

## Toward a Functional Framework for Interpreting the Second Amendment<sup>†</sup>

By Scott Bursor

The 103d Congress passed the Brady Handgun Violence Prevention Act<sup>1</sup> and the ban on "assault" weapons,<sup>2</sup> two of the most controversial gun control measures in American history. President Clinton, who signed those measures into law, later assured the overwhelming majority of the American people who believe that they have a constitutional right to own firearms<sup>3</sup> that "[t]he Members of Congress who voted for that bill and I would never do anything to infringe on the right to keep and bear arms *to hunt and to engage in other appropriate sporting activities.*"<sup>4</sup>

The Second Amendment provides that "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."<sup>5</sup> And though this provision of the Bill of Rights has been avoided by the Supreme Court,<sup>6</sup> ignored by the legal academy,<sup>7</sup> and dismissed by even the most fervent defenders of civil (pg.1126) liberties<sup>8</sup> for several

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<sup>1</sup> Pub. L. No. 103-159, § 102, 107 Stat. 1536 (codified at 18 U.S.C. § 922(s)-(t) (1994)) (requiring a five-day waiting period for the purchase of a handgun).

<sup>2</sup> Pub. L. No. 103-322, §§ 110101-110106, 108 Stat. 1796, 1996-2010 (codified at 18 U.S.C. §§ 921(a)(30), 922(v)-(w) (1994)) (outlawing the manufacture, transfer, or possession of semiautomatic assault weapons and the transfer or possession of large capacity ammunition feeding devices); *see also* Ann Devroy, *Crime Bill is Signed with Flourish*, WASH. POST, Sept. 14, 1994, at A4 ("President Clinton yesterday signed the bitterly contested ... bill that bans several assault weapons ...."); Katharine Q. Seelye, *As Senate Debates Crime Bill, Weapons Ban Is the Focus*, N.Y. TIMES, Aug. 23, 1994, at A14 (detailing the passage of the assault weapons ban in the House).

<sup>3</sup> A recent *U.S. News & World Report* poll asked, "Do you agree that the Constitution guarantees you the right to own a gun?" 75% agreed; 18% disagreed. Gordon Witkin, *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 29; *see also* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206-07 n.11 (1983) (citing two national surveys indicating that 70% to 87% of Americans believe the Constitution gives individuals the right to keep and bear arms).

<sup>4</sup> President William J. Clinton, State of the Union Address (Jan. 24, 1995), in 141 CONG. REC. H584, H587 (daily ed. Jan. 24, 1995) (emphasis added).

<sup>5</sup> U.S. CONST. amend. II.

<sup>6</sup> The Supreme Court has repeatedly denied certiorari in Second Amendment cases. *See infra* note 12.

<sup>7</sup> *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-40 (1989) (noting the absence of significant discussion of the Second Amendment in "law reviews, casebooks, and other scholarly legal publications" (footnotes omitted)). Levinson suspects the following:

the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting

decades, the trend toward more restrictive regulation of firearms is likely to generate a renewed interest in this "Lost Amendment."<sup>9</sup>

Some outspoken supporters of more restrictive gun control have urged that the Amendment be repealed.<sup>10</sup> Others have taken a less forthright tack by arguing that despite the apparent clarity of its language ("right of the people"), the Second Amendment was never meant to guarantee an individual right to own arms. Rather, they argue, it was designed solely to allow the states to continue to maintain their militia units (or, in modern terms, the National Guard) free from federal interference. Thus the Amendment presents no obstacle to even the total prohibition of private firearm ownership. This notion has been referred to as the "states' right" theory.

Although the states' right theory is understandably very attractive to supporters of more restrictive regulation of firearms<sup>11</sup> and has been accepted by a number of courts,<sup>12</sup> it is seriously flawed and has proven to be virtually indefensible in the law reviews.<sup>13</sup> Thus, the claim

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prohibitory regulation.  
*Id.* at 642 (footnote omitted).

<sup>8</sup> See AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 95-96 (1993) (Policy #47) ("Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected.").

<sup>9</sup> Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965).

<sup>10</sup> E.g., George F. Will, *America's Crisis of Gunfire*, WASH. POST, Mar. 21, 1991, at A21 (editorial) ("[G]un control advocates who want to square their policy preferences with the Constitution should face the need to deconstitutionalize the subject by repealing the embarrassing amendment.").

<sup>11</sup> See, e.g., Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383, 390 (1983) (embracing the states' right theory to justify gun control measures).

<sup>12</sup> See, e.g., *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Cody v. United States*, 460 F.2d 34, 37 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981), *aff'd*, 740 F.2d 952 (1st Cir.), *cert. denied*, 469 U.S. 842 (1984); *Eckert v. Pennsylvania*, 331 F. Supp. 1361, 1362 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir.), *cert. denied*, 410 U.S. 989, and *cert. denied*, 411 U.S. 920 (1973) (all endorsing the states' right theory).

<sup>13</sup> Of the 34 law review articles published since 1980 that offer substantial discussion of the Second Amendment, only 3 endorse the states' right theory. All 3 appeared in symposia in which anti-gun groups were invited to submit articles detailing their positions. Two were written by lobbyists for anti-gun groups. See Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991). The third was written by a politician. See Spannaus, *supra* note 11 (Minnesota Attorney General).

In contrast, articles endorsing the view that the Second Amendment protects an individual right have been authored by some of the major figures in constitutional law and have been published in the most prestigious law reviews. See, e.g., Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991) [hereinafter Amar, *Bill of Rights as a Constitution*]; David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Richard E. Gardiner, *To Preserve liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113 (1982); Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms*, 96 W. VA. L. REV. 1 (1993); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to Bear Arms*, LAW & CONTEMP. PROBS., Winter 1986, at 151; Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982); Stephen P. Halbrook, *The Jurisprudence of the Second And Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981); David T. Hardy, *The Second Amendment and the Historiography*

that the (pg.1127) right to bear arms was intended to ensure the states' dominion over formal military units such as the National Guard is rarely heard in serious (pg.1128) constitutional discourse.<sup>14</sup> However, the debate over the Amendment's meaning has not been closed. Rather, the terms of the debate seem to have shifted. Instead of arguing over *whether* the Amendment was meant to guarantee an individual right, the debate has evolved to a more sophisticated and intricate exploration of *why* the Amendment guaranteed that right.

This more sophisticated debate is carried on largely within what I will call a "functional framework." This framework is constructed from the rationales for the adoption of the Second Amendment—the reasons that the ratifiers sought to protect private gun ownership. Within this functional framework or approach there is still much room for disagreement. The states' right theory, for example, has evolved into a more refined doctrine which concedes that the Amendment originated as a protection of an individual right but holds that the scope of that right is limited to militia service. Thus, there is no right to own arms for personal or private self-defense.<sup>15</sup> Other approaches recognize a right to own arms to defend the state,<sup>16</sup> to resist the state,<sup>17</sup> for personal

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*of the Bill of Rights*, 4 J.L. & POL. 1 (1987); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986) [hereinafter Hardy, *Armed Citizens*]; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87 (1992); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 143-45; Kates, *supra* note 3; Levinson, *supra* note 7; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce L. Malcolm, 54 GEO. WASH. L. REV. 452 (1986) (reviewing STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)); Joyce L. Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Thomas M. Moncure, Jr., *Who is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991), takes an unusual position that is difficult to classify but is addressed below at some length. See *infra* notes 15, 90-111 and accompanying text.

George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 688-93 (1992) does not explicitly endorse either the individual or states' right view. Anastaplo does opine that what is to be done about gun control is a political rather than constitutional question. *Id.* at 693. Nevertheless, he seems to regard the Second Amendment as being somewhat analogous to the First. He says that

[t]o emphasize a personal right here [under the Second Amendment], with little or no regard for the obligations and demands of the community in protecting itself, is something like putting the emphasis in the First Amendment upon the physical act of speaking without regard for the primary public-discourse aspect of the traditional right to "freedom of speech."

*Id.* at 691. Instead of erasing the Second Amendment from my copy of the Constitution, I will attempt, throughout this Note, to show how a proper "regard for the obligations and demands of the community in protecting itself" might shape the contours of the individual right to arms.

<sup>14</sup> See, e.g., ROBERT J. COTTROL, *GUN CONTROL AND THE CONSTITUTION* at xxxv (1994) ("To claim, as some have, that the Second Amendment was meant to protect a body like the National Guard, is to severely misread the historical record in ways so fundamental as to warrant almost instant dismissal.").

<sup>15</sup> See, e.g., *id.* (explaining the refined states' right theory which holds that "since the militia has essentially disappeared, the individual right also ceases to exist"); see also Williams, *supra* note 13, at 586 (asserting that because it assumes "a universal militia of a type which does not exist today ... the literal wording of the Second Amendment is meaningless").

<sup>16</sup> See, e.g., Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 1000 (1975) (arguing that the Second Amendment "was designed solely to protect the states").

<sup>17</sup> See, e.g., Levinson, *supra* note 7, at 651 (stressing the republican rationale of keeping arms to deter and resist government tyranny).

self-defense,<sup>18</sup> or for combinations of these purposes.<sup>19</sup> Still another alternative is embodied in President Clinton's suggestion that the right to keep and bear arms is limited to hunting and appropriate sporting activities.<sup>20</sup>

Thus, the central issues in the current Second Amendment debate could be phrased as follows: Why did the ratifiers of the Bill of Rights seek to protect the widespread ownership of arms? And how, given modern conditions, are we to interpret that protection? These are the issues that I will explore in this Note.<sup>(pg.1129)</sup>

Part I examines the late-eighteenth-century conception of the relation between a right to arms and a free society. Analysis of the dominant political and philosophical ideas of the era suggests that widespread private ownership of arms was understood to serve at least four interrelated functions. An armed populace was thought to be the best means of defending the state, sensitizing the government to the rights of the people, preserving civil order and the natural right of self-defense, and cultivating the moral character essential to self-government. I label these the military, political, civil, and moral functions and conclude that the Second Amendment was designed to protect private ownership of arms so that the citizenry would remain capable of performing each of these functions.

In Part II, I consider the modern relevance of the view of the armed citizenry embodied in the Second Amendment. Many commentators have asserted that this view is a dangerous anachronism inapplicable to late-twentieth-century America. After rejecting these assertions as unfounded, I argue that despite the advent of modern police forces and professional armies, an armed citizenry is still capable of performing each of the four functions.

Because much of the rhetoric employed to discourage recognition of a Second Amendment right laments the absurdity that individuals would be allowed to own flamethrowers or nuclear weapons, it is important to demonstrate that a proposed theory does not compel such a result. Part III applies my functional theory of the Second Amendment to several gun control measures to illustrate that such a theory is capable of protecting the rights of citizens without invalidating reasonable restrictions on the keeping and bearing of arms.

## I. A Functional Analysis of the Second Amendment

We must begin by examining the rationale offered for the right to keep and bear arms. The text of the Second Amendment states that its ultimate end is "the security of a free State."<sup>21</sup> The means to that end is "the right of the people to keep and bear Arms."<sup>22</sup> In seeking to determine how

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<sup>18</sup> See, e.g., Cottrol & Diamond, *supra* note 13 (stressing the importance of the right to keep and bear arms for self-defense, particularly for segments of the minority community that, historically, have not received adequate protection from the police).

<sup>19</sup> See, e.g., Kates, *supra* note 3, at 268 (concluding that the Amendment was designed to protect the private ownership of arms "for three purposes: (1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism").

<sup>20</sup> See *supra* text accompanying note 4.

<sup>21</sup> U.S. CONST. amend. II.

<sup>22</sup> *Id.* The Amendment also speaks of a "well regulated Militia," which could be read as the means by which the security of a free state is to be protected. However, any distinction between the "Militia" and the citizenry at-large is unwarranted. Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional part-time volunteers, like today's Guard, would have been called "a *select* corps" or "*select* militia"—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, the "militia" referred to all Citizens capable of bearing arms.... [So] "the militia" is identical to "the people" ....

private (pg.1130) ownership of arms was believed to contribute to that security, we look to the understanding of the ratifiers and the traditions that influenced them.

#### A. *The Ideological Origins of the Right to Arms*

Madison drafted the Bill of Rights with the aid of innumerable suggestions from his countrymen, most commonly in the form of the state bills of rights and the hundreds of amendments suggested by the state conventions that ratified the Constitution.<sup>23</sup> Indeed, Madison began his work by purchasing a pamphlet that listed over two hundred demands of the state conventions,<sup>24</sup> eliminating some, and rewording and consolidating as many as possible to develop the Bill of Rights.<sup>25</sup> Drafted with an eye toward earning the approval of the statehouses,<sup>26</sup> the Bill of Rights was thus infused from the bottom up with the dominant ideology of the day.

That ideology was the Whig ideology, which dominated American politics in the late eighteenth century. John Adams estimated that ninety percent of Americans were Whig sympathizers at the time of the American Revolution.<sup>27</sup>

"In the late Eighteenth Century, a firm background in history was considered indispensable to any legal or political thinker."<sup>28</sup> The American Whigs were deeply familiar with Latin, Greek, and English history.<sup>29</sup> They were also intimately familiar with and deeply influenced by the writings of their English predecessors.(pg.1131)

John Adams held special regard for Harrington .... Adams and Madison both studied Molesworth in detail; Jefferson's library boasted copies of Sydney, Molesworth and Harrington. These works, and those of Fletcher, were also owned by the likes of Benjamin Franklin, John Hancock, and George Mason. When Burgh's *Political Disquisitions* were printed in the colonies, Benjamin Franklin served as editor, and the subscription list for the

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Amar, *Bill of Rights as a Constitution*, *supra* note 13, at 1166 (emphasis in original) (footnotes omitted). Thus, throughout this Note, I will use the terms "militia," "people," "armed citizen(s) (ry)," and "armed populace" interchangeably.

<sup>23</sup> See 12 THE PAPERS OF JAMES MADISON 58 (Charles F. Hobson & Robert A. Rutland eds., 1979) (editor's note); DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 71 (1986) [hereinafter HARDY, ORIGINS]; Hardy, *Armed Citizens*, *supra* note 13, at 605-06 (all discussing Madison's reliance on suggestions from state conventions).

<sup>24</sup> 12 THE PAPERS OF JAMES MADISON, *supra* note 23, at 58; HARDY, ORIGINS, *supra* note 23, at 71; Hardy, *Armed Citizens*, *supra* note 13, at 605-06.

<sup>25</sup> BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 160-91 (1977).

<sup>26</sup> Madison himself had stated that he favored the adoption of a Bill of Rights only because it was "anxiously desired by others." 11 THE PAPERS OF JAMES MADISON, *supra* note 23, at 297. Madison's draft of the Bill of Rights was thus intended to "embody a present consensus of opinion about the obvious rights of human beings." Hardy, *Armed Citizens*, *supra* note 13, at 605.

<sup>27</sup> Hardy, *Armed Citizens*, *supra* note 13, at 571 & n.55.

<sup>28</sup> *Id.* at 586 n.128.

<sup>29</sup> As David Hardy has observed,

It was an age when Patrick Henry might, although admittedly lacking in legal knowledge, gain admission to the bar by his grasp of history and logic; when a solid knowledge of Latin and Greek, and of such authors as Homer, Demosthenes, and Xenophon, was an entrance requirement for many colleges; and when Jefferson might spend his spare time accumulating one of the best historical libraries in the colonies and Madison his correcting footnotes in Latin translations.

*Id.*

first edition included George Washington, Thomas Jefferson, John Adams, John Hancock, and John Dickinson.<sup>30</sup>

The American Whigs also drew upon the libertarian and republican thought of the Florentine tradition articulated by authors such as Niccolò Machiavelli, Sir Walter Raleigh, Jean Bodin, John Trenchard, Thomas Gordon, and Walter Moyle.<sup>31</sup>

## B. *The Functions of Private Arms*

The context of the ratification of the Constitution and the adoption of the Bill of Rights suggests that private ownership of arms, as protected by the Second Amendment, was intended to serve at least four functions. First, an armed populace was considered the best military means of defending a free state against foreign conquerors.<sup>32</sup> Second, an armed populace was thought to play an important political role by sensitizing the rulers to the rights of the people.<sup>33</sup> Third, ownership of arms suitable for self-defense was universally held to be among the natural rights of man as well as the most effective means of preserving civil order.<sup>34</sup> And fourth, being armed was considered essential to the dignity and moral character of citizens of a free state.<sup>35</sup> I have labeled these the military, political, civil, and moral functions.<sup>(pg.1132)</sup>

*1. Military.*—No one disputes that the military function of the citizen militia was an important consideration in the adoption of the Second Amendment. This agreement is not surprising given the ubiquitous reliance on militia to serve some military function at least since medieval times.<sup>36</sup> Military and political systems in which every free man was obligated by law to possess weapons and to serve in militia when called upon have been traced as far back as 690 A.D.<sup>37</sup> English

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<sup>30</sup> *Id.* at 586-87 (footnotes omitted); *see also* LAWRENCE D. CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 35 (1982) (describing the influence that both Whig and Opposition authors had on colonial political thought through the dissemination of works to "political leaders, public orators, and pamphleteers too numerous to mention"); CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN* 102 (1959) (noting that Americans like James Madison and John Adams studied the writings of liberal Whig Robert Molesworth "when they were considering the problems of the New World").

<sup>31</sup> *See* Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 *J. AM. HIST.* 599, 601, 601-05 (1982) (tracing the libertarian notion of a right to bear arms from the Florentine tradition of the "citizen-warrior as the staunchest bulwark of a republic"). On the relationship of the Florentine, libertarian, and republican traditions, *see generally* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 199-213, 290-92 (1975).

<sup>32</sup> *See infra* section I(B)(1).

<sup>33</sup> *See infra* section I(B)(2).

<sup>34</sup> *See infra* section I(B)(3).

<sup>35</sup> *See infra* section I(B)(4).

<sup>36</sup> *See* JAMES B. WHISKER, *THE CITIZEN-SOLDIER AND UNITED STATES MILITARY POLICY* 3 (1979) (noting that the medieval citizen-militia had been fully structured by the end of the tenth century).

<sup>37</sup> Hardy, *Armed Citizens*, *supra* note 13, at 562. ("It is likely, though, that 'the obligation of Englishmen to serve in [the militia (or *fyrð*)] is older than our oldest records.'" (quoting J. BAGLEY & P. ROWLY, *A DOCUMENTARY HISTORY OF ENGLAND 1066-1540*, at 152 (1965))); *see* WHISKER, *supra* note 36, at 4-6 (discussing the organization and training of the select and great *fyrð* and noting that the citizens in the select *fyrð* were required to provide their own weapons).

history is replete with instances in which the militia were called upon for military service.<sup>38</sup> Moreover, the military might of militia was universally praised by authors of the major republican and libertarian treatises.<sup>39</sup>

From America's early colonial history, the militia (not the British army) was the primary, and most effective, means of protection from foreign invaders.<sup>40</sup> Thus, on the eve of the American Revolution, the Baptist preacher John Allen warned King George of the peril of war with Americans who

know the use of the gun, and the military art, as well as any of his Majesty's troops at St. James's, and where his Majesty has one (pg.1133) soldier, who art in general the refuse of the earth, America can produce fifty, free men, and all volunteers, and raise a more potent army of men in three weeks than England can in three years.<sup>41</sup>

This sentiment was expressed more conservatively by the Continental Congress in its declaration of July 1775, in which it warned the English that "men trained in arms from their infancy, and animated by the love of liberty, will afford neither a cheap or easy conquest."<sup>42</sup> These warnings did not go unnoticed, as the widespread American ownership of arms was often cited by Parliament as a reason to negotiate with the colonists rather than use force.<sup>43</sup> These circumstances instilled Americans with a well-founded belief in the military superiority of an armed populace as opposed to a select militia or super-select standing army.

2. *Political.*—The Whigs believed that the widespread ownership of arms would prevent domestic tyranny by sensitizing the rulers to the rights of the people. Most Federalists and all Anti-Federalists shared the Whig tradition's suspicion of government and desire to prevent the concentration of power that they believed inevitably led to tyranny. They had justified the American Revolution by appealing to the natural rights of men and the idea that governments "derived their

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<sup>38</sup> See generally JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO AMERICAN RIGHT* 19-20, 31, 61-62 (1994) (noting the military role of the militia in the English Civil War, the Interregnum, and the Second Dutch War).

<sup>39</sup> See Shalhope, *supra* note 31, at 601, 601-05 (describing a libertarian theme of American Republicanism as a "fear of standing armies and the exaltation of militias composed of ordinary citizens"); see also 2 JAMES BURGH, *POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES* 345 (Philadelphia, Robert Bell & William Woodhouse 1775) ("[T]his author prefers a militia to an army."); DAVID HUME, *Idea of a Perfect Commonwealth*, in HUME: *POLITICAL ESSAYS* 221, 230 (Knud Haakonssen, ed., 1994) ("[W]ithout a militia, it is vain to think any free government will ever have security or stability."); RICHARD PRICE, *OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD* 9 (Boston, True & Weston 1818) ("Free states ought to be bodies of armed citizens, well regulated, and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace.").

<sup>40</sup> See DANIEL J. BOORSTIN, *THE AMERICAS: THE COLONIAL EXPERIENCE* 361 (1958) ("From their American experience the colonies had come to believe that defense began at home.... [T]hey believed that the British Constitution hallowed their assertion that treasury and army must be locally controlled."); DAVID HAWKE, *COLONIAL EXPERIENCE* 396 (1969) (noting that Pennsylvania pacifists quickly learned that the British Army was not going to adequately protect them in the French and Indian War, and that only local militias would do the job); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 163-64 (1992) (noting that, during the Seven Years War in the 1750s, New England militias outraged the British commander by refusing to join in under his command, instead preferring the free, contractual agreements inherent in the local militias).

<sup>41</sup> JOHN ALLEN, *AN ORATION UPON THE BEAUTIES OF LIBERTY, OR THE ESSENTIAL RIGHTS OF THE AMERICANS* at xiv (2d ed. 1773), *microfilmed on* 3 Early American Imprints 1639-1800, No. 13016 (Clifford K. Shipton ed., American Antiquarian Society).

<sup>42</sup> 1 *JOURNALS OF CONGRESS* 163 (1800-1801).

<sup>43</sup> Hardy, *Armed Citizens*, *supra* note 13, at 593.

just Powers from the Consent of the Governed."<sup>44</sup> Similarly, our Constitution is premised on the sovereignty of the individual and the idea that individuals yield some of *their* sovereignty to the government to promote *their* interests (not the interests of their rulers).<sup>45</sup>

The idea of individual sovereignty, when examined against the backdrop of the republican and libertarian principles of the Whigs, yields great insight into the political dimension of the relationship between armed citizens and their government. The Framers were familiar with Aristotle's warning that "the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together."<sup>46</sup> Andrew Fletcher, (pg.1134) an early Whig who was widely read in the colonies,<sup>47</sup> also warned that "he that is armed, is always master of the purse of him that is unarmed."<sup>48</sup>

These axioms were embodied in the Second Amendment's guarantee of an armed populace—a guarantee that was the ultimate check in the Constitution's grand design of checks and balances, a guarantee that the people would remain free, sovereigns of themselves. These axioms indicate that an armed citizenry is absolutely necessary to ensure the subordination of military to civilian control, to keep the rulers sensitive to the rights of the people, and to maintain the people's ability to resist tyrannical rulers. For indeed, democracy and civil rights cannot exist where the citizens are disarmed.<sup>49</sup>

3. *Civil.*—The widespread ownership of arms was also intended to preserve the natural right of self-defense. During the consideration of our Bill of Rights, the personal right to own arms for self-defense was much less discussed than were the political aspects of the right to bear arms. Such discussion was lacking not because the Framers did not believe in such a right, but because it was the least controversial aspect of the right to arms. Nevertheless, there is ample evidence of the widespread belief in the right to own arms for self-defense.

The English considered the right to self-defense to be the premier natural right upon which all other rights depended. The English Declaration of Rights of 1689 was widely understood to

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<sup>44</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>45</sup> See U.S. CONST. pmbl. ("We the People ...."); *id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>46</sup> 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 472 (photo. reprint 1971) (London, C. Dilly & John Stockdale 1788) (quoting MARCHAMONT NEDHAM, THE EXCELLENCY OF A FREE STATE, OR THE RIGHT CONSTITUTION OF A COMMONWEALTH (1656)); See also 2 BURGH, *supra* note 39, at 345 ("Those, who have the command of the arms in a country, says Aristotle, are masters of the state ....").

<sup>47</sup> See HARDY, ORIGINS, *supra* note 23, at 47; see also *supra* text accompanying note 30.

<sup>48</sup> ANDREW FLETCHER, THE POLITICAL WORKS OF ANDREW FLETCHER, ESQ. 9 (London, J. Bettenham 1737).

<sup>49</sup> Joel Barlow described the link between democracy, equality, and arms:

Only admit the original, unalterable truth, that all men are equal in their rights, and the foundation of every thing is laid; to build the superstructure requires no effort but that of natural deduction. The first necessary deduction will be, that the people will form an equal representative government.... Another deduction follows, that the people will be universally armed.... A people that legislate for themselves ought to be in the habit of protecting themselves; or they will lose the spirit of both.

JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE, RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT pt. 1, at 69-70, 72 (New York, Childs & Swaim 1792) (emphasis omitted).

encompass such a right.<sup>50</sup> And although the Declaration only guaranteed Protestants the (pg.1135) right to own arms and would have allowed the disarming of Catholics, even the most anti-Catholic members of Parliament considered it oppressive to do more than reduce their armament. A 1689 act, passed when there was still risk of King James, a papist, returning to the throne, allowed Catholics to retain all arms needed for self-defense.<sup>51</sup> The debate surrounding this measure evidenced the belief that the natural right of self-defense was inviolable. "The act's zealous sponsor, who complained during the debate that 'we are so mealy-mouthed and soft-handed to the Papists,' nonetheless explained that Parliament should not seize arms 'necessary [for the] defense of their houses.'"<sup>52</sup>

The view that the right to own arms for self-defense was the first right of nature was held on both sides of the Atlantic Ocean. James Burgh's *Political Disquisitions*, which played a central role in the shaping of political thought in the colonies,<sup>53</sup> exhorted that "he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses ...."<sup>54</sup> Given the uncontroversial nature of this sentiment, the *natural* right to own arms for personal self-defense was soon codified in the constitutions of several states. Meeting in 1776, the constitutional convention of Pennsylvania, presided over by Benjamin Franklin, framed a Declaration of Rights which stated "[t]hat the people have a right to bear arms for the defense of themselves, and the state."<sup>55</sup> A year later, Vermont's constitutional convention adopted verbatim the same provision.<sup>56</sup> (pg.1136)

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<sup>50</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*143-44 ("The fifth and last auxiliary right of the subject ... is also declared by the [1689 Declaration of Rights] and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation ...."). During the debate over the 1689 Declaration the private ownership of arms for self-defense was much less controversial than ownership of arms for political reasons.

[D]ownplaying the role of the armed citizenry in maintaining liberty, the [Declaration] claimed for the individual a right to be armed. In light of this shift, it is particularly ironic that some modern American lawyers have misread the English right to have arms as merely a "collective" right inextricably tied to the need for a militia. In actual fact, the Convention retreated steadily from such a position and finally came down squarely, and exclusively, in favour of an individual right to have arms for self-defence. Not only was the militia left out of the Declaration of Rights, but even the notion that private arms were necessary for common, as opposed to individual, defence was excluded.

MALCOLM, *supra* note 38, at 119-20 (footnote omitted).

<sup>51</sup> Malcolm, *supra* note 13, at 309.

<sup>52</sup> Hardy, *Armed Citizens*, *supra* note 13, at 581 n.103 (quoting 5 PARL. HIST. ENG. 182-83 (1688-1689) (alteration in original)).

<sup>53</sup> See *supra* text accompanying note 30.

<sup>54</sup> 2 BURGH, *supra* note 39, at 390. The influential American jurist St. George Tucker expressed a similar sentiment in 1 WILLIAM BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA pt. 1 app. at 300 (photo. reprint) (St. George Tucker ed., Philadelphia, Birch & Small 1803) [hereinafter TUCKER'S NOTES ON BLACKSTONE] ("The right of self defence is the first law of nature ....").

<sup>55</sup> STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 21-22 (1989) (quoting PA. CONST. of 1776, Declaration of Rights art. XIII). This provision was modified by the Pennsylvania Declaration of Rights of 1790, but the protection of the right to be armed for self-defense was no less certain. The later declaration stated "[t]hat the right of the citizens to bear arms in defense of themselves and the state shall not be questioned." PENNSYLVANIA DECLARATION OF RIGHTS, art. XXI (1790).

<sup>56</sup> VT. CONST. of 1793, ch. 1, art. 15 (noting that the relevant provision originally appeared in VT. CONST. of 1777, ch. 1, art. 15).

Other states adopted provisions that spoke of the "common defense."<sup>57</sup> However, such language was not meant to abrogate the right to use arms for personal self-defense. The Parliament that enacted the 1689 English Declaration of Rights clearly saw such language not as a restriction, but as an amplification of the right.<sup>58</sup> The circumstances surrounding the adoption of the Massachusetts Constitution evidenced the same belief. The Massachusetts convention proposed the following language: "The people have a right to keep and bear arms for the common defence."<sup>59</sup> Some objected to the use of such language as possibly restricting the right.<sup>60</sup> John Adams, the drafter of the provision, probably dismissed such a reading. When read in conjunction with Article I, which included among the unalienable rights "defending their lives and liberties; ... and protecting property,"<sup>61</sup> the provision clearly protected the right to own arms for personal self-defense.<sup>62</sup> Further, because the right to keep and bear arms remained in "the people," they would, of course, be able to use their arms for lawful purposes in addition to the common defense.<sup>63</sup>

The demands for a federal Bill of Rights expressed at many of the state ratifying conventions also envisioned a right to keep and bear arms for self-defense and other lawful purposes. The first call for the inclusion of a right to bear arms in the federal Constitution was advanced in a failed motion made during the Pennsylvania ratifying convention which would have demanded "[t]hat the people have a right to bear arms for the *defense of themselves* and their own state, or the United States, or for the purpose of killing game."<sup>64</sup> The Pennsylvania delegates did not secure enough votes to condition ratification upon such a call, but their report was widely circulated throughout the states and influenced the drafting of subsequent bills of rights.<sup>65</sup> Madison, when drafting the Bill of Rights in the First Congress, worked from a reprint of the state demands that included the (pg.1137) Pennsylvania report.<sup>66</sup> Although the language of the Second Amendment does not speak explicitly of a personal right to self-defense, several factors indicate that this absence stems from Madison's belief that its inclusion was commonly understood: The right to self-defense was the least controversial aspect of the right to arms,<sup>67</sup> and the right to self-defense was, at the time, universally

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<sup>57</sup> See HALBROOK, *supra* note 55, at 22-23 (analyzing the adoption of a right to bear arms in the states of Pennsylvania, North Carolina, Vermont, and Massachusetts that incorporated the "common defense" idea).

<sup>58</sup> See *supra* note 50.

<sup>59</sup> JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 41, 226 (Boston, Dutton & Wentworth 1832) (1779-1780) [hereinafter MASSACHUSETTS CONVENTION].

<sup>60</sup> See HALBROOK, *supra* note 55, at 42 (noting that the towns of Northampton and Williamsburg proposed alterations to the amendments that would include a reference to self-defense as well as to the common defense).

<sup>61</sup> MASSACHUSETTS CONVENTION, *supra* note 59, at 223.

<sup>62</sup> HALBROOK, *supra* note 55, at 42.

<sup>63</sup> *Id.*

<sup>64</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-98 (Merrill Jensen ed., 1976) (emphasis added).

<sup>65</sup> EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957).

<sup>66</sup> See SCHWARTZ, *supra* note 25, at 121-24, 156-59 (noting that the compendium of state demands, which Madison had at hand when drafting the Bill of Rights, included the proposals of the Pennsylvania minority); see also IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 264 (1950); HARDY, ORIGINS, *supra* note 23, at 71; Hardy, *Armed Citizens*, *supra* note 13, at 605-06; Shalhope, *supra* note 31, at 608 (all noting that Madison worked from the lists of amendments suggested by state conventions).

<sup>67</sup> See *supra* note 50.

believed to be man's first natural right, inseparable from the people's right to arms.<sup>68</sup> Thus, it is not surprising that in the process of paring down the list of demands to a reasonable number of amendments, Madison considered it unnecessary to explicitly mention self-defense in the text of the Second Amendment.

During the Senate's debates about the proposed Bill of Rights, that body rejected a motion to insert the words "for the common defense" next to the words "to bear arms."<sup>69</sup> We have no record of the debates because the Senate debates at this time were conducted in secret;<sup>70</sup> thus the reason for the rejection is unknown. However, there are two possible explanations. Either the Senate, like the Parliament of a century earlier, believed the language dangerously expanded the right, or they shared the concern of those in Massachusetts who had feared that such language could be read to restrict the right. The militia's strong showing in the recent Revolution and the nearly universal regard for a citizen militia seem to indicate that the Senate was concerned with the latter. Regardless of the reason, the Senate intended to preserve the individual citizens' natural right of self-defense that existed at common law and was imported from England.

4. *Moral.*—A central tenet of the republican tradition held that being armed is essential to the development of civic virtue and good moral character. Both Machiavelli and Harrington "considered the bearing of arms to be the primary means by which individuals affirmed their social (pg.1138) power and political participation as responsible moral agents."<sup>71</sup> Burgh, who directly influenced many of the Framers,<sup>72</sup> articulated the "integral relationship ... between the possession of arms and the spirit and character of the people."<sup>73</sup> He denounced English society's loss of virility and virtue, and insisted that "interested only in luxury and commerce, Englishmen had surrendered their arms" and yielded their military responsibilities to a professional army.<sup>74</sup>

Other commentators also recognized the importance of the right to bear arms to moral development. Joel Barlow illustrated this belief in his *Advice to the Privileged Orders in the Several States of Europe*, writing that a government that disarms its people "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression."<sup>75</sup> Adam Smith likewise lamented the fate of a disarmed people, who, he believed, inevitably suffered "that sort of mental mutilation, deformity and wretchedness which cowardice necessarily involves in it."<sup>76</sup>

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<sup>68</sup> See 1 TUCKER'S NOTES ON BLACKSTONE pt. 1 app. at 300 ("The right of self-defense is the first law of nature... Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 89-90 (1984) (noting unanimity of opinion on this understanding of the right to bear arms).

<sup>69</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 129 (New York, Thomas Greenleaf 1789).

<sup>70</sup> See HARDY, ORIGINS, *supra* note 23, at 76 ("No record was kept of the Senate debates until 1794. As a result, we do not know the substance of that body's deliberations on the Bill of Rights.").

<sup>71</sup> Shalhope, *supra* note 31, at 603.

<sup>72</sup> See *supra* text accompanying note 30.

<sup>73</sup> Shalhope, *supra* note 31, at 604.

<sup>74</sup> *Id.* at 604, 604-05.

<sup>75</sup> BARLOW, *supra* note 49, pt. 1, at 68.

<sup>76</sup> 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 373 (London, W. Strahan & T. Cadell 1776).

In 1775, the Continental Congress echoed Burgh's and Barlow's contempt for the state of English society and contrasted it with the virtuous republican character of the American people. Warning against attempts to tyrannize the colonists, the Congress declared that

[i]n Britain, where the maxims of freedom were still known, but where luxury and dissipation had diminished the wonted reverence for them, the attack [of tyranny] has been carried on in a more secret and indirect manner: Corruption has been employed to undermine them. The Americans are not enervated by effeminacy, like the inhabitants of India; nor debauched by luxury, like those of Great-Britain.<sup>77</sup>

The recognition of the moral function of arms did not fade after the Revolution. Years later, Thomas Jefferson advised his teen-age nephew: "As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind."<sup>78</sup> This boldness, enterprise, and independence was (pg.1139) believed by the Framers to be necessary to the character of a good citizen and essential to the vitality of democratic government. Thus, by protecting the citizens' right to own arms, the ratifiers of the Second Amendment sought to encourage the moral development of citizens, and hence, the republic.

### C. *Epilogue ... Prologue*

There is some artificiality in distinguishing the military, political, civil, and moral functions of arms embodied in the Second Amendment. It is clear that there is much overlap and interrelation between the functions. The capability of self-defense inherent in the civil function is also among the essential elements of the other three. Likewise, the military function of repelling foreign foes is closely entwined with the ability to restrain domestic tyrants and subdue the military to civilian control that are at the core of the political function.

Historically speaking, it is also clear that the tradition from which the Amendment derives did not make such distinctions. According to classical republican (and to some extent, Whig) ideology, there is no distinction between defending one's self or one's state and no distinction between foreign aggressors, domestic tyrants, or common criminals—all were enemies of the state (people).<sup>79</sup>

The value of this framework lies not in its conceptual neatness or historical accuracy, but in its usefulness as a guide to understanding the Second Amendment. Delineating the functions inherent in the ratifiers' view of the relationship between arms, freedom, and security should serve to clarify inquiry into the protection of that relationship embodied in the Second Amendment. Before considering how best to interpret the Second Amendment in accordance with that view, however, we must address its relevance to our modern world.

## II. Arms and the Modern World

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<sup>77</sup> 1 JOURNALS OF CONGRESS 163 (1800-1801).

<sup>78</sup> THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 349 (Adrienne Koch & William Peden eds., 1993).

<sup>79</sup> See Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 147 ("As the Founders would have conceived it, the yeoman repelling intruders from his dwelling was, with the same arms, acting both in his own and the common defense—whether those intruders were felons, oppressive officials, or enemy soldiers.").

Is the view of an armed populace embodied in the Second Amendment still valid in a society with professional military and police forces? Is an armed populace still capable of performing the functions detailed above? Many have argued that it cannot and thus, that the private ownership of arms is an anachronism inapplicable to our current circumstances.<sup>80</sup> (pg.1140) These arguments rest on empirical assertions that are highly debatable to say the least.

Commentators often attack the vitality of the military and political functions of the militia concept with the argument that they can no longer be performed by a militia.<sup>81</sup> Simply stated, the argument is that an armed citizenry cannot restrain a domestic tyrant or deter a foreign conqueror backed by a modern army. This empirical assertion is frequently made by lawyers, politicians, or other advocates who offer neither argument nor authority for the proposition.<sup>82</sup> And while this assertion may be true in some limited number of circumstances, as a categorical assertion it is demonstrably false.

Consider some recent examples. The Vietnam War demonstrated that a modern military power can be resisted by guerilla fighters bearing only small arms.<sup>83</sup> This lesson has not been forgotten. In 1992, the United States declined to intervene in the conflict in Bosnia-Herzegovina after an aide to General Colin Powell, then Chairman of the Joint Chiefs of Staff, advised the Senate Armed Services Committee that the widespread ownership of arms in the former Yugoslav republic made even limited intervention "perilous and deadly."<sup>84</sup> The deterrent effect of an armed populace was emphasized by Canadian Major General Lewis Mackenzie, who led United Nations peacekeeping troops in Sarajevo for five months. Despite the tremendous capabilities of the United States Armed Forces, he explained, the prevalence of arms ownership in the area caused him to believe that if American forces were to be sent to Bosnia, "Americans [would be] killed.... You can't isolate it, make it nice and sanitary."<sup>85</sup>

The validity of these concerns has also been demonstrated in the current conflict in Chechnya where "[m]ore than 40,000 soldiers from the (pg.1141) Russian army ... have quickly been humbled by a few thousand urban guerrillas who mostly live at home, wear jeans, use castoff weapons and have almost no coherent battle plans or organization."<sup>86</sup> The Russian army's nuclear capability apparently has not translated into a tactical advantage in the streets of Chechnya.

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<sup>80</sup> See, e.g., Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 665 (1989) ("[The] vision of an armed citizenry, collectively resisting the excesses of state power on behalf of itself as a community, is at best nostalgic, and at worst dangerously naive ...."); Ehrman & Henigan, *supra* note 13, at 40 (asserting that the right to keep and bear arms is an anachronism inapplicable to modern times); Williams, *supra* note 13, at 586 ("[U]nder modern conditions, the literal wording of the Second Amendment is meaningless.").

<sup>81</sup> See, e.g., Brown, *supra* note 80, at 665 ("[O]f what serious assistance are handguns and machine guns for the defense of the state in a nuclear age?" (emphasis omitted)).

<sup>82</sup> See, e.g., *id.*

<sup>83</sup> See MICHAEL L. LANNING & DAN CRAGG, *INSIDE THE VC AND THE NVA: THE REAL STORY OF NORTH VIETNAM'S ARMED FORCES* 101 (1992) ("Beginning in the late 1950's the VC relied on outdated equipment, primitive weapons, and leftover ammunition from the war against the French."); JAMES W. MCCOY, *SECRETS OF THE VIET CONG* 3 (1992) ("[By] beat[ing] back the finest troops and equipment that the west could send against it[,] ... the North Vietnamese Army ... proved that warfare doctrines which emphasized human assets and maneuver were superior to the most technologically advanced methods available.").

<sup>84</sup> See Sid Balman Jr., *Military Experts Advise Against Armed Intervention in Bosnia*, UPI, Aug. 11, 1992, available in LEXIS, News Library, UPI File (reporting that the aide cited widespread ownership of arms, in addition to the presence of multiple factions and racial hatred, as a reason not to intervene).

<sup>85</sup> *Id.*

<sup>86</sup> Michael Specter, *For Russia's Troops, Humbling Days*, N.Y. TIMES, Jan. 8, 1995, at A1.

In addition to these anecdotal examples, there is further evidence of the military practicality of an armed citizenry. The 1966 Arthur D. Little, Inc. Report ("the Little Report"), commissioned by the United States Department of the Army, concluded that in spite of recent technological developments in the modes of waging war, a modern war will almost certainly be a "shooting war" in which the basic individual weapon of combat will be the rifle.<sup>87</sup> The Little Report does more than refute the notion that riflemen are militarily obsolete in the nuclear era. It offers an additional insight into the military value of armed citizens: they make better soldiers when they enter the service. They are significantly better marksmen than those who did not own arms prior to enlistment (even when marksmanship is measured *after* military training) and are more confident in their ability to perform effectively in combat.<sup>88</sup> Furthermore, gun owners are more likely to enlist, to prefer combat outfits, and to become marksmanship instructors.<sup>89</sup>

David Williams's *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*<sup>90</sup> presents another version of the obsolescence argument. Essentially, Williams argues that because there is no universal militia and because gun owners are not a representative sample of the American population, the political function of private arms ownership is an anachronism.<sup>91</sup> That is, because today's armed citizens are only a slice of the population, motivated by self-interest rather than the common good, they cannot (or will not) perform their role of keeping the government sensitive to the rights of *all* citizens.<sup>92</sup>

Despite this supposed obsolescence, Williams recognizes that "[t]he right to arms and the universal militia were significant structural elements in the polity contemplated by the Constitution," and therefore urges courts to "update the [Second] Amendment."<sup>93</sup> Williams's "updated Second (pg.1142) Amendment would ... have no independent content but would be a shadowy gravitational presence in interpreting the rest of the Constitution ... to increase the influence of the people over their government."<sup>94</sup> According to Williams, the Second Amendment ought to be interpreted in such a way that it does not protect the right to own arms (which it explicitly mentions), but in a way that pulls the Constitution toward policies such as "workplace democracy," "campaign finance reform or proportional representation," and greater protection of "statutory welfare and other kinds of property that provide autonomy in the modern world."<sup>95</sup>

Upon reading Williams's republican interpretation of the right to keep and bear arms, one may be struck by the differences between his conception of autonomy and that of the republican tradition espoused by Aristotle, Machiavelli, Fletcher, Burgh, and the shapers of the Bill of Rights. Williams's analysis is insightful in its sensitivity to the important political function of arms in our constitutional scheme. However, by suggesting that tinkering with our electoral processes and

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<sup>87</sup> THE ARTHUR D. LITTLE REPORT: A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP (1966), *reprinted in* WHISKER, *supra* note 36, at 47, 57. Whisker notes that the Little Report "was not written for a pro-guns organization" and "is of the highest professional standards." *Id.* at ix.

<sup>88</sup> *See id.* at 58.

<sup>89</sup> *Id.*

<sup>90</sup> Williams, *supra* note 13.

<sup>91</sup> *Id.* at 590-91.

<sup>92</sup> *Id.* at 591.

<sup>93</sup> *Id.* at 598.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 597-600.

welfare payments can better serve that function, Williams turns a blind eye to the tenet of the republican tradition that motivated the adoption of the Amendment: Political and civil rights are inseparable from a right to arms. Our Constitution recognizes that those who have *arms* are masters of the state, not those who are proportionately represented or more firmly entrenched on the public dole.

Williams also recognizes the important role of the Second Amendment in ensuring the subordination of the military to civilian control. He is at least concerned about the possibility of the "populace stand[ing] effectively disarmed before the might of the state."<sup>96</sup> But Williams would tolerate that "nightmare" so long as courts "apply ... the Constitution stringently against the military and police."<sup>97</sup> His belief that courts can subdue an ambitious military runs directly counter to a central tenet espoused by every influential writer in the republican tradition and perhaps best stated by Machiavelli: "[I]t is unreasonable to expect that one who is armed will obey willingly one who is unarmed; or that any unarmed man will remain safe among armed servants."<sup>98</sup> The Framers of the Bill of Rights heeded this warning and placed their faith in armed citizens as the ultimate bulwark against tyranny. Williams would ignore the warning and place his faith in courts.<sup>99</sup> (pg.1143)

Williams is not alone in his belief that the Second Amendment is an anachronism. Others have argued that the notion that citizens bearing small arms could offer effective resistance to a modern army is absurd.<sup>100</sup> It is interesting to note that, while dismissing the capabilities of millions of armed citizens as a check on a modern army, they suggest that nine lawyers can adequately fill that role.

Nevertheless, the question of whether armed citizens can serve as an effective check on the state in our nuclear age is an important one. The belief that an armed citizenry would subdue aggressive rulers and keep them sensitive to the rights of the people was perhaps the most important motivation for the inclusion of the right to keep and bear arms in the Constitution.<sup>101</sup> Thus, the continued vitality of an armed populace as a check on the modern state should have important implications on our interpretation of the Second Amendment. As I have noted above, there is little reason to dismiss the effectiveness of a modern militia.<sup>102</sup> Much to the contrary, the Little Report and

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<sup>96</sup> *Id.* at 601.

<sup>97</sup> *Id.*

<sup>98</sup> NICCOLO MACHIAVELLI, *THE PRINCE* 88 (George Bull trans., Penguin Books 1968) (1514).

<sup>99</sup> Contrast Williams's faith in the ability of courts to control the military with the views of a Revolutionary war veteran and friend of both Jefferson and Madison:

Arms can only be controlled by arms. An Armed nation only can keep up an army, and also maintain its liberty.... An armed nation only can protect its government against an army. Unarmed, and without an army, a nation invites invasion. Unarmed, and with an army, it invites usurpation. All nations lose their liberties by invasion or usurpation.

JOHN TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* 178, 180 (1814).

<sup>100</sup> *See, e.g.,* Brown, *supra* note 80, at 665 (posing the question: "[O]f what serious assistance are handguns and machine guns for the defense of the state in a nuclear age?" (emphasis omitted)).

<sup>101</sup> *See supra* text accompanying note 49.

<sup>102</sup> *See supra* text accompanying notes 82-89.

the conflicts in Vietnam, Bosnia, and Chechnya<sup>103</sup> offer compelling evidence that armed citizens can restrain, deter, or repel a modern army.<sup>104</sup>

Some, while acknowledging the effectiveness of an armed citizenry as a check on government, have questioned the prudence of such a scheme. Certainly, we ought not encourage or facilitate armed uprisings whenever a particular group feels shorted by the political process. Moreover, it is entirely legitimate for the government to punish insurrection. Can such punishment be consistent with a proper respect for the political function of the right to arms?

Of course it can. The Second Amendment does not guarantee immunity from punishment for insurrection; it merely guarantees the capacity for resistance. And that capacity, as a check on government, does not go (pg.1144) unchecked itself. The Constitution explicitly affirms the validity of punishing insurrection,<sup>105</sup> and the potential of punishment is a check on the armed populace. It strongly discourages armed resistance except in the cases of the most severe encroachments by the government. This idea is best expressed in the Declaration of Independence: "Prudence, indeed, will dictate that Governments long established should not be changed [or challenged] for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."<sup>106</sup>

The moral function of the right to arms was also recognized by Williams.<sup>107</sup> Nevertheless, Williams renders that function anachronistic by analyzing it only in terms of the virtue instilled by formal militia training and the self-sacrificial aspects of militia service,<sup>108</sup> while ignoring the "boldness, enterprise, and independence" that the Framers believed was engendered by private gun ownership.<sup>109</sup> The moral dimension of the right to arms has more to do with the Framers' beliefs about human nature than the training received in militia service. The Second Amendment embodies a belief that when an individual is rendered defenseless, his character is weakened and corrupted.<sup>110</sup> This belief is no less valid today than it was in the eighteen century. Indeed, it seems to be a universal law of nature that even applies to other species. For example, the effects of disarmament and defenselessness on character have even been recognized in felines, who, when declawed, suffer

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<sup>103</sup> Consider again the current conflict in Chechnya. Feeling that the Russian government has violated their rights, the Chechens have turned to the ultimate arbiter of their rights—their arms. Khasan Aliyev, a Chechan fighter, says he has taken up arms because "the Russians have no right to treat us this way." Specter, *supra* note 86, at A11. Aliyev's tone is clear: "We will wait for them wherever they are. How long will it have to go on before they realize we won't surrender?" *Id.* One wonders how zealously Aliyev would assert what he believes to be his rights were he disarmed and facing the Russian army.

<sup>104</sup> See *supra* text accompanying notes 84-89.

<sup>105</sup> See U.S. CONST. art. I, § 8, cl. 15 (granting Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *id.* art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason ...."); *id.* amend. XIV, §§ 3, 4 (prohibiting persons that "have engaged in insurrection or rebellion" from holding office and voiding debts "incurred in aid of insurrection or rebellion against the United States").

<sup>106</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>107</sup> See Williams, *supra* note 13, at 579-81 (noting that service in the militia involved self-sacrifice and instilled civic virtue in the citizenry).

<sup>108</sup> *Id.* at 580.

<sup>109</sup> See *supra* text accompanying note 78.

<sup>110</sup> See *supra* text accompanying notes 71-77.

from neuroses, insecurity, reclusiveness, and irritability.<sup>111</sup> Are we to assume that defenselessness has a lesser effect on the human character? In short, it is easy for advocates to ridicule or dismiss the value of an armed populace given our current circumstances. But the evidence points strongly to the conclusion that, despite our very different circumstances, armed citizens are still (pg.1145) capable of performing the military, political, civil, and moral functions that were entrusted to them when the Second Amendment was adopted.<sup>112</sup>

### III. Interpreting the Second Amendment

An abundance of literature detailing the historical and ideological origins of the Second Amendment has been produced in the last fifteen years. Though this literature offers excellent insights into the meaning of the right to bear arms, a framework for a Second Amendment jurisprudence consistent with those insights has been lacking.

Don Kates's *Handgun Prohibition and the Original Meaning of the Second Amendment*<sup>113</sup> presents one example of this incongruity. After providing an excellent analysis of the philosophical and historical origins of the right to keep and bear arms,<sup>114</sup> the language of the Second Amendment and the Bill of Rights,<sup>115</sup> and the proposal and ratification of the Second Amendment,<sup>116</sup> Kates concludes that the Amendment was designed to protect the private ownership of arms "for three purposes: (1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism."<sup>117</sup> Thus it would seem logical to interpret the Amendment to protect arms that are useful in performing *any one* of these functions. In translating this understanding of these purposes into a more concrete formulation of the right, though, Kates asserts that "only such arms as have utility for *all three* purposes" are constitutionally protected.<sup>118</sup>

Kates also asserts that only such arms as "are lineally descended from the kinds of arms the Founders knew fall within the Amendment's (pg.1146) guarantee."<sup>119</sup> Another authority suggests that

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<sup>111</sup> MONTGOMERY COUNTY HUMANE SOCIETY, DECLAWING CATS: MANICURE OR MUTILATION? 1 (on file with the *Texas Law Review*). For an illustration of similar symptoms of defenselessness exhibited by humans, *see infra* text accompanying note 141.

<sup>112</sup> Perhaps it is worth mentioning the burden of proof on this issue. The burden of proof, I would think, must fall on those who urge that the Second Amendment's protection of private arms ownership be disregarded because changing circumstances have rendered it an inefficacious means to the desired end. In our system, we generally regard constitutional rights as being fairly important. One response to the changed-circumstances argument is that Article V of the Constitution sets out the procedures for adapting the Constitution to changing circumstances. Whatever the merits of that response, it seems that at a bare minimum, if changed circumstances are to abrogate a constitutional right, the bases for the abrogation should be clearly established. That has not been the case with regard to the Second Amendment.

<sup>113</sup> Kates, *supra* note 3.

<sup>114</sup> *Id.* at 225-39.

<sup>115</sup> *Id.* at 214-20.

<sup>116</sup> *Id.* at 220-25.

<sup>117</sup> *Id.* at 268.

<sup>118</sup> *Id.* at 259 (emphasis in original). Later, Kates defends this assertion by arguing that "[s]ince [in the late-eighteenth century] citizens would depend upon the same kinds of weaponry for performing all three functions (individual defense, military defense, and law enforcement) of what the Founders saw as an integral whole, the arms contemplated by the amendment are such as are suitable for all three functions." Kates, *supra* note 79, at 148.

<sup>119</sup> Kates, *supra* note 3, at 259.

the Amendment does not include types of arms that could not have been foreseen by the Framers.<sup>120</sup> Nevertheless, no support for these limiting principles appears in the many thorough treatments of the history of the Anglo-American right to arms or in the adoption of the Second Amendment. These limiting principles seem to stem more from the desire to avoid the absurd result that the Second Amendment is absolute and guarantees the right to own even nuclear weapons,<sup>121</sup> than from faithful adherence to the original understanding of the provision.<sup>122</sup>

Adherence to a functional approach would yield a theory of the Second Amendment more consistent with its purposes. Recognizing that the original understanding of the Second Amendment was based on the belief that arms should perform military, political, civil, and moral functions,<sup>123</sup> and that that belief remains viable in modern times,<sup>124</sup> we ought to interpret the Amendment in a way that proscribes interference with armed citizens' capacity to perform those functions. That is, the four functions should serve as benchmarks for measuring the constitutional limits of interference with the right to keep and bear arms.

To illustrate this functional approach, I shall consider the federal ban of machineguns,<sup>125</sup> laws prohibiting the carrying of handguns,<sup>126</sup> federal laws prohibiting the sale or delivery of firearms to minors<sup>127</sup> and felons,<sup>128</sup> and miscellaneous burdens on weapons ownership.<sup>129</sup>

#### A. *The Federal Machinegun Ban*

A federal law makes it "unlawful ... to sell or deliver ... to any person [a] machinegun"<sup>130</sup> and "unlawful for any person to transfer or (pg.1147) possess a machinegun."<sup>131</sup> This law does not seriously hinder performance of the civil function because other weapons better suited for self-defense remain available. The primary concern raised by the ban of this militarily useful weapon is that it will render armed citizens incapable of performing their military and political roles. That is, being limited to less potent arms may leave the citizenry too weak to deter an ambitious tyrant (foreign or domestic) backed by a modern army. The touchstone here is the military capability of the armed citizenry vis-a-vis a modern army.

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<sup>120</sup> Hardy, *Armed Citizens*, *supra* note 13, at 636 (remarking that restrictions on modern weaponry—weapons unforeseen at the time of the Framers—"do[] no violence to the freedoms the Framers sought to protect").

<sup>121</sup> See Kates, *supra* note 3, at 259 ("This triple test resolves the *ad absurdum* and *ad horribilus* results ... sometimes viewed as flowing from an individual right interpretation of the amendment.").

<sup>122</sup> But see Hardy, *Armed Citizens*, *supra* note 13, at 636 (arguing that the Second Amendment's guarantee should not apply to weapons that pose qualitatively different social costs than the weapons familiar to the Framers).

<sup>123</sup> See *supra* Part I.

<sup>124</sup> See *supra* Part II.

<sup>125</sup> 18 U.S.C. § 922(b)(4), (o) (1994).

<sup>126</sup> See *infra* note 137.

<sup>127</sup> 18 U.S.C. § 922(b)(1) (1994).

<sup>128</sup> *Id.* § 922(d)(1).

<sup>129</sup> Such burdens include various taxing and licensing regimes. See, e.g., *infra* text accompanying notes 145-47.

<sup>130</sup> 18 U.S.C. § 922(b), (b)(4) (1994).

<sup>131</sup> *Id.* § 922(o); see also 26 U.S.C. § 5845(b) (1994) (defining the term "machinegun").

To effectively perform the military and political functions, the citizenry need not be capable of defeating a modern army—it merely needs to be a credible counterbalance to such a force.<sup>132</sup> A merely credible show of force is sufficient because the tyrant contemplating armed conflict must weigh more than just the possibility of defeat. "The decision to use military force is not determined solely by whether the contemplated benefits can be successfully obtained through the use of available forces, but rather is determined by the *ratio* of those benefits to the expected costs."<sup>133</sup> Before attempting to conquer an armed people, a tyrant must contemplate the casualties his own forces will suffer, the likelihood of prolonged resistance and civil war, the difficulty of governing during and after such a conflict, and many other difficulties. Even if the tyrant decides that these costs are not too great, his soldiers may not necessarily agree and follow him. The widespread ownership of arms increases the potential costs of military aggression, thereby making such aggression less likely.

In the late twentieth century, notwithstanding the sophisticated weaponry of modern armies, citizens armed with small, relatively basic, firearms can still be an effective deterrent<sup>134</sup> and can offer effective resistance if needed.<sup>135</sup> Thus, at this point in time, it seems unlikely that restrictions such as the ban on machineguns would run afoul of the Second Amendment. By implication, weapons even more potent than the machinegun can be prohibited without undermining the military or political functions of an armed citizenry, thus avoiding the *ad absurdum* and *ad horribilus* implications of an unlimited right.<sup>136</sup> Nevertheless, a broader ban, of, for instance, all semiautomatic firearms, might tilt the balance of (pg.1148) power so heavily against armed citizens that it would fall within the scope of the Amendment's prohibition. It is also possible that, as weapons technology progresses, and armies possess more sophisticated weaponry, what was formerly beyond the Constitution's protection (*e.g.*, machineguns) might then fall within it to preserve the balance.

## B. Prohibitions on Carrying Handguns

In many jurisdictions, citizens are effectively denied the right to carry handguns when they leave their homes.<sup>137</sup> It is immediately apparent that such laws hinder the civil function by severely

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<sup>132</sup> Lund, *supra* note 13, at 113-14.

<sup>133</sup> *Id.* at 115 (emphasis in original).

<sup>134</sup> See *supra* text accompanying notes 84-85 (Illustrating the deterrent effect that the widespread possession of arms in Bosnia had on the United States's decision whether to intervene in the conflict).

<sup>135</sup> See *supra* note 83 (noting the success of the poorly armed North Vietnamese Army and Viet Cong against the well-equipped United States armed forces); text accompanying note 86 (illustrating the resistance that poorly armed Chechan rebels have maintained against the superior firepower of the Russian army).

<sup>136</sup> See *supra* note 121 and accompanying text.

<sup>137</sup> New York, for example, has criminalized the possession of "any firearm," N.Y. PENAL LAW § 265.01(1) (McKinney Supp. 1996), and classified the possession of "any loaded firearm" as a felony. *Id.* § 265.02 (McKinney 1989). Although New York has a licensing provision in its code, that provision grants almost total discretion to the local sheriff whether to issue the permit or not. See *id.* § 400.00(1) (McKinney Supp. 1996) (requiring that "no good cause exist[] for the denial of the license"). Permits are routinely denied to all but the rich and famous or politically connected. See Kates, *supra* note 3, at 208 n.17 (noting that the list of permit holders in New York City is composed of people like Arthur Ochs Sulzberger (publisher of *The New York Times*), Nelson Rockefeller, and others noted for their "political influence, wealth, [or] social prominence"). Another example is California, where it is illegal to carry firearms concealed on the person or in a vehicle. CAL. PENAL CODE § 12025(a) (West Supp. 1996). Again, the availability of licenses is subject to the unfettered discretion of the local sheriff. See *id.* § 12050 ("[The local sheriff,] upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, *may* issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed." (emphasis

hampering law-abiding citizens' ability to defend themselves against criminal attacks.<sup>138</sup> The laws' moral and political effects are perhaps less obvious. Studies have shown a rising fear of crime,<sup>139</sup> and Americans have demonstrated a willingness to disregard essential rights and grant broad powers to the police to protect them.<sup>140</sup> One illustration of this phenomenon is the eagerness of residents of high crime areas to forego their Fourth Amendment rights by endorsing aggressive police programs. In many large cities, the police operate with a "free-ranging mandate to stop cars and search bodies," and with "impunity from criticism because residents of high-crime neighborhoods, too scared to go outside when the street lights come on, have demanded the programs."<sup>141</sup> Perhaps this is also an illustration of (pg.1149) the diminished reverence for freedom and capacity for democratic government that Jefferson and the First Continental Congress associated with being disarmed.<sup>142</sup>

### C. *Laws Prohibiting Minors and Felons from Owning Firearms*

Current federal laws prohibit the sale or delivery of firearms to minors and felons,<sup>143</sup> but such laws do not interfere with any function of the armed citizenry. As Kates explains,

In classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the "virtuous citizen." Free and republican institutions were believed to be dependent upon civic *virtu* which, in turn, depended upon each citizen being armed—and, therefore, fearless, self-reliant and upright.... One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.<sup>144</sup>

### D. *Miscellaneous Burdens on Weapon Ownership*

Gun control strategies have often involved measures that do not prohibit gun ownership but make it more costly or troublesome to obtain arms or ammunition. Senator Moynihan's recent proposal to impose a special tax on ammunition<sup>145</sup> exemplifies this strategy. Other such burdens

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added)).

<sup>138</sup> *But see* Kates, *supra* note 3, at 267 (recognizing the civil function of the right to bear arms but, nonetheless, asserting that prohibiting arms-carrying outside the home is constitutionally unproblematic).

<sup>139</sup> *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 183-89 (1994) (compiling several studies over 20 years showing an increasing fear of crime).

<sup>140</sup> *See* Mark Fritz, *Cities Seek Answer to Crime in Aggressive Police Programs*, AUSTIN AM.-STATESMAN, Feb. 5, 1995, at A17 (noting that "the climate of fear has turned many communities into glorified crime labs," as citizens are letting police use drastic measures of search and seizure to make their neighborhoods safer).

<sup>141</sup> *Id.* at A17.

<sup>142</sup> *See supra* text accompanying notes 77-78.

<sup>143</sup> 18 U.S.C. § 922 (1994).

<sup>144</sup> Kates, *supra* note 79, at 146.

<sup>145</sup> *See* Adam Clymer, *Finance Panel Agrees on Plan Subsidizing Health for the Poor*, N.Y. TIMES, July 2, 1994, at 1, 7 (noting that the provision of the health care bill that would have imposed a special tax on ammunition was defeated in the Senate Finance Committee by a vote of 15 to 5).

include the Brady Law's five-day waiting period for the purchase of a firearm,<sup>146</sup> and cumbersome and expensive licensing regimes, which are in force in many jurisdictions.<sup>147</sup>

A functional approach can be employed to determine if such measures are indeed a hindrance to the performance of the military, political, civil, or moral functions of private arms ownership. A finding of such hindrance would not, however, end the inquiry. "As [the Supreme Court's] jurisprudence relating to all liberties ... has recognized, not every law (pg.1150) which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."<sup>148</sup> If it is determined that the law hinders the exercise of a constitutionally protected activity, further inquiry is necessary to determine whether the hindrance exceeds constitutional bounds. There are several doctrinal approaches that could be utilized for such inquiry. For example, such inquiry could take the form of the least restrictive means test,<sup>149</sup> strict scrutiny,<sup>150</sup> or the "undue burden" analysis that the Supreme Court has developed for determining the constitutionality of restrictions on the exercise of the right to an abortion.<sup>151</sup> Thus, a functional approach does not compel absolutism, as it is reconcilable with many conventional limiting principles.

#### IV. Conclusion

The last fifteen years have seen the debate over arms and rights in America evolve from a simplistic quarrel over whether the Second Amendment protects private arms ownership to a more sophisticated debate over the scope of that right. This current debate raises two central issues. First, what interests were the Amendment intended to protect? A functional analysis of the roles of arms in a free society, as commonly understood at the time of the Amendment's ratification, indicates that widespread arms ownership was intended to deter and, if necessary, repel foreign aggressors,<sup>152</sup> prevent domestic tyranny by sensitizing the rulers to the rights of the people,<sup>153</sup> preserve the natural right of self-defense,<sup>154</sup> and facilitate the development of civic virtue and moral character essential for self-governance.<sup>155</sup> Second, in light of this understanding and our modern circumstances, how are we to interpret the Second Amendment? The interpretation most consistent with that understanding is one that focuses on preserving the citizenry's capability of performing those roles.

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<sup>146</sup> 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1994).

<sup>147</sup> See, e.g., CAL. PENAL CODE §§ 12051-12054 (West 1992 & Supp. 1996) (requiring applicants for a license to carry a firearm to undergo fingerprinting, investigation, and various filings and requiring applicants to pay fees to cover the costs of the application process); N.Y. PENAL LAW § 400.00 (McKinney 1989 & Supp. 1996) (requiring applicants for a license to carry firearms to file various forms, submit photographs, submit to a police investigation, and pay fees to cover these costs).

<sup>148</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).

<sup>149</sup> See Lund, *supra* note 132, at 123-24 (suggesting application of the least restrictive means analysis to gun control laws).

<sup>150</sup> See Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms*, 37 VILL. L. REV. 1407, 1451-57 (1992) (advocating the application of strict scrutiny to federal gun control legislation).

<sup>151</sup> See *Casey*, 505 U.S. at 874-98 (applying the "undue burden" standard to a Pennsylvania law restricting access to abortions). Though the undue burden standard has not been precisely defined, it would generally prohibit regulations that have "the purpose or effect of placing a substantial obstacle in the path of" a person seeking to exercise her right. *Id.* at 877.

<sup>152</sup> See *supra* section I(B)(1).

<sup>153</sup> See *supra* section I(B)(2).

<sup>154</sup> See *supra* section I(B)(3).

<sup>155</sup> See *supra* section I(B)(4).

Such an interpretation avoids the absurd and (pg.1151) horrible results of an absolute right to arms<sup>156</sup> while protecting the rights and safety of citizens.

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<sup>156</sup> *See supra* note 121 and accompanying text.