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A Well-Regulated Militia: A Historical Reading of the Second Amendment

Darya Treanor
Boston College, treanoda@bc.edu

A WELL-REGULATED MILITIA: A HISTORICAL READING OF THE SECOND AMENDMENT

DARYA TREANOR [1]

Abstract: The Second Amendment is one of the most controversial parts of the United States Constitution, and since its reinterpretation in the 2008 Supreme Court Case *D.C. v. Heller*, it has officially been understood to protect the individual right to own and bear arms. Even the opponents of this view, who often point to the Militia Clause to argue that the amendment is not about individual gun ownership, do not pay enough attention to the military history and language behind the Second Amendment. This paper will argue that the Second Amendment was initially written to protect the rights of service members, not civilians. If it were to be interpreted and applied according to this originalist reading, the Second Amendment would be able to invalidate laws and regulations against LGBTQ+ people in the military or restrictions on women in combat. This paper lays out a historical explanation of why the Second Amendment should be read this way and an example of how the legal reasoning springing from this reading could be used to protect the civil rights of members of the American armed forces.

Introduction

The exact wording of the Second Amendment to the United States Constitution is "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2] There are many ways to read this passage, but in the 2008 case *D.C. v. Heller*, the United States Supreme Court chose to interpret the amendment as a protection of the individual right to gun ownership, despite the wealth of historical data showing that the Framers of the Constitution had no such intention. This interpretation of the Second Amendment, however, completely overlooks the Militia Clause, which is consequentially underutilized and too often ignored in contemporary debate. This is a misgiving because while the Militia Clause is not of much use in the political and legal fight over gun control laws, it shows promise as a defense of the rights of soldiers. In particular, a historically informed reading

[1] Darya Treanor is a senior at Boston College studying philosophy and political science. She is interested in the legal and constitutional history of the United States, and plans on attending law school starting in the fall of 2024.
[2] U.S. Constitution, amend. II.

of the Second Amendment might provide legal grounds for a constitutional defense of LGBTQ+ soldiers facing discrimination in the United States military.

Summary

To summarize the legal argument, based on the exact language of the Constitution and its author's own interpretation, the Second Amendment establishes the right of States to maintain a militia and the right of citizens to join their state militia. The National Guard, the legally recognized successor of state militias, has now been incorporated into the standing military, so regulations about joining the military should match those of the National Guard. In other words, by incorporating the National Guard into the standing military, the government also incorporated laws and provisions like the Second Amendment so that they now apply to the standing military. The Second Amendment, therefore, protects an individual's right to join the military and serve their country, and given the Fourteenth Amendment, sex (and therefore sexuality and gender identity, which are reliant on sex) are protected categories against which the government cannot discriminate. Any policy that would discriminate against LGBTQ+ Americans seeking to join the military violates the Second Amendment and is consequently argued unconstitutional.

Origins of the Second Amendment

The Second Amendment to the US Constitution was passed in 1971, along with the other amendments that make up the Bill of Rights. As Congress deliberated on the need for the Bill of Rights and for specific amendments, many issues had to be discussed and clarified. However, during the discussion of what would become the Second Amendment, "what was not mentioned at all, by anyone, was any private use of arms."[3] Instead, the Congressmen discussed the purpose of a militia and how to ensure that the states were able to maintain militias without interference from the federal government, thus allowing states to protect themselves from federal overreach. States' rights and autonomy, and the role of a militia in securing the same, are the proper subject of the amendment. There is no sign that the amendment addressed private gun ownership or use.

In fact, the debate surrounding what later became the Second Amendment invoked the rights of individuals, specifically, religious freedom. Future Vice President Elbridge Gerry argued that Congress should alter a clause from the proposed amendment reading, "but no person

[3] Robert A. Goldwin, "From Parchment to Power," (Washington: The AEI Press, 1997), 128.

religiously scrupulous shall be compelled to bear arms."[4] Gerry worried that this clause, meant to allow conscientious objectors to avoid military service, could be co-opted by the federal government to designate members of certain religious groups as religiously scrupulous and then ban them from bearing arms and joining the militia. By misusing the clause in this way, Gerry believed that the federal government could arrogate state power over the state militias and even stop the formation of effective militias altogether. Gerry's concern was that the federal government might strip the right to bear arms from individuals based on their religious backgrounds; this fear suggests that the right to bear arms was not only intended to allow the establishment of state militias, but it would also protect the rights of individuals to join those state militias.

Gerry's suggestion that the conscientious objector clause should be changed in order to close this loophole was narrowly defeated, but the debate continued on the amendment's original draft, which read: "[t]he right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[5] This expanded attempt to summarize the Founders' thoughts on the right to bear arms makes it very clear that the Second Amendment is, at its core, a military regulation.

Between the initial debate about the amendment and its ultimate ratification and adoption, the language evolved and changed. Nevertheless, the origins of the Second Amendment strongly suggest that it was intended to protect the right of citizens to organize in regulated and state-run military groups. There is no textual or contextual suggestion of an individual right to bear arms. The military origins of the Second Amendment appear to be largely ignored in debates over its role in modern law and jurisprudence; however, they are relevant to certain contemporary military applications.

Pre-*Heller* Second Amendment Law

Many Americans would be surprised to learn that until 2008, the Supreme Court had never held that the US Constitution provides for the individual right to own a gun. Although people claimed that it was a constitutionally protected right before the Supreme Court recognized

[4] Ibid 127.
[5] *Annals of Congress,* 1st Cong., 1st sess., 451. Available at: https://web.archive.org/web/20110111095149/http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001%2Fllac001.db&recNum=227.

that right, individual gun ownership only came to be understood as a right very late in American constitutional discourse.

Many twentieth-century scholars of the Constitution believed that when the Second Amendment refers to arms, it means specifically arms for use in well-regulated state militias. David Hutchinson, for example, argued in 1928 that the relevant "arms" were "those of the soldier to be used for defence [*sic*], and [does] not include knives, daggers, sling-shots, or other such weapons."[6] While his specific assertion about Second Amendment relevance to weapons other than firearms would not be readily accepted today, the implication here is not only that "arms" are for use in a regulated militia but also that "[t]he carrying of concealed weapons may, therefore, be prohibited by law under the police power."[7] Hutchinson cites the Supreme Court case *US v. Cruickshank* and several federal and state laws to support this claim. It is telling that, in his nearly four-hundred-page book on the origins of the ideas within the Constitution, he dedicates less than a full page to the Second Amendment. In contrast, the First Amendment is the focus of four and a half pages of detailed dissection, and even the oft-ignored Third Amendment is the subject of one and a half pages. This suggests that, in the early 20th century, Hutchinson considered his interpretation of the Second Amendment to be so blatantly obvious that he did not have to go to any great lengths to prove it or address any other opinions. In short, in this period, it was widely understood that the Second Amendment did not invalidate the existence of regulations and limits on individual gun ownership.

The landmark 2008 case that changed the understanding of the law was *District of Columbia v. Heller.* While this case has been praised as a long-awaited recognition of individual freedoms, it has also been criticized as blatant judicial activism from a conservative court. The case concerns a DC law that placed limits and regulations on the ownership of handguns, including a ban on the registration of handguns and requirements for how legally owned firearms had to be stored when not in use.[8] The plaintiffs, including the case's namesake Dick Anthony Heller, asked the courts "to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home" on

[6] David Hutchinson, *The Foundations of the Constitution* (New Jersey: University Books, Inc., 1975), 291.
[7] David B. Kopel, Clayton E. Cramer & Joseph E. Olson, *Knives and the Second Amendment*, 47 U. Mich. J. L. Reform 167 (2013). Available at: https://repository.law.umich.edu/mjlr/vol47/iss1/4.
David Hutchinson, *The Foundations of the Constitution* (New Jersey: University Books, Inc., 1975), 291.
[8] *District of Columbia v. Heller*, 478 F.3d 370 (U.S. 2008).

Second Amendment grounds.[9] After the District Court dismissed the suit, the plaintiffs appealed, and the Supreme Court reversed the lower court's decision and held that the Second Amendment protects the individual right to own firearms, regardless of militia or military service, and to use those firearms for lawful purposes.

Until *Heller*, the legal consensus was that the Second Amendment did not prevent the creation and enforcement of gun regulations, and in fact, "no federal appellate court had ever invalidated any law as a violation of the Second Amendment."[10] As such, *Heller* represents a marked shift in judicial behavior as well as mainstream thought about the amendment. Most judges and legal scholars, such as Justice James C. McReynolds in *United States v. Miller,* understood the Militia Clause to mean that the Second Amendment only applied to the right to own and operate firearms so long as it had "some reasonable relationship to the preservation or efficiency of a well-regulated militia."[11]

Regulations on gun ownership in the US date back to the British colonies in America, and the presence of these largely unchallenged laws suggests that early Americans did not view gun control as conflicting with the Second Amendment or the American value of freedom. Even after gaining independence, most states continued using English common law, complete with traditional restrictions on gun use**,** such as a prohibition on traveling with concealed weapons in populated areas and strict regulations about how firearms should be stored.[12] In fact, according to John Adams' autobiography, during the American Revolution, the Founders recommended that state and local governments "cause all Persons to be disarmed, within their respective Colonies, who are notoriously disaffected to the cause of America."[13] This is more evidence that the Founders were comfortable with gun regulations and that they intended the right to bear arms to mean that the people could fight *for*, rather than against, or in spite of, the government. The right to bear arms was explicitly tied to military service, with potential enemies of the Patriots stripped

[9] "District of Columbia v. Heller," Legal Information Institute (Cornell Law School), accessed February 3, 2023, https://www.law.cornell.edu/supremecourt/text/07-290.
[10] Lainie Rutkow, Stephen P. Teret, Jon S. Vernick, and Daniel W. Webster, "Changing the Constitutional Landscape for Firearms: The US Supreme Court's Recent Second Amendment Decisions," *American Journal of Public Health* 101, (2011): 2021-2026, https://doi.org/10.2105/AJPH.2011.300200.
[11] *US v Miller*, 307 US 174, 178 (U.S. 1939).
[12] Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004). Available at: https://ir.lawnet.fordham.edu/flr/vol73/iss2/3.
[13] John Adams in *The Adams Papers*, Diary and Autobiography of John Adams, vol. 3, *Diary, 1782–1804; Autobiography, Part One to October 1776*, ed. L. H. Butterfield, (Cambridge: Harvard University Press, 1961), 369–370.

of their arms and those with religious objections to military service subject to a higher tax rate.[14] Moreover, in many states, the right to bear arms was contingent on the swearing of loyalty oaths in which a person pledged allegiance to their individual state or the United States altogether, or at least repudiated allegiance to the British king.[15] The diversity of the gun regulations during colonial and post-colonial America shows the long history of laws restricting gun ownership and that the very Founders who created the Second Amendment were entirely comfortable with some regulation on firearms.

State Militias and the National Guard

It is clear that the Second Amendment's phrase "bear arms" has had a primarily military context throughout much of history, and indeed, the Second Amendment was originally intended to apply to the state militias. Scholars have argued that the phrase has two separate meanings: a natural meaning relating to the literal carrying of firearms and an idiomatic meaning relating to military service and activities. Several post-*Heller* researchers attempting to determine exactly what the authors of the Second Amendment thought "bear arms" to mean have agreed that it "was mostly used in its idiomatic or military sense during this period, but not solely or exclusively so."[16] It, therefore, cannot be definitively concluded from this phrase alone that the Second Amendment is meant to refer to military activity, but in conjunction with the Militia Clause, it seems to suggest that there is a military connotation to the amendment's text as a whole. The Militia Clause or the phrase "bear arms" on its own would not necessarily mean that the Second Amendment refers to military weapons, but when considered together, the Framers' concern with the military is clear.

Before writing his book *Armed in America*, Patrick J. Charles performed a detailed historical analysis of the antecedents of the Second Amendment, which produced two historical conclusions: in eighteenth-century militia laws, all of the language that comprised the Second Amendment–"well-regulated militia," "necessary to the security of a free state," "bear arms,"

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[14] Ibid.
[15] John D. Sinks, "Oaths of Allegiance During the American Revolution," District of Columbia Society, Sons of the American Revolution, May 8, 2021, https://www.dcssar.org/resources/Documents/Publications/Oaths%20of%20Allegiance%20During%20the%20American%20Revolution%208%20May%202021.pdf.
[16] E. Gregory Wallace, "Legal Corpus Linguistics and the Meaning of 'Bear Arms,'" Duke Center for Firearms Law, Duke University, July 16, 2021, https://firearmslaw.duke.edu/2021/07/legal-corpus-linguistics-and-the-meaning-of-bear-arms/.

and "keep arms"–appeared regularly. Conversely, in all the other eighteenth-century laws, including the laws pertaining to crime, self-defense, weapons, and hunting, none of the languages that comprised that Second Amendment was present–not even different variants of the term "bear arms"--i.e., "to bear arms," "bearing arms," etc. Even more telling was the fact that not one eighteenth-century legal commentator or one eighteenth-century legal case used the term "bear arms" or any variant of the terms to describe the act of carrying arms or using arms in the act of self-defense.[17] Given this, even if the evidence does not overwhelmingly prove that the language of the Second Amendment applies only to the military, it certainly establishes that there is no historical basis for the individualist reading of the Second Amendment. The weight of the historical evidence shows that the language of the Second Amendment implies a military context, and although there are occasional instances of other uses of the phrase "bear arms," the Framers clearly had the military, and more specifically, the state militias, in mind while drafting the amendment.

The state militias of the late eighteenth century were meant to provide a mechanism for national defense while avoiding the creation of a standing army, which was viewed as a potential weapon that the federal government could use to exert tyrannical power over the states. Each state raised a militia of its own, but because these militias might have needed to work together, they had to be "well-regulated," meaning that the standards for the different militias would be set by the federal government so that there would not be irreconcilable differences between discipline or training that might complicate a combined endeavor. These militias became somewhat obsolete, however, with the advent of the national standing army. The Continental Army, which won the Revolutionary War, was ordered to disband in 1784 (although two companies remained active in order to protect military equipment.)[18] Later, under the Militia Act of 1792, the state militias were legally recognized, and additionally, the law gave the President the right to call on the militias of any state.[19] This law made the state militias a part of the federal military system; they no longer answered only to the individual states.

In *Presser v. Illinois*, an 1886 Supreme Court case, the unanimous court ruled that the Illinois National Guard was "the regular organized volunteer militia of [the] state" and that no

[17] Patrick J. Charles, *Armed in America* (Amherst: Prometheus Books), 23-24.
[18] "The U.S. Army: America's First National Institution," U.S. Army, accessed February 16, 2023, https://www.army.mil/1775/.
[19] Militia Act of 1792, May 2-8, 1792.

other group was legally recognized as a military organization.[20] *Presser* effectively declared that the National Guards are the modern successor or equivalent of the state militias to which the Second Amendment refers, and the decision was reinforced by Congress when it passed the Militia Act of 1903, which reorganized the National Guard out of the militia system.[21] The National Guard itself seems to conform to this view as well; they claim that December 13th, 1636, the date on which the first Massachusetts militias were organized, is the birthday of the National Guard.[22] Today, however, the National Guard is not solely under the jurisdiction of the states; rather, the National Guard is considered a special unit of the American military that answers to both the President and the governors of states.[23] The National Guard, and therefore the state militias, was effectively absorbed into the national military.

It seems plausible that once the National Guard was incorporated into the rest of the military, the Second Amendment was also incorporated into the legal corpus surrounding the military. In other words, while the Second Amendment was originally designed to apply to state militias, the evolution of the relationship between the state militias and the standing military has resulted in an expansion of the meaning and role of the Second Amendment. The constitutional framework pertaining to the militias now applies to the National Guard and the rest of the standing military as well.

Anti-LGBTQ+ Laws in the Military

There are a number of reasons why a person might want to join the United States military. Putting aside the obvious points of patriotism and a desire for public service, working in the military can offer Americans who may not have many other options a job and steady salary, benefits like healthcare that might otherwise be out of reach, preference for future government positions, funding for their education, and retirement pensions.[24] Benefits like these can make a

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[20] "Presser v. State of Illinois," Legal Information Institute (Cornell Law School), accessed February 17, 2023, https://www.law.cornell.edu/supremecourt/text/116/252.
[21] Militia Act of 1903, 32 Stat. 775 (1903).
[22] "About the Guard: How We Began," National Guard, accessed February 16, 2023, https://www.nationalguard.mil/About-the-Guard/How-We-Began/.
[23] Anshu Siripurapu, "A Unique Military Force: The U.S. National Guard," Council on Foreign Relations, last modified January 15, 2021, https://www.cfr.org/backgrounder/unique-military-force-us-national-guard.
[24] "VA Benefits for Service Members," U.S. Department of Veterans Affairs, last modified October 4, 2022, https://www.va.gov/service-member-benefits/.
"Veterans' Preference Information," U.S. Department of Labor, accessed February 17, 2023, https://www.dol.gov/agencies/vets/programs/vetspref.

substantial difference in an individual's life and help them to support themselves and their families. However, there are many limits on who can join the military. The government cites a variety of reasons for these limits, ranging from the rational to the absurd, and historically, one of the groups that has been discriminated against in military service is LGBTQ+ Americans.

The first reported case of an officer in the US military being discharged due to their sexuality was in February 1778, in the middle of the Revolutionary War, when two soldiers were found together in bed.[25] One of them was Lieutenant Gotthold Frederick Enslin, who was court-martialed and subsequently expelled from the Continental Army on the orders of George Washington himself. This is to say that military discrimination against gay Americans is as old as the country itself—or arguably even older, given that the United States had not formally won independence in 1778.

However, the United States did not formally ban gay individuals from the military or even technically forbid homosexual behavior until much later. In 1917, Congress adopted the Articles of War of 1916, which criminalized sodomy and the intent to commit sodomy.[26] Consensual sodomy remained criminalized in the military even after the Supreme Court case of *Lawrence v. Texas* declared anti-sodomy laws unconstitutional in 2003.[27] It was not until ten years later that Barack Obama signed the National Defense Authorization Act of 2014, repealing the ban.[28] These anti-sodomy provisions did not technically exclude homosexual Americans from joining the military, but in 1982, the Department of Defense created a policy stating that "[h]omosexuality is incompatible with military service."[29] Although this was the first explicit ban on homosexual members of the military, in practice, American soldiers could be discharged for homosexual activity throughout the nineteenth and twentieth centuries.[30]

"Military Programs and Benefits," USA.gov, last updated November 10, 2022, https://www.usa.gov/military-assistance.

[25] "Uniform Discrimination," Humans Rights Watch, accessed February 17, 2023, https://www.hrw.org/reports/2003/usa0103/USA0103FINAL-02.htm.

[26] Ibid.

[27] Jeremy J. Gray, "The Military's Ban on Consensual Sodomy in a Post-Lawrence World," *Washington University Journal of Law and Policy* 21 (2006): 379-406, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1235&context=law_journal_law_policy.

[28] Chris Johnson, "Defense bill contains gay-related provisions," *Washington Blade*, December 20, 2013, https://www.washingtonblade.com/2013/12/20/defense-bill-contains-gay-related-provisions/.

[29] William A. Woodruff, "Homosexuality and Military Service: Legislation, Implementation, and Litigation," 64 UMKC L. Rev. 121 (1995-1996): 131, https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1037&context=fac_sw.

[30] "Uniform Discrimination," Humans Rights Watch, accessed February 17, 2023, https://www.hrw.org/reports/2003/usa0103/USA0103FINAL-02.htm.

When Bill Clinton became President of the United States in 1993, he attempted to lift the ban on homosexuality despite public and military opposition. He failed, but as a compromise, Congress passed a law allowing homosexuals in the military to serve if their homosexuality remained a secret. This rule, often called "Don't Ask, Don't Tell," remained in place until 2010, and it had a number of flaws that allowed the military to continue discriminating against its gay members. For instance, while recruiters did not ask potential soldiers about their sexual orientation, the Pentagon continued to investigate serving members of the military, and members of the military with same-sex partners were forced to keep their relationships and major parts of their lives from their coworkers. The same-sex military partners were also denied the benefits and support available to heterosexual military spouses, and if someone was outed for whatever reason, they could receive an other-than-honorable discharge on the basis of their sexuality, which meant they could be denied benefits, including the education benefits of the GI Bill, pension payments, and health care.[31] As a result, outed servicemembers forced out of the military would not just lose their military career but access to many of the resources intended to help them build post-military careers. Due to the bigotry that the law enabled and the lack of evidence that one's sexual orientation impeded the military's organization and discipline in any way, Don't Ask, Don't Tell was repealed in 2010, allowing gay and lesbian servicepeople to serve openly as of September 2011. However, even with this policy change, veterans who were less-than-honorably discharged under the law did not necessarily regain access to benefits until ten years later. On the tenth anniversary of the repeal coming into effect, the Biden White House instructed the Department of Veterans Affairs to work with veterans who were discharged on the basis of their sexuality, gender identity, or HIV status.

The current guidelines regarding the sexuality and gender identity of military employees state that transgender and homosexual individuals are permitted to serve.[32] Still, LGBTQ+ servicemembers may be afraid to live openly due to fears about discrimination and harassment or

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[31] Quil Lawrence, "Veterans Discharged Under 'Don't Ask Don't Tell' Get A Chance for VA Benefits," *All Things Considered*, NPR, September 20, 2021, https://www.npr.org/2021/09/20/1039071130/veterans-discharged-under-dont-ask-dont-tell-are-now-eligible-for-va-benefits.

[32] "LGBTQ in the Military," Military One Source, U.S. Department of Defense, accessed February 26, 2023, https://www.militaryonesource.mil/military-life-cycle/friends-extended-family/lgbtq-in-the-military/.
"5 Things to Know About DOD's New Policy on Military Service by Transgender Persons and Persons With Gender Dysphoria," U.S. Department of Defense, accessed February 26, 2023, https://www.defense.gov/News/News-Stories/Article/Article/1783822/5-things-to-know-about-dods-new-policy-on-military-service-by-transgender-perso/.

concerns that a rollback of LGBTQ+ rights in the future will lead to the reimplementation of a policy like "Don't Ask, Don't Tell."

Sexuality, Gender, and the Fourteenth Amendment

There have been many constitutional arguments against and challenges to laws limiting the membership of LGBTQ+ Americans in the military, but most of them cite the First, Fifth, and Fourteenth Amendments, using free association, due process, and anti-discrimination grounds.[33] However, they have not had much success in the court system, and this is not only due to the presence of homophobia and transphobia in society; there are fair legal arguments against using the Fifth and Fourteenth Amendments to strike down these laws. Both courts and academics have thoroughly examined the debates over the validity of these constitutional challenges. However, to my knowledge, there is no apparent scholarship suggesting that the Second Amendment might be used to overrule these laws.

The Fourteenth Amendment is almost universally understood to forbid discrimination on the basis of sex, with Supreme Court cases such as *Reed v. Reed* and federal laws like the Civil Rights Act of 1964 using this interpretation.[34] The Civil Rights Act of 1964 was a response to the promise of the Fourteenth Amendment and an attempt to make the principles laid out in the amendment legally practical and usable, and the law's Title VII prohibits, among other things, discrimination on the basis of sex.[35] It is clear that our legal system relies on the understanding that under the Fourteenth Amendment, sex is a protected category.

Despite this, there is debate about whether the Fourteenth Amendment protects gender identity and sexuality. Opponents of such protection argue that different LGBTQ+ groups are not subject to the same level of discrimination as the traditionally acknowledged suspect classes, including racial and religious minorities, or quasi-suspect classes like sex. The main argument is that gender identity and sexuality are not "obvious, immutable, or distinguishing characteristics," unlike, for instance, the physical markers that accompany race, ethnicity, and sex.[36] Under this

[33] See *McVeigh v. Cohen*, *Witt v. Department of the Air Force*, and *Log Cabin Republicans v. United States of America*.
[34] "Timeline of Major Supreme Court Decisions on Women's Rights," ACLU, accessed February 26, 2023, https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf.
"Legal Highlight: The Civil Rights Act of 1964," U.S. Department of Labor, accessed February 26, 2023, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964.
[35] "Legal Highlight: The Civil Rights Act of 1964," U.S. Department of Labor, accessed February 26, 2023, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964.
[36] *Lyng v. Castillo*, 477 U.S. 635 (1986).

argument, since one's sexuality and gender identity are not necessarily obvious, it is harder to discriminate against someone on the basis of these qualities, and thus, a high standard of judicial scrutiny is unnecessary. Moreover, since these identities can change over time, some people argue that there are ways, such as the controversial pseudomedical practice of conversion therapy, that someone can avoid this type of discrimination. On the other hand, proponents of these protections point out that gender identity and sexuality are understood differently depending on one's biological sex and that any discrimination on the grounds of one's gender or sexuality is also on the grounds of one's sex. As it turns out, however, there is legal precedent suggesting that gender or sexuality-based discrimination is legally considered sex discrimination. In *Bostock v. Clayton County, GA*, the Supreme Court held that firing an employee due to their sexual orientation is a violation of Title VII.[37] Since Title VII derives from the Fourteenth Amendment, the outcome of *Bostock* suggests that sexual orientation's derivation from sex means that, like sex, sexual orientation is a protected category against which people cannot (easily) legally discriminate. In this way, discrimination on the basis of one's sexuality can be held to violate the Constitution.

The Legal Case

A hypothetical legal case relying on a military reading of the Second Amendment is fairly simple. The Framers' intention in creating the Second Amendment was to protect the existence of the state militias, which includes the right of the people to join and serve in state militias. The state militias of the late eighteenth century, of course, no longer exist, but there is legal evidence that the National Guard is the officially recognized successor to those militias. Since the National Guard now occupies a peculiar position in which it answers to both the President and state governors, it has effectively been incorporated into the standing army, and by absorbing the state militias into the standing military's body, the military also absorbed the obligations of the militias, including the Second Amendment's protection of those seeking to join the militias.

Due to the Fourteenth Amendment's Equal Protection Clause and the widespread understanding that it prohibits discrimination based on sex, along with the legal evidence that it prohibits discrimination on the basis of sexual orientation or gender identity, the Second

[37] *Bostock v. Clayton County, GA*, 590 U.S. ___ (2020).

Amendment right to join the military and serve one's country belongs to Americans regardless of their LGBTQ+ identity.

Even if people have the right to join the military under the Second Amendment, there *are* qualities that can act as disqualifiers. The government *can* prevent certain types of people from joining the military if it impedes military discipline or efficacy; after all, the Second Amendment refers to "a well-regulated Militia." This means that in order to create any new bans on LGBTQ+ military personnel, the United States military would need to provide evidence that limitations on gay or trans servicemembers are necessary to maintain the discipline and regulation of the military. Unless they can provide this evidence–and scholarly argument as well as the absence of an effect from the repeal of "Don't Ask, Don't Tell" suggest that no such evidence exists–then sexuality and gender identity are protected categories against which the government cannot discriminate for military purposes.

Conclusion

Despite the historical and legal evidence in favor of this argument, it is difficult to imagine any lawsuit being brought on these grounds in the near future since current military policy allows servicemembers to serve openly regardless of their sexuality. At least for this particular issue, nobody has standing to bring the case in the first place, although it is possible that there are people who could use this interpretation of the Second Amendment to bring related cases against the United States government. For instance, a woman in the Armed Forces would be able to challenge any restrictions on women in combat that still exist, and men might be able to use the principles of this case to challenge the sex-specific burden of Selective Service.[38]

More importantly, however, this is an unusual and fringe reading of the Second Amendment, and it's hard to picture many, if any, judges espousing it in today's world. Although this is a valid application of the Framers' intent and the legal principles set out in the Second Amendment, it would take a considerable change in the legal and cultural understanding of the Constitution for any argument based on this interpretation to succeed in court. At the moment, the military history of the Second Amendment probably does not offer a very practical way to reshape civil rights for soldiers or access to the military.

[38] Technically, all combat positions in the US military have been open to women since 2016. However, in practice, the implementation of the new rules is not yet complete.

The Second Amendment entails much more than we normally suspect, and we do the amendment a disservice by thinking of it in the narrow terms that the Supreme Court set down in 2008. The historical record very clearly establishes that the Second Amendment is supposed to protect the states' right to maintain militias and the people's right to serve in those militias.

But *D.C. v. Heller* established that the Second Amendment protects individual gun ownership, and this is now the law of the land. I believe that, at the very least, this interpretation of the Second Amendment's potential applications in our twenty-first-century world is *no less* plausible than the one that the Supreme Court set out in *Heller*.

While this argument is legally sound, it may seem less-than-practical in the current political climate. Nevertheless, legal arguments that are not currently in vogue in the legal community still have value, both academically and as a roadmap for future efforts to secure constitutional rights.

The Second Amendment occupies a controversial and delicate position in American politics due in large part to very distinct understandings of what the amendment actually says and what the Founding Fathers meant to accomplish via the amendment. This reading of the Second Amendment will not settle the argument, but it reveals a different set of problems and controversies that the amendment might play a role in addressing. Shifting the focus of the Second Amendment from individual gun ownership to the social role of public defense would exemplify a change that might resolve many of our country's long-standing issues: a shift from individualism to civic society that could, in its own way, reunite us.