalism underlie Justice Scalia’s reasoning despite his disavowal).
\item \textsuperscript{112} \textit{See infra} notes 114–17 and accompanying text.
\end{itemize}
\end{footnotesize}
pronouncements, have long understood that the privilege of citizenship entails an obligation to serve in the military.\textsuperscript{113}

The importance of military service in the history of race-based claims of political equality in the United States is well-recognized.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{118} The military now offers citizenship in six months to immigrants who enlist, revealing both how far the 2009 American military has ventured from its origins and how essential military service is to citizenship.\textsuperscript{119} Far from

\begin{footnotes}
\item 113. See, e.g., Kerber, supra note 107, at 236.
\item 116. Goring, supra note 114, at 476.
\item 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.
\item 119. Id.
\item 120. Id.
\end{footnotes}
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.\(^1\)

**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\(^1\)* 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.\(^3\) 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.\(^4\) 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).


\(^{123}\) 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.