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## ARTICLE

# AMERICA'S TWO FIRST FREEDOMS: A BIBLICAL CHRISTIAN PERSPECTIVE ON HOW THE SECOND AMENDMENT SECURES FIRST AMENDMENT RIGHTS

*The Hon. J. Kenneth Blackwell*<sup>†</sup>

### I. INTRODUCTION

Some constitutional rights work in tandem since they arise from similar conduct, yet are completely separate and distinct, such as a criminal defendant's Fifth Amendment right against self-incrimination during prosecution, and that same defendant's Sixth Amendment right to a jury trial during that same prosecution.<sup>1</sup> Other constitutional rights can synergistically reinforce each other. An example of such synergy can arise with the first two Amendments in the Bill of Rights; exercising the Second Amendment right to bear arms can enhance First Amendment rights, most notably the rights of free speech and religious liberty.<sup>2</sup>

People can expose themselves to risk by expressing unpopular opinions. Oftentimes that risk is economic or social, such as people deciding to boycott a business, or ostracizing an offender from social circles. People often vote with their pocketbooks when they patronize a business that they support for reasons other than that business's products or services; or, conversely, refuse to enrich that business if the buyer strongly objects to the owner's views. This is even more evident regarding private events, where a person typically invites people he likes to his house party, and is careful not to invite people he does not like.

But other times—rare in this country, but common in some nations—expressing controversial opinions can even entail physical risk. Many advocates for racial equality in the South through the late nineteenth

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1. See U.S. CONST. amend. V, cl. 3; *id.* at amend. VI, cl. 2.
2. See *id.* at amend. I, cls. 1-3; *id.* at amend. II.

century and much of the twentieth century suffered such risk.<sup>3</sup> In modern America, it is possible that those expressing sincerely held religious beliefs that undergird traditional values may face the same risk of intimidation or physical harm. For Americans facing such concerns, the Second Amendment right to keep and bear arms offers protection that merits serious consideration.

The Second Amendment secures an individual's right to self-defense and defending others against both public and private violence.<sup>4</sup> Theoretically, a person who is immediately capable of defending himself—and others—is less susceptible to being intimidated into silence than a defenseless person. If this is true, then those who exercise their Second Amendment right may be bolder in asserting their First Amendment rights as well, enjoying both rights to a greater extent.

But how can an observant Christian who takes a biblical approach to daily life use deadly force in self-defense? What are his moral obligations in such situations? Beyond that, how does the rule change when the threat is imposed by government? Many Christians believe the Bible teaches that they should peacefully obey the government, even when that government refuses to protect them or—worse yet—is physically persecuting them for their faith.

This Article suggests that Christians in America find themselves in an entirely different framework than Christians in other nations. Biblical doctrine teaches that each person lives in their specific time and place (i.e., the nation of that person's residence, during a particular period of time in history) as a result of Divine Providence.<sup>5</sup> The Second Amendment is a fundamental right to self-defense and defense of others, and therefore can be used when justified. It is a right to protect oneself against violence from both criminals and government. The Constitution, including the First and Second Amendments, is the Supreme Law of the Land.<sup>6</sup> Any government officer, or any law that is subordinate to the Constitution, in the United States that attempts to deprive the American people of those rights is illegally acting *ultra vires*, as a rogue without legitimate authority; and

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3. See discussion *infra* Part VI.A.

4. U.S. CONST. amend. II.

5. See, e.g., *Psalms* 139:16b (New Int'l Version) ("All the days ordained for me were written in your book before one of them came to be."); *Acts* 17:26 (New Int'l Version) (explaining that for all people God "determined the times set for them and the exact places where they should live").

6. U.S. CONST. art. VI, cl. 2.

therefore, Christians are not rebelling against legitimate authority in resisting such persecution or oppression.

This Article uses an interdisciplinary approach employing both law and theology. There are significant similarities between the concerns and predicate principles underlying the Second Amendment with those in the First Amendment. While some major Supreme Court cases concern First Amendment issues where political expression is involved, there appears to be no cases that clearly connect mainstream religious expression to Second Amendment rights. That may be because it is only in modern times—indeed, just in the past several years, as this Article shows—that expressing historically orthodox Christian beliefs and moral principles has become controversial.<sup>7</sup> So only now is there more clearly a role for scholarly exploration of whether these First and Second Amendment matters share a common doctrinal foundation. As suggested by my biographical footnote above, my experience over the past two decades has been that church-going Americans have a great deal in common with typical American gun owners; indeed, many Americans equally belong to both communities.

Some call religious liberty America's first freedom because it was the principle motivating those who first permanently settled this nation. Others could call the right to bear arms America's first freedom because it protects all the others. They may both be correct. This Article shows how the two Amendments work in concert to protect the right of every American to think and speak according to the dictates of their conscience without undue fear of retribution either from government or from their fellow citizens. It is a right to believe free from coercion.

Part II of this Article surveys what the Supreme Court has held in regard to the Second Amendment, insofar as it secures a fundamental right for private citizens to keep and bear arms unconnected to any type of public service for self-defense and other lawful purposes. Part III sets forth rudimentary principles for formulating Christian doctrine, and explains the Christian doctrine of providence. Part IV states the modern orthodox Protestant—i.e., Evangelical Christian—doctrine regarding self-defense, exploring Christian teachings on self-defense both from the text of the Bible and from leading Christian authorities over the centuries. Part V discusses the Supreme Court's recent re-emphasis of the principle of coercion in the First Amendment, and its ready application to the Second Amendment. Part VI considers why exercising First Amendment rights, whether in terms of political speech or religious exercise, can heighten that person's concern

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7. See discussion *infra* Part VII.A.

for being able to also exercise Second Amendment rights. Part VII explains why the robust exercise of Second Amendment rights can lead to freer exercise of First Amendment rights.

Parts II and III form the underlying foundation for this Article by introducing the reader to two topics that at first seem unconnected. The first consists of material on the Second Amendment as settled black-letter law, and the second is a discussion on Christian doctrine for discovering divine truth and applying it to each person's individual circumstances. Part IV then explains the self-defense doctrine that explores its basis in biblical text and surveys its historical development. Parts VI and VII attempt to tie together those beliefs and rules to current events and trends. This Article attempts to start a long-term discussion through raising several points that together form a roadmap for future research on the topic of religious beliefs regarding self-defense in America.

## II. THE SECOND AMENDMENT SECURES A FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS FOR PERSONAL DEFENSE

This Article begins by laying a foundation to help the reader understand the substance and contours of the right to self-defense that is part of the right to bear arms in the Second Amendment. For that, we look to the history of the right to bear arms. In doing so, we find recurring themes of the importance of self-defense. This right alternates between two purposes. The first is the protection of the individual against physical harm; the second is to collectively protect civil society by keeping government in check via a well-armed populace.

### A. *Decades of Debate*

Only in recent years has jurisprudence emerged to govern the Second Amendment, and even that is in its nascent stage—barely eight years old at the national level.<sup>8</sup> The recent vintage of this case law is in part attributable to the scarcity of significant gun control laws in the United States' early history. Gun ownership was widespread during the framing, and continued unabated throughout the nineteenth century.<sup>9</sup> The Supreme Court mentioned the Second Amendment only six times during this period, and

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8. See Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. C.R. L.J. 167, 167-68 (2008).

9. See generally STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984).

those were tangential references that never explored this provision in the Bill of Rights.<sup>10</sup>

What this Article refers to as “gun control laws” did not emerge until the next century. The first significant restriction was New York’s Sullivan Act in 1911,<sup>11</sup> which was upheld by the state court against a constitutional challenge two years later with no meaningful exploration of the Second Amendment.<sup>12</sup> The first such federal statute was the National Firearms Act of 1934,<sup>13</sup> followed shortly thereafter by the Federal Firearms Act of 1938.<sup>14</sup>

Before 2008, the Supreme Court dealt directly with the Second Amendment in only one case.<sup>15</sup> That 1939 case involved illegally transporting a sawed-off shotgun, *United States v. Miller*.<sup>16</sup> The Court’s entire relevant discussion is less than five pages, none of which involved a single paragraph containing evidence of why the First Congress drafted the Second Amendment, or why the States ratified it.<sup>17</sup> Several courts of appeals have used adjectives such as “cryptic” to describe *Miller*,<sup>18</sup> and during oral argument in *District of Columbia v. Heller*,<sup>19</sup> Justice Anthony Kennedy called *Miller* “deficient.”<sup>20</sup>

*Miller*’s cursory examination led to three conflicting theories on the nature of the Second Amendment and whether it was a right of private citizens at all.<sup>21</sup> The first theory said it was only a right for States to arm their National Guard units (the collective-right model); the second theory stated that individuals have the right to be armed only in connection with militia service (sophisticated collective-right model); and the third theory

10. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1362.

11. 1911 N.Y. LAWS ch. 195, § 1, at 443 (codifying N.Y. PENAL LAW § 1897, ¶ 3) (making it illegal to possess without a license “any pistol, revolver or other firearm of a size which may be concealed upon the person”).

12. *People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 425 (N.Y. App. Div. 1913).

13. Pub. L. No. 73-474, 48 Stat. 1236 (1934).

14. Pub. L. No. 75-785, 52 Stat. 1250 (1938).

15. *United States v. Miller*, 307 U.S. 174 (1939).

16. *Id.* at 175.

17. *See id.* at 178-82.

18. *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2002).

19. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see discussion infra* Part II.B.

20. Transcript of Oral Argument at 62, *Heller*, 554 U.S. 570 (2008) (No. 07-290).

21. *See United States v. Miller*, 307 U.S. 174, 179-83; Klukowski, *supra* note 8, at 174-76.

said that private citizens can possess arms (individual-right model).<sup>22</sup> The individual-right model emerged from the first significant legal scholarship on the Second Amendment. The first major article appeared in *Michigan Law Review* in 1983,<sup>23</sup> quickly followed by a treatise and another couple of articles,<sup>24</sup> which in turn led well-respected liberal Professor Sanford Levinson to accept the individual-right model in a 1989 *Yale Law Journal* article.<sup>25</sup> This spurred a significant volume of new scholarship, much of which supported the individual-right model,<sup>26</sup> including that of an iconic liberal legal scholar of this generation, Professor Laurence Tribe.<sup>27</sup>

The federal appeals courts were split between these three theories, most of which focused on *Miller*, and adopted one of the three theories.<sup>28</sup> The last

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22. Klukowski, *supra* note 8, at 174-76.

23. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

24. See generally HALBROOK, *supra* note 9; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

25. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

26. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996); Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399 (1999); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); but see, e.g., Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998); Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27 (2000).

27. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902-03 & n.221 (3d ed. 2000).

28. Four circuits adopted the collective-right theory: *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). Five circuits adopted the hybrid model, called the sophisticated collective-right theory: *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

two circuits to publish opinions examining this growing historical scholarship held that the individual-right model is correct.<sup>29</sup>

*B. The Supreme Court Speaks—Twice*

The Supreme Court took one of these latter two cases, a test case challenging the near absolute ban on handgun ownership in the nation's capital. In *District of Columbia v. Heller*, the Court held that the Second Amendment secures the right of private citizens who are law-abiding and peaceable to keep and bear firearms for lawful purposes unconnected from any public militia service.<sup>30</sup> Justice Antonin Scalia wrote a lengthy opinion for the Court that discussed the text, structure, and history of the Second Amendment and adopted the individual-right model.<sup>31</sup>

Two years later, the Court considered a case challenging a city handgun ban in Chicago that was very similar to the one invalidated in *Heller*, involving a near-absolute ban on the private ownership of firearms in the home.<sup>32</sup> The Supreme Court held that the right to bear arms is a fundamental right that applies with equal force against federal and state governments through the Fourteenth Amendment.<sup>33</sup> Justice Samuel Alito wrote the principal opinion. The opinion was for a five-Justice majority, except for one part, which was a plurality opinion. Justice Clarence Thomas declined to join one part that applied the substantive due process doctrine, and instead took the originalist view that the Second Amendment applied to the States through the Privileges or Immunities Clause.<sup>34</sup>

There were many issues still undecided after *Heller* and *McDonald*, some of which the Court will likely address in coming years. But one question the Court did answer was whether the Second Amendment secured the right to

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29. *Parker v. District of Columbia*, 478 F.3d 370, 382 (D.C. Cir. 2007), *aff'd sub nom.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). During this time, the Ninth Circuit held that the Second Amendment is not an individual right in *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002). But *Silveira* reaffirmed that the court's holding from an earlier case decided in 1996, where the court of appeals adopted the collective-right model with no serious exploration of the text or history of the Amendment. *See Hickman*, 81 F.3d at 101. The last two circuits to examine the issue as a question of first impression were persuaded by the weight of the scholarship and evidence presented to recognize an individual right.

30. *Heller*, 554 U.S. at 592, 593, 598-99, 605.

31. *See id.* at 572-636.

32. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

33. *Id.* at 791.

34. *Id.* at 805-06 (Thomas, J., concurring in part and concurring in the judgment).



own firearms for the purpose of self-defense.<sup>35</sup> Another question the Court answered was that the purpose of the right's codification in the Constitution was to empower the American people to resist a tyrannical regime.<sup>36</sup> This constitutional provision is a deliberate check on the power of the state over human beings, whether that power is being exerted in self-defense from a presidential despot or a foreign oppressor subjugating the United States.<sup>37</sup> "Extant political writings of the [Founders'] period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders."<sup>38</sup>

The majority opinions in both cases contain unhelpful dicta.<sup>39</sup> "Dictum settles nothing, even in the court that utters it."<sup>40</sup> Nonetheless, federal appellate courts afford considerable weight to Supreme Court dicta, with the result that such dicta is often controlling in practice, if not in theory.<sup>41</sup> While several statements in *Heller* are no more than Justice Scalia cabining the Court's holding, there is dictum that the Court was not "cast[ing] doubt" on certain "longstanding prohibitions" regarding felons and the mentally ill, firearms in "sensitive places," and limitations on firearms commerce.<sup>42</sup> The Court designates all of these limitations on firearm possession as "presumptively lawful," and adds that this list is not

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35. See *Heller*, 554 U.S. at 628-29; *McDonald*, 561 U.S. at 767-68.

36. *Heller*, 554 U.S. at 599.

37. See THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 281 (1880), available at <https://archive.org/details/generalprinciple00cooluoft>.

38. *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring).

39. It is worth noting that the courts of appeals are split on whether this language is dicta. Some correctly recognize that it is, see, e.g., *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring), while others wrongly conclude it is not, see, e.g., *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010). Others note this disagreement, but do not definitively take either side. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 90 n.5 (3d Cir. 2010).

40. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005).

41. See, e.g., *Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004); *McCalla v. Royal Maccabees Life Ins. Co.*, 369 F.3d 1128, 1132 (9th Cir. 2004); *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998); *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994).

42. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

exhaustive.<sup>43</sup> These dicta provide a basis for lower courts to uphold various types of gun-control laws with cursory opinions that do not search those laws with the rigor that should be required for state actions that burden fundamental rights.

People have a natural right to defend themselves and others.<sup>44</sup> So long as they are law-abiding and peaceable adult citizens, this right carries with it the concomitant right to obtain, possess, and carry firearms as an instrumentality to effectuate self-defense.<sup>45</sup> This is a right against both public and private violence,<sup>46</sup> where the former is unlawful physical violence perpetrated by organized units of society such as an instrumentality of the government, and the latter is violence perpetrated by criminals.

### C. *Self-Defense Recognizes the Value of Human Life*

The right to defend your family is at least as great as the right to defend yourself. A person may choose to take a risk regarding his own safety that would be morally reprehensible to take regarding others, especially risks that would endanger a spouse, family member, or someone else committed

43. *Id.* at 627 n.26.

44. Although modern legal thought places a premium on positive and decisional law to the exclusion of all else, this Article argues from a natural law viewpoint. Scholars differ on whether natural law—certain principles of individual and group conduct that transcend national and cultural boundaries and that human beings can discover and implement as morally sensitive creatures—can be derived either from generally nontheistic philosophical principles, versus whether natural law requires theistic concepts, if not perhaps specifically Judeo-Christian antecedents. Compare C.S. Lewis, *God and the Moral Law*, reprinted in *CHRISTIAN APOLOGETICS: AN ANTHOLOGY OF PRIMARY SOURCES* 171–73 (Khaldoun A. Sweis & Chad V. Meister eds., 2012) (discussing natural law in a fashion that only tangentially references the divine) with Paul Copan, *The Moral Argument*, reprinted in *CHRISTIAN APOLOGETICS*, *supra*, at 174–90 (arguing that natural law requires theological principles as a foundation). Surveying the world's belief systems showcases these principles of natural law. See generally C.S. LEWIS, *THE ABOLITION OF MAN* 83–101 (Harper 2001) (Appendix) (1943). The Declaration of Independence premises America's political separation from Great Britain on natural law. See *THE DECLARATION OF INDEPENDENCE* para. 1 (U.S. 1776) (referencing “the law of nature and of nature's God.”). This is especially important when examining the right to bear arms. Blackstone referenced self-defense as a natural right. See 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*4 (1765). Much modern scholarship also discusses the right to bear arms within a natural law paradigm. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 *YALE L.J.* 995, 1003–04 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)).

45. See *Heller*, 554 U.S. at 635–36.

46. *Id.* at 599.

to the person's care, such as a young child. There are also things for which a person is willing to subject himself to pain and suffering, or even to lay down his life, but such a decision is one of self-sacrifice, not the sacrifice of others.

Many brave and principled people heed the biblical exhortation—"Greater love has no one than this, that someone lay down his life for his friends."<sup>47</sup> Some of the most moving stories about bravery and nobility involve someone who sacrifices his life to save others, whether on a battlefield, in the line of duty as a policeman or firefighter, a devoted parent who makes the ultimate sacrifice for his young child, or just an ordinary person in daily life who shows extraordinary bravery. But no one praises or eulogizes a person who sacrifices someone else's life in an otherwise similar situation.<sup>48</sup> Therefore, if there is a right to defend yourself against harm, when you can freely choose to forfeit your own life under certain circumstances—or even under a duty to sacrifice your life in certain dangerous occupations—then it follows that the right is at least as great to defend those committed to your care and protection. From a Christian moral perspective, the right to defend others is at least as great as the right to defend yourself. That is the premise upon which this Article proceeds to apply in the context of religious liberty.

### III. PRINCIPLES OF BIBLICAL INTERPRETATION FOR THE CHRISTIAN DOCTRINE OF SELF-DEFENSE

Because the Symposium, *Under Fire: The Right to Keep and Bear Arms*, for which this Article was written, focuses on the right to bear arms from a Christian perspective, this Article must briefly mention several Christian beliefs and concepts as a foundation for a normative Christian understanding of self-defense. Such an understanding must be derived from the Bible, as the sacred text of the Christian religion, subordinately supplemented by several major Christian works that have had an enduring

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47. *John* 15:13.

48. There are other situations where a person does have a duty to order another person into harm's way, or possibly even to certain death. Military officers, police or firefighter commanders, and select others, are faced with such situations. The author of this Article was Mayor of Cincinnati, and had to order city police into situations where they would certainly face danger. This part of the discussion refers instead to people who are not in such a senior position over those who have a duty to risk themselves in the service of others.

impact on Christian thought over the centuries.<sup>49</sup> These biblical verses and lesser authorities discuss the use of deadly force related to various subject matters, such as criminal justice, social responsibility regarding the welfare of other persons, and self-defense. This Article surveys these authorities to explore orthodox Christian beliefs regarding self-defense and the use of force to put in context how Christians in America can live out their faith in this nation's distinctive legal and governmental system.

Given that this is a legal publication, the other part of the foundation for this Article's theory needs to provide an overview of two aspects of Christianity. The first concerns the way observant Christians read and study the Bible. This science of interpreting biblical texts is called hermeneutics.<sup>50</sup> The second concerns the Christian doctrine of providence, the belief that all the circumstances of each person's life and world affairs is governed by the will of an Almighty God who knows everything and possesses infinite power to order matters according to his own will. Such beliefs necessarily impact what Christians believe about the right to self-defense.

#### A. *Christian Doctrine on Discovering and Understanding Divine Will*

There are two broad sources for orthodoxy within Christendom. For Protestants, the Bible alone is the Word of God, infallible and inerrant, and authoritative on every topic to which it clearly speaks.<sup>51</sup> For Roman Catholics, both the Bible and church tradition are regarded as the Word of God: one written and the other unwritten, together comprising the deposit of faith.<sup>52</sup> Within either faith tradition, orthodoxy on any moral issue should not change, because the predicate source of authority cannot change.

The Bible contains a number of passages relevant to self-defense. As the text of the Bible is the supreme authority for Christian faith and practice,<sup>53</sup> its references to self-defense are the *sine qua non* to ascertaining correct Christian doctrine on the matter. Thus, for a devout Christian, the operative question becomes, "What does the Bible say about self-defense?"

49. Other faith traditions have their own authorities on this topic as well. But those are beyond the scope of this Article, which is premised upon Christian beliefs.

50. R.C. SPROUL, KNOWING SCRIPTURE 45 (1977).

51. 2 *Timothy* 3:16; *Titus* 1:9.

52. CATECHISM OF THE CATHOLIC CHURCH pt. I, § 1, ch. 2, art. 2, ¶¶ 80-82 (1994), available at [www.vatican.va/archicce/ENG0015/\\_PL.HTM](http://www.vatican.va/archicce/ENG0015/_PL.HTM).

53. See 2 *Timothy* 3:16; see also THY WORD IS STILL TRUTH: ESSENTIAL WRITINGS ON THE DOCTRINE OF SCRIPTURE FROM THE REFORMATION TO TODAY, at xix (Peter A. Lillback & Richard B. Gaffin Jr., eds., 2013).

Begin with the Old Testament. In doing so, it is critical to be cognizant of the fact that under Christian doctrine there are some significant differences between the Old Covenant established under Moses as articulated in the Pentateuch, and the New Covenant instituted by Jesus Christ.<sup>54</sup> Christianity teaches that moral principles articulated in the Old Testament—such as commands to honor your parents, and not to steal or covet<sup>55</sup>—are timeless and eternal, as they are derived from the character of God, and thus are ubiquitous and universal in their applicability to human beings.<sup>56</sup> They are also repeated in the New Testament.<sup>57</sup> But many other commands have to do either with ceremonial laws that foreshadowed the coming Messiah and were done away with after the death of Christ, or were civil or judicial laws for the nation-state of Israel as it reflected God's character under a theocratic form of government.<sup>58</sup> Neither would apply in the United States, as America is neither a theocracy nor a theonomy.<sup>59</sup>

That is in contrast to the New Testament. Although Christians accept both the Old and New Testaments as authoritative, the teachings of Jesus Christ, his apostles, the biblical evangelists, and other New Testament writers are even more clearly received by Christians as the Word of God.<sup>60</sup> While Christians regard the Old Testament as divinely inspired on equal terms with the New Testament, the Christian belief of progressive revelation holds that God's revelation of his nature, truth, and commands for humanity unfold with greater comprehensibility and utility in the New

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54. 3 HERMAN BAVINCK, REFORMED DOGMATICS 206-24 (2006).

55. See *Exodus* 20:12, 15, 17.

56. JOHANNES G. VOS, THE WESTMINSTER LARGER CATECHISM COMMENTARY 78-85, 225-29 (G.I. Williamson ed., 2002) (1946-49).

57. See *Ephesians* 4:28 (stealing); *Ephesians* 6:2 (honoring parents); *Romans* 13:9 (coveting).

58. JAMES MONTGOMERY BOICE, FOUNDATIONS OF THE CHRISTIAN FAITH 221-24 (1986).

59. See NEW DICTIONARY OF THEOLOGY 667-68 (Sinclair Ferguson, David Wright, & J.I. Packer eds., 1988). Theocracy is a form of government where religious leaders are also political leaders who run the government. WEBSTER'S THIRD NEW INT'L DICTIONARY 2370 (1981). Theonomy is a system of government where society's laws are expressly based on God's law as found in religious doctrine, but where society's rulers may still be secular rulers. *Id.* at 2371. These forms of government are closely related and can overlap, but should nonetheless be regarded as distinct.

60. See ESV STUDY BIBLE: ENGLISH STANDARD VERSION 23-26, 1803-05, 1811-14, 2147-50 (2007); cf. WAYNE GRUEDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 60-63 (1994).

Testament.<sup>61</sup> Therefore, a survey of New Testament verses is especially indispensable in formulating Christian teaching on self-defense.

### B. *Christian Understanding of Divine Providence*

Christians believe that God is truly omniscient and omnipotent—that is, literally “all-knowing” and “all-powerful.” The Christian doctrine of divine providence is that this Almighty God dictates all the circumstances of a person’s life and provides for every creature’s daily needs for as long as he gives them to live; God “gives to all mankind life and breath and everything.”<sup>62</sup> Christians believe the Bible’s teachings that God determines the times and physical places in which a person lives,<sup>63</sup> and “works all things according to the counsel of his will.”<sup>64</sup>

As one of the most consequential Protestant creedal statements in church history, the *Westminster Confession of Faith* explains this doctrine:

1. God the great Creator of all things doth uphold, direct, dispose, and govern all creatures, actions, and things, from the greatest even to the least, by his most wise and holy providence, according to his infallible foreknowledge, and the free and immutable counsel of his own will . . . .
2. Although, in relation to the foreknowledge and decree of God, the first Cause, all things come to pass immutably, and infallibly; yet, by the same providence, he ordered them to fall out, according to the nature of second causes, either necessarily, freely, or contingently.
3. God, in his ordinary providence, maketh use of means, yet is free to work without, above, and against them, at his pleasure.
- . . . .
5. The most wise, righteous, and gracious God doth oftentimes leave, for a season, his own children to manifold temptations, and the corruption of their own hearts, to chastise them for their former sins . . . that they may be humbled; and, to raise them to a more close and constant

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61. See 1 BENJAMIN B. WARFIELD, *THE WORKS OF BENJAMIN B. WARFIELD* 11-15 (1932); NORMAN L. GEISLER, *BAKER ENCYCLOPEDIA OF CHRISTIAN APOLOGETICS* 608-09 (1999).

62. *Acts* 17:25; see *Matthew* 6:25-34.

63. See *Psalms* 139:1-12, 16; *Acts* 17:26.

64. *Ephesians* 1:11.

dependence for their support upon Himself, and to make them more watchful against all future occasions of sin, and for sundry other just and holy ends.<sup>65</sup>

Observant Christians believe that God employs his infinite knowledge and power to ultimately cause all the circumstances in their lives unfailingly to bring about outcomes for their ultimate benefit. The Bible teaches that “we know that for those who love God all things work together for good, for those who are called according to his purpose.”<sup>66</sup> Thus, whether Christians find themselves in peaceful circumstances or in challenging ones, they believe that God permits it and has some purpose—which may be inscrutable and perhaps even to achieve ends that the believer will not ever understand during his lifetime—to accomplish through those events.

This belief in providence extends to situations where a Christian’s safety—or even his life—is threatened. As a general matter, Christians obey the legitimate rulers of the places in which they live. “Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment.”<sup>67</sup> The only exception to this rule for Christians is when obeying the civil authorities would cause a person to disobey God. Since Christians regard God as the highest authority, in such moments, those earthly authorities become illegitimate. For example, when the apostles were ordered to stop spreading the gospel of Jesus Christ, they refused, responding, “We must obey God rather than men.”<sup>68</sup>

For Christians living in the United States of America in the twenty-first century, the highest earthly authority is the Constitution of the United States. Biblical writers would have had no concept of a written instrument acting as the highest authority in a nation. When adopted in 1789, the Constitution of the United States was the first written constitution in the history of the world. It establishes this nation’s form of government, and creates the offices of what would in biblical parlance be called the “rulers” and “those in authority” in this country, at least at the federal level. So in the United States, the Constitution should be regarded as the authority to which respect is due. Part of that Constitution is the Second Amendment,

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65. WESTMINSTER CONFSSION OF FAITH ch. 5 (1646).

66. *Romans* 8:28.

67. *Romans* 13:1-2.

68. *Acts* 5:29.

which—as explored in Part II—is a fundamental right to keep and bear arms for self-defense both against criminals and against a tyrannical regime. Christians also regard America's democratic form of government as provided by God, so a regime is not tyrannical so long as it is the government for which the American people voted on Election Day. Even a bad government is not tyrannical if it is chosen by the people, and retained by the people. So Christians in America today are required by their faith to believe that God purposefully put them in a nation where they operate in a democratic republic, where they choose their own government at regular intervals, and where they possess this fundamental right to bear arms—all as parts of a Constitution that supersedes all lesser authorities.

#### IV. MODERN CHRISTIAN DOCTRINE ON THE RIGHT TO SELF-DEFENSE

Because the Symposium, *Under Fire: The Right to Keep and Bear Arms*, for which this Article was written, focuses on the right to bear arms from a Christian perspective, it is essential to articulate a normative Christian understanding of self-defense. Such an understanding must be derived from the Bible, as the sacred text of the Christian religion, subordinately supplemented by several major Christian works that have had an enduring impact on Christian thought over the centuries.<sup>69</sup> These biblical verses and lesser authorities discuss the use of deadly force related to various subject matters, such as criminal justice, social responsibility regarding the welfare of other persons, and self-defense. This Article surveys these authorities to explore orthodox Christian belief regarding self-defense and the use of force, to put that in the context of how Christians in America can live out their faith in this nation's distinctive legal and governmental system.

##### A. *The Westminster Larger Catechism*

Although not as well known in many Christian circles as its abbreviated counterpart, the *Westminster Shorter Catechism*, the *Westminster Larger Catechism* deals with the use of force as applied to the Ten Commandments.<sup>70</sup> Although the *Westminster Larger Catechism* is almost five centuries old, it continues to accurately state the modern orthodox doctrine of Christian self-defense. The *Westminster Larger Catechism* is as good a source as any regarding this topic. When discussing the Sixth

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69. Other faith traditions have their own authorities on this topic as well. But those are beyond the scope of this Article, which is premised upon Christian beliefs.

70. See Vos, *supra* note 56, at 329-54.



Commandment,<sup>71</sup> in answer to Question 135 regarding the commandment not to murder, it reads:

The duties required in the sixth commandment are all careful studies, and lawful endeavors, to preserve the life of ourselves and others by resisting all thoughts and purposes, subduing all passions, and avoiding all occasions, temptations, and practices, which tend to the unjust taking away the life of any, by just defense thereof against violence . . . .<sup>72</sup>

This is one of the clearest statements in major Christian literature on both a right to self-defense and a right to defend others. As one of the preeminent works of post-Reformation Christianity, this is seen as an authority for many Protestant churches, especially the more theologically conservative Presbyterian and Baptist churches.<sup>73</sup> A thorough examination of this teaching enlarges upon these points.

First, it proscribes a broad principle for how people should regard human life. The *Westminster Larger Catechism* explains that “careful studies, and lawful endeavors, to preserve . . . life” includes “every form of human research and planning directed toward the preservation of life.”<sup>74</sup> This includes “scientific investigation of the causes and prevention of diseases,” developing medicines, and preventive measures, such as road safety policies.<sup>75</sup>

It speaks further on the core self-defense corollary. It explains, “[L]awful endeavors to preserve the life of ourselves and others . . . means all efforts

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71. Both Protestants and Eastern Orthodox use this enumeration of the Ten Commandments, and so it was the list used by Calvin. It should be noted, to avoid confusion, that Roman Catholics and Lutherans use a different enumeration, under which the commandment against murder is the fifth out of ten. Most Protestants list as separate commandments having no other God (first) and not creating any idols (second), while not coveting is a single command (tenth). The Catholic/Lutheran list includes as one command having no other God and no idols (first), but still totals ten because of separate commands not to covet your neighbor's wife (ninth), nor your neighbor's possessions (tenth).

72. *Id.*

73. Cf. NEW DICTIONARY OF THEOLOGY, *supra* note 59, at 156-57 (discussing the WESTMINSTER CONFSSION OF FAITH of 1646). The Westminster Assembly then codified this same doctrinal system in the WESTMINSTER LARGER CATECHISM. See VOS, *supra* note 56, at ix-xx. Specifically, many Baptists of Reformed or Calvinistic denominations use the Second London Baptist Confession of Faith of 1689, which is a Baptist variation of the Westminster Confession of Faith.

74. VOS, *supra* note 56, at 362.

75. *Id.*

directly or indirectly aimed at preserving human life, excepting such efforts as may be wrong because forbidden by God's moral law."<sup>76</sup> In response to the subsidiary question, "What is included in the just defense of human life against violence?" Vos's *Commentary* answers:

This requirement of the sixth commandment includes the duty of the nation to protect its people against the unjust violence of all enemies, foreign and domestic, as well as the duty of every individual to defend himself and others against violence on the part of lawbreakers of all kinds. Thus the sixth commandment involves the right and duty of defensive warfare and of the power of the police in enforcing law and order, as well as the right and duty of defending oneself and other persons against criminal violence whenever occasion may require.<sup>77</sup>

This encapsulates much of what this Article discussed in Part II. The Second Amendment is a right of self-defense and defense of others against criminals. It is also a means of defense against illegitimate government authority (foreign and domestic) that seeks to unjustly endanger innocent human life, in the case of domestic government only if it were to throw off the constraints of the Constitution and effectively create a new form of government that actually takes up arms against the American people. Since the First and Second Amendments are part of the Supreme Law of the Land,<sup>78</sup> any private or governmental violence attempting to shear Americans of their fundamental rights to life and safety is unjust and unlawful violence, and can be legitimately resisted.

The argument that recent decades have seen a change in this doctrine of self-defense is illusory. There have been those who have put forward theology that is inconsistent with this Christian right (and sometimes duty) of self-defense, but that theology is neither biblical nor historical, and thus is not orthodox. Examining one prominent Second Amendment scholar, who is an adherent of a faith other than Christianity, illustrates this point.

David Kopel erroneously cites the Vietnam War as the "precipitating cause" of a shift of "mainline Protestant churches towards pacifism."<sup>79</sup> Kopel's fundamental premise underlying this error is that he refers to this as

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76. *Id.*

77. *Id.* at 363.

78. U.S. CONST. art. VI, cl. 2.

79. David B. Kopel, *Evolving Christian Attitudes Towards Personal and National Self-Defense*, 45 CONN. L. REV. 1709, 1712 (2013).

“changes in orthodox Christian attitudes.”<sup>80</sup> He cites the United Methodists as an example.<sup>81</sup> Rather, many leaders and teachers in those denominations have moved away from orthodox doctrine by wandering away from the authority of Scripture as the infallible and all-sufficient rule for doctrine and practice in the Christian faith.<sup>82</sup> This is much more likely the cause of their anti-gun ideological shift, just as their doctrines on various other issues have strayed from biblical orthodoxy, leading to deep divisions in those denominations that leave many calling for a permanent split into separate denominations.<sup>83</sup> This Article eschews the use of “mainline” as carrying the negative inference that denominations that are faithful to biblical teaching authority should be considered somehow outside the mainstream.

Kopel unknowingly showcases his error by restating his point in different words elsewhere in the article when he refers to the “sudden shift . . . of mainline Protestant churches towards pacifism.”<sup>84</sup> For more than a half century in America, the descriptor “orthodox” has been in contradistinction to “mainstream” among Protestant denominations.

Various heterodox Protestant denominations that had become increasingly anti-war over the past century reversed course after Pearl Harbor, and subsequently strongly supported the military’s use of lethal force in World War II.<sup>85</sup> In addition, no scholar has made a serious case for the proposition that pacifism was ever a defining doctrine in the mid-twentieth century, even among denominations that did not adhere to the authority of Scripture. “The pacifist views were not necessarily absolutist, in the sense of forbidding a husband to protect his wife from a criminal who was trying to rape and kill her. Rather, the pacifism tended to focus on more

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80. *Id.* at 1713.

81. *Id.* at 1712-13.

82. See, e.g., James V. Heidinger, II, *How United Methodists Do Theology* 7, GOOD NEWS (July/Aug. 1992); J. Philip Wogaman, *It’s Time for You to Tell the Truth* 4-5, CIRCUIT RIDER (Apr. 1994).

83. For example, that denomination’s position on gay marriage and sexuality. See *Conferences Reject Church’s Stance on Gays*, UNITED METHODIST CHURCH, <http://www.umc.org/news-and-media/conferences-reject-churchs-stance-on-gays> (last visited Jan. 19, 2015); Timothy C. Morgan, *Is Gay Marriage Destroying the United Methodist Church?*, CHRISTIANITY TODAY (June 11, 2014), <http://www.christianitytoday.com/gleanings/2014/june/is-gay-marriage-destroying-united-methodist-church.html?paging=off>.

84. Kopel, *supra* note 79, at 1712, 1727.

85. See *id.* at 1730.

pragmatic arguments, such as the claim that wars do not solve anything.<sup>86</sup> This is not to say that devout orthodox Christians cannot be pacifists.<sup>87</sup> But to the extent individual Christians decline to bear arms, they are following their personal conscientious inclinations, not a biblical command.

So in contrast to more recent deviations among churches that have openly doubted the reliability of the Bible, the teaching of the *Westminster Larger Catechism* continues to be an excellent summary of Evangelical (i.e., orthodox Protestant) beliefs regarding self-defense. It is as relevant in the twenty-first century as in the seventeenth century, and supports the theory set forth in this Article. Modern Roman Catholic doctrine takes a very similar position on this matter, which, like its Protestant counterpart, has remained largely unchanged for centuries.<sup>88</sup>

#### B. *Biblical Verses Directly Supporting the Catechism's Formulation*

As the text of the Bible is the supreme authority for Christian faith and practice,<sup>89</sup> Evangelical Protestants do not believe that doctrinal confessions or catechisms have any sort of inherent authority. Instead, as already noted and documented, Evangelical Protestants regard the Bible as the sole authority for all questions of faith and morality. As such, confessions and catechisms are useful only insofar as they accurately synthesize or expound upon what the Bible teaches. There are a number of verses the *Commentary* lists for Question 135,<sup>90</sup> several of which deserve discussion here.

The verse best known in the Bible on this topic is found in the Ten Commandments: "You shall not murder."<sup>91</sup> Some would quote an older translation, such as the King James Version, "Thou shalt not kill."<sup>92</sup> But that translation is imprecise to the extent that it lends itself to the formulation of unbiblical doctrine on this issue. Classical Hebrew (the language in which almost all of the Old Testament is written, including Exodus) transliterates

86. *Id.* at 1727.

87. See Christian Printing Mission, "Shall I Enter the Army?" *Moody Said, "No."*, HEARTBEAT OF THE REMNANT, Mar./Apr. 2006, at 22, 23.

88. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 52, at pt. III, § 2, ch. 2, art. 5, ¶¶ 2263-65.

89. See 2 Timothy 3:16; see also THY WORD IS STILL TRUTH, *supra* note 53, at xix.

90. See VOS, *supra* note 56, at 361-70. Many of the verses listed in Part IV.B are discussed in those pages of Vos's *Commentary*, along with a one-sentence description from Vos of the theological proposition that should be derived from each verse.

91. Exodus 20:13 (ESV).

92. Exodus 20:13 (KJV).

the Hebrew word for “to kill” as “qatal,”<sup>93</sup> while “to murder” is transliterated “ratsakh.”<sup>94</sup> The term carries the meaning of unjustified homicide, but does not prohibit homicides that are justified. This verse in Hebrew is transliterated “lo tirtsakh,”<sup>95</sup> using the word “ratsakh,” and therefore specifically prohibits murder, not all homicides.

While this by itself does not mean a Christian is permitted to use deadly force, it does mean that the Ten Commandments do not explicitly impose such a broad prohibition, leaving open the possibility of a right to use deadly force under certain circumstances. If this were a legal text as opposed to a biblical text, the canon *inclusio unius est exclusio alterius*<sup>96</sup> would suggest that the verse be interpreted to prohibit only unjustified homicides, and not pose any bar to justified homicides. It is unclear whether—or how—this canon applies to non-legal texts. Many theological authorities take this verse to entail, by negative inference, a corollary command to engage in self-defense, as discussed below. These authorities’ interpretation likewise argues that this verse prohibits only homicides that are unjustified, and that Christians are required to use physical force under certain circumstances. In fact, shortly thereafter in Exodus, the Bible expressly authorizes the death penalty for those who commit a capital offense.<sup>97</sup> And shortly after that, the Bible sanctions the use of deadly force in self-defense against nighttime home invaders.<sup>98</sup>

The Bible also imposes on people an affirmative duty to preserve innocent life. First is the duty to preserve your own life. “[H]usbands should love their wives as their own bodies. He who loves his wife loves himself. For no one ever hated his own flesh, but nourishes and cherishes it.”<sup>99</sup> The Bible requires people to care for their own bodies, not only through nutrition and proper maintenance, but also through self-protection. Related to that is the duty to preserve the life of others. An example of this can be found in 1 Kings where a government official in ancient Israel saw that Jezebel—an immoral queen of Israel—was threatening the lives of Israel’s

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93. In Hebrew, the word is קטל

94. In Hebrew, the word is רצח

95. See BIBLIA HEBRAICA 119 (Stuttgartensia 1990) (recording Exodus 20:13 as “תִּרְצַח לֹא”).

96. “The inclusion of one is the exclusion of another.” See, e.g., Honig v. Doe, 484 U.S. 305 (1988).

97. Exodus 21:12-14, 23-24, 29.

98. Exodus 22:2-3.

99. Ephesians 5:28-29.

prophets.<sup>100</sup> In response, this official “took a hundred prophets and hid them by fifties in a cave and fed them with bread and water.”<sup>101</sup> It was not rebellion against legitimate authority to assist those being persecuted to escape their persecutors and to care for the daily physical needs of these innocent people in danger.

This preservation of innocent life begins on the level of thoughts and feelings. Long before a person reaches the point of premeditated action, Christians have a duty to not pursue a train of thought that leads to the destruction of innocent human life, and a duty to subordinate emotional urges that endanger others.<sup>102</sup> Instead, Christians are commanded to be quick to forgive insult and to seek peace when possible. “But if anyone slaps you on the right cheek, turn to him the other also.”<sup>103</sup> The scholarly study note in the English Standard Version (ESV) accompanying this verse is helpful in positing that this verse does not speak against self-defense.<sup>104</sup> Most people are right-handed, so an openhanded slap across someone’s face during a physical attack would strike their left cheek, not their right.<sup>105</sup> Striking the right cheek would instead be the result of a backhanded slap, which is meant as a degrading and humiliating insult, rather than a violent attack meant to cause physical harm.<sup>106</sup> Therefore, this verse is about forgiving insults and overlooking slights, not contrary to defending against an actual hostile attack.

### C. Biblical Sources

In addition to these points, various other biblical verses speak to the concept of self-defense. Several of the more prominent ones deserve mention here.

#### 1. Old Testament References

The first relevant reference is found in the first book of the Bible: *Genesis*.

And for your lifeblood I will require a reckoning: from every beast I will require it and from man. From his fellow man I will

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100. 1 *Kings* 18.

101. 1 *Kings* 18:4.

102. See VOS, *supra* note 56, at 361.

103. *Matthew* 5:39.

104. ESV STUDY BIBLE, *supra* note 60, at 1830 n.5:39.

105. *Id.*

106. *Id.*

require a reckoning for the life of man. Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image.<sup>107</sup>

This is the Bible's instituting capital punishment for murder. It is not directly on point, but it is relevant. It declares the value of human life and that the taking of that life is a grave matter that requires an answer. It shows two forms of homicide: the first unjustified, the second justified. While the context here is in the criminal justice system, not vigilante justice, it lays the foundation for the value of innocent life. From that can be inferred a right—if not a duty, discussed below—to defend innocent life.

The next biblical passage is found in the chapter of *Exodus* following the giving of the Ten Commandments. Referring to an ox that gores a human to death, *Exodus* says, “[I]f the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner also shall be put to death.”<sup>108</sup>

Note the *mens rea* element here. It is not murder, as there is no malice aforethought; instead it is similar to what in American jurisprudence would be labeled either second-degree manslaughter or negligent homicide. This showcases a moral obligation to take care regarding the lives of other people.<sup>109</sup> When an individual's actions lead to the death of an innocent person, the gravity of that situation is so great that the liable individual must pay with his own life.<sup>110</sup>

After those, the next relevant verse comes from *Deuteronomy*. “When you build a new house, you shall make a parapet for your roof, that you may

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107. *Genesis* 9:5-6.

108. *Exodus* 21:29.

109. The next verse in that passage reads, “If a ransom is imposed on him, then he shall give for the redemption of his life whatever is imposed on him. If it gores a man's son or daughter, he shall be dealt with according to this same rule.” *Exodus* 21:30-31. In modern terms in the American legal system, that is functionally similar to a monetary judgment imposed for the tort of wrongful death.

110. It is imperative to note, however, that it is unclear whether capital punishment here is due to the individual's moral culpability, or instead is due to God exemplifying his holiness in the context of the people of Israel under the Mosaic Covenant. See *supra* notes 55-62 and accompanying text. While discussing the demands of the Old Covenant in that regard in the Pentateuch is far beyond the scope of this piece—and for that matter is better suited to a theological journal than a legal journal in any event—whenever the death penalty is articulated in *Exodus*, *Leviticus*, or *Deuteronomy* the possibility cannot be dismissed that the sanction is not due to moral culpability, and therefore might not apply to Christians under the New Covenant.

not bring the guilt of blood upon your house, if anyone should fall from it.”<sup>111</sup> This too shows a moral obligation to protect the lives of innocent persons; a homeowner is required to go through the time, expense, and effort to add a feature to his house to help protect the life of a visitor. Like the previous example, the modern analogue for failure to take such preventive care would be some form of negligent homicide. The other person in that scenario is presumably present in the house with the owner’s permission, which suggests that when a homeowner invites a person into his house, the owner assumes a duty of care concerning the visitor. Applied in the defensive context, it has no relevance to a right of *self*-defense, but this duty of care is evidence from which a right to defend *others* can be inferred.

More direct support for defense rights is found in *Nehemiah*: “Those who carried burdens were loaded in such a way that each labored on the work with one hand and held his weapon with the other. And each of the builders had his sword strapped at his side while he built.”<sup>112</sup> A sword’s function is as an instrument of deadly force against another person. The Jewish people were returning from the Babylonian Exile, facing a dangerous land that they had left unoccupied for decades.<sup>113</sup> The import here is clear: As they were rebuilding the walls to their city to effectuate their defense, they were to be equipped to use deadly force if attacked.<sup>114</sup> This verse therefore supports both a right to self-defense and a right to defend others.

## 2. New Testament References

Perhaps the most commonly mentioned verses involving weapons in the New Testament is Jesus’ statement that “all who take the sword will perish by the sword.”<sup>115</sup> This happened in the context of Jesus being arrested by the temple guards to be tried, and eventually crucified by the Romans.<sup>116</sup> Leading authorities over the centuries comment that Jesus is instructing those disciples present with him in that situation not to resist the government agents who were there to take Jesus into custody and then

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111. *Deuteronomy* 22:8.

112. *Nehemiah* 4:17-18.

113. ESV STUDY BIBLE, *supra* note 60, at 799, 821.

114. *Id.* at 832 n.4:17.

115. *Matthew* 26:52.

116. *Matthew* 26:36-27:26.



sentence him to the death that he explained was intended by God to achieve something far greater.<sup>117</sup>

In the New Testament, one widely discussed passage is Jesus speaking to his disciples about life after he is taken from them, and instructs them in part, "And let the one who has no sword sell his cloak and buy one."<sup>118</sup> The ESV study notes accompanying verses thirty-five and thirty-six provide a helpful discussion:

Many interpreters take this to be a metaphorical statement commanding the disciples to be armed spiritually to fight spiritual foes (cf. Eph[esians] 6:10-17). In favor of this view: (1) In Luke 22:38 the disciples misunderstand Jesus' command and produce literal swords (v. 38); on this view, Jesus' response that "it is enough" is a rebuke, saying essentially, "Enough of this talk about swords." (2) Just a few minutes later Jesus will again prohibit the use of a literal sword (vv. 49-51; cf. Matt[hew] 26:51-52; John 18:10-11). Others take this as a command to have a literal sword for self-defense and protection from robbers. In support of this view: (a) The moneybag and knapsack and cloak in this same verse are literal, and so the sword must be taken literally as well. (b) Jesus' response that "it is enough" (Luke 22:38) actually approves the swords the disciples have as being enough, and Jesus' later rebuke in vv. 49-51 only prohibits them from blocking his arrest and suffering (cf. John 18:11), that is, from seeking to advance the kingdom of God by force. (c) The very fact that the disciples possess swords (Luke 22:38) suggests that Jesus has not prohibited them from carrying swords up to this point (cf. John 18:10-11), and Jesus never prohibited self-defense (see note on Matt[hew] 5:39). Both views have some merit.<sup>119</sup>

There are many other biblical verses that can be discussed on this matter, but these are the most prominent. The foregoing provides material from both the Old and New Testaments that demonstrate a consistency in biblical teaching on self-defense. While various pacifist faiths may claim that their understanding of the Bible is what mandates their opposition to

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117. See, e.g., 5 MATTHEW HENRY'S COMMENTARY ON THE WHOLE BIBLE 399-402 (Mac Donald Pub. 1988) (1721).

118. *Luke* 22:36.

119. ESV STUDY BIBLE, *supra* note 60, at 2006 n.22:35-36.

the use of force,<sup>120</sup> examining the entirety of biblical counsel instead provides strong scriptural support for a Christian belief in the right to self-defense and the defense of others.

#### D. Other Christian Authorities

Although only the Bible is regarded as the infallible sacred text of the Christian faith, various leading theologians and church leaders have also written on the issue. Although it is not necessary to exhaustively explore all of these sources, nor would such an exploration be remotely possible in a single law review Article, surveying several of the most prominent authorities of Christendom should prove instructive.

Augustine of Hippo (a.k.a. St. Augustine) is probably the greatest theologian of the first millennium of Christianity.<sup>121</sup> He actually represents an interesting and nuanced approach to this concept. On one hand, Augustine wrote of “just war”<sup>122</sup>—deliberate armed conflict in which soldiers are morally justified in taking human life. Yet Augustine was also believed to suggest that when an individual is confronted with deadly force, he should not respond with deadly force. Augustine seems to proceed from the ephemeral nature of mortal life in the body, the individual’s recognition that even the evil assailant is nonetheless himself a precious creature of God, and the individual victim should focus on his eternal soul rather than his corporeal body, since the body will soon enough deteriorate anyway, while the attacker cannot jeopardize the victim’s infinitely valuable soul.<sup>123</sup>

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120. For example, iconic evangelist Dwight L. Moody did not join the Union army in the Civil War to fight against slavery because he refused to kill another human being even in a war he regarded as just. Christian Printing Mission, “*Shall I Enter the Army?*” *Moody Said*, “No.”, HEARTBEAT OF THE REMNANT, Mar.–Apr. 2006, at 22, 23 available at <http://www.ephraministries.org/remnant-2006-03-index.a5w?A5WSessionId=bef871bf672f4c30abf1c5c594a28f2b>.

121. See NEW DICTIONARY OF THEOLOGY, *supra* note 59, at 58-61 (discussing Augustine’s contributions to Christianity and several of his most influential works). Augustine’s teaching on the moral nature of man and the sovereign power of God over the human condition and over matters of eternal salvation has defined a great deal of Christian thought on those central themes of the Christian religion, and bears his name under the label Augustinianism. See *id.* at 61-63.

122. See 19 AURELIUS AUGUSTINE, CITY OF GOD AGAINST THE PAGANS 929 (R.W. Dyson trans., Cambridge Univ. Press 1998) (c. A.D. 413-26) (more commonly referred to simply as “CITY OF GOD”).

123. See AURELIUS AUGUSTINE, ON FREE CHOICE OF THE WILL 9 (Thomas Williams trans. 1993) (c. A.D. 388-93).

Taken together, these still strongly suggest that the forcible defense of others is morally justified, since Augustine approves of soldiers acting with deadly force specifically for the reason that those soldiers are using “force for the protection of citizens,”<sup>124</sup> not the state *qua* the state, but Augustine essentially encourages an individual who is physically attacked not to resist the attack insofar as that individual is the sole victim. Augustine seems to be saying that the individual should defend others as he defends the state, since the only life he can justifiably lay down is his own. Another distinction that can be drawn is that a soldier in a just war is acting as an instrumentality of the state, who has a general obligation to submit to legitimate authority, while the individual has complete discretion in whether and how to act, and thus has greater freedom to decide whether to engage in violent defensive action.

Then there is Thomas Aquinas, possibly the most influential theologian of the Roman Catholic Church.<sup>125</sup> Aquinas taught that there are four factors that must be considered to determine the morality of an action: (1) being, (2) object, (3) circumstances, and (4) end (i.e., objective).<sup>126</sup> Applied in this context, Aquinas, in his *Summa Theologica*, taught that killing another human in self-defense is broad enough to include using deadly force against a burglar in your house.<sup>127</sup> “Therefore, according to Aquinas, killing is lawful as long as it is nothing more than a foreseen consequence of an action directed toward the preservation of life.”<sup>128</sup> This then would allow for a right to self-defense and a right to defend others.

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124. *Id.*

125. See NEW DICTIONARY OF THEOLOGY, *supra* note 59, at 682-84 (discussing Aquinas’s contributions to Roman Catholicism and several of his works, most notably *Summa Theologica*). Aquinas’s theological and philosophical teachings on metaphysics, epistemology, ethics, and the relationship between faith and reason has had enormous influence on Western thought, and carries his name as Thomism. See *id.* at 684-86.

126. See 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* 663-70 (Fr. Dominican Prov. trans., Christian Classics 1948) (1274). Given the variety of translations and publishers of *Summa Theologica*, it is helpful to note this material is found at pt. I of pt. II, question 18, arts. 1-4.

127. See *id.* at 1465, pt. II of pt. III, question 64, art. 7.

128. Jonathan Spelman, *The Morality of Killing in Self-Defense: A Christian Perspective* 13-14 (2008), ASHBROOK STATESMANSHIP THESIS, available at <http://ashbrook.org/wp-content/uploads/2012/06/2008-Spelman.pdf>.

Many post-Reformation Christian writers take a simpler approach, possibly attributable to the emergence of Ockham's Razor.<sup>129</sup> Consider John Calvin, considered by many the foremost theologian of the Protestant Reformation.<sup>130</sup> In his *Institutes of the Christian Religion*, Calvin explores each of the Ten Commandments.<sup>131</sup> When discussing the Sixth Commandment against murder,<sup>132</sup> Calvin writes that it includes a positive corollary, which is, "Accordingly, we are required faithfully to do what in us lies to defend the life of our neighbor . . . to be vigilant in warding off harm, and, when danger comes, to assist in removing it."<sup>133</sup> In other words, the biblical prohibition on deliberately causing the death of an innocent person conversely imposes on each person a duty to defend that innocent person from deadly threats posed by others. Calvin does not refer to self-defense in this section, but the reasoning by which he supports this moral obligation would equally apply to a person defending his own life, if that person is innocent of any wrongdoing that warrants capital punishment.

Given the enormity of the full body of theological literature, these examples above constitute only a small sample of thought on the issue. I do not presume to claim mastery over all the relevant works. But these prominent examples provide a sampling of Christian thought. Extrapolating from these, it is reasonable to conclude that many Christian authorities consider the use of deadly force for defensive purposes morally justified under certain circumstances.

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129. William of Ockham promulgated Ockham's Razor in the fourteenth century, which, in short, is the principle that explanations and causes should be the most simple and direct that addresses the matter at hand. GEISLER, *supra* note 61, at 778.

130. Martin Luther's actions may have sparked the Reformation, beginning with his nailing his ninety-five theses to the castle church door in Wittenberg, Germany on October 31, 1517. See NEW DICTIONARY OF THEOLOGY, *supra* note 58, at 402. And Luther was a truly prolific writer whose entire body of work is nothing short of voluminous. See *id.* at 401-06. Nonetheless, I would say that Calvin's works represent a more systematic approach to theology and have had a more enduring impact on more areas of theology than anyone else from the Reformation period, including even Luther. See *id.* at 120-24, 565-72.

131. See generally 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 326-56 (Henry Beveridge trans., 1845) (1536).

132. See *supra* note 71 as to why the commandment against murder is labeled as the Sixth Commandment in this Article, versus the Fifth Commandment.

133. CALVIN, *supra* note 131, at 347.

V. THE FIRST AMENDMENT IS A LEGAL RIGHT AGAINST COERCION, AND THE SECOND AMENDMENT EFFECTUATES THE RIGHT

The Supreme Court has recently restored a fundamental First Amendment principle from which the Court had begun to deviate in 1971,<sup>134</sup> one that ties the First Amendment to the Second regarding self-defense. It is the principle of coercion: the First Amendment guarantees that Americans shall not be coerced with regard to the opinions—including religious beliefs—that they hold.<sup>135</sup> To coerce means “[t]o force to act or think in a certain way by use of pressure, threats, or intimidation, [or] to dominate, restrain, or control forcibly.”<sup>136</sup> The Supreme Court was closely divided on the predicate principles of the First Amendment. That balance tipped when Justice Samuel Alito replaced Justice Sandra Day O’Connor in 2006, as seen in two cases in particular since that time.<sup>137</sup>

A. *The First Amendment Adrift*

1. The Establishment Clause Unmoored from History

The Court decided *Lemon v. Kurtzman* in 1971.<sup>138</sup> The Court was attempting to reconcile two lines of cases. One was historically grounded, predicated upon the concept that the Establishment Clause of the Constitution should benevolently accommodate the varying religious beliefs of the American people.<sup>139</sup> The other arose in cases from the 1960s, embracing a “strict separation” theory of the Establishment Clause, that the Clause was designed to remove references to faith and the divine as much as possible from public life, to completely sterilize the public square from religion.<sup>140</sup> This latter view of the Establishment Clause reached its zenith in 1968, in *Epperson v. Arkansas*, where the Court held that the Clause forbids

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134. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

135. See U.S. CONST. amend. I, cls. 1-3 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

136. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 367 (3d ed. 1996).

137. See discussion *infra* Part V.B.

138. *Lemon*, 403 U.S. 602.

139. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL’Y 219, 225-27 (2008).

140. *Id.* at 224-25.

the government from favoring religion or faith generically over irreligion or atheism.<sup>141</sup>

After years of confusion, the Court attempted to make sense of these inconsistent cases with the “endorsement test.”<sup>142</sup> In 1989, the Supreme Court adopted this test to invalidate a courthouse nativity display in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>143</sup> The endorsement test asks whether a reasonable observer would believe the challenged government action has the effect of endorsing religion.<sup>144</sup>

## 2. Free Speech Clause Confusion

Several similar changes occurred in free speech jurisprudence during this time. The one change relevant to this Article began in *Austin v. Michigan Chamber of Commerce* where the Court held that corporations did not have First Amendment rights under the Free Speech Clause.<sup>145</sup> This decision overruled nearly a century of case law, including fairly recent cases.<sup>146</sup> Then the Supreme Court reaffirmed *Austin*'s error thirteen years later in a controversial 5-4 decision that upheld several stringent restrictions on political speech in the Bipartisan Campaign Reform Act—also known as BCRA or McCain-Feingold—in its decision in *McConnell v. FEC*.<sup>147</sup>

Before this decision, the government generally had a compelling interest in avoiding corruption arising out of campaign contributions (which few would doubt), or even the appearance of corruption.<sup>148</sup> But that had always been limited to quid pro quo corruption, or “this for that.”<sup>149</sup> In *McConnell*, the Court expanded this idea to forbid even groups' independent expenditures—those that are not coordinated with the office-seeker—within certain time periods before Election Day, even if they only discussed

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141. *Epperson v. Arkansas*, 393 U.S. 97, 108-09 (1968).

142. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

143. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 578-79, 620-21 (1989).

144. *Id.* at 620.

145. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 664-65 (1990).

146. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (holding political speech does not forfeit Free Speech Clause protection “simply because its source is a corporation.”).

147. *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003).

148. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

149. *Id.* at 26-28.

issues the group cares about.<sup>150</sup> For example, the National Rifle Association could not put out an advertisement two weeks before Election Day telling the voters whether Candidate Smith supported or opposed gun rights. This entire concept of curtailing political speech would have been unthinkable to the Framers of the Constitution, and unknown in American law for over two centuries.

*B. The First Amendment Reclaimed in Citizens United and Town of Greece*

Two lines of cases righted the ship on both of these issues in recent years. Time—and with it the composition of the Supreme Court—will determine whether these recently restored principles become well-settled law once again.

The first such case—decided just after Justice Samuel Alito replaced Justice O'Connor in 2007—was *FEC v. Wisconsin Right to Life, Inc.*<sup>151</sup> In that case the Supreme Court held that the Bipartisan Campaign Reform Act's ("BCRA") ban on independent political speech only prohibited "electioneering communication" that expressly advocated the election or defeat of a candidate.<sup>152</sup> Then, in its landmark decision in 2010, *Citizens United v. FEC*, the Court overruled *Austin* and the relevant part of *McConnell*.<sup>153</sup> Restoring recognition of organizational free speech rights is also important because most media outlets are some form of corporate entity.<sup>154</sup> Therefore, even though BCRA contained an exception for media, it is important for the sake of an informed citizenry to affirm that those media outlets are entitled to speak as a constitutional right, not as a statutory entitlement that Congress could rescind at any time.<sup>155</sup>

The Supreme Court's holding that the First Amendment does not lose its power just because the speaker is a group—such as the NRA—instead of a human being, restored a century of precedent and two centuries of political thought. It was a repudiation of the premise that government has the right to shape the marketplace of ideas. To the contrary, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use

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150. *McConnell*, 540 U.S. at 205-06.

151. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

152. *Id.* at 481 (Roberts, C.J., plurality).

153. *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010).

154. *Id.* at 349-54.

155. *Id.*

information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."<sup>156</sup>

The second case is an Establishment Clause case, *Town of Greece v. Galloway*, where the Supreme Court upheld the constitutionality of beginning legislative bodies' sessions with prayer.<sup>157</sup> The Court began by reaffirming its first legislative prayer case, *Marsh v. Chambers* from 1983.<sup>158</sup> But then the Court turned to the concept of coercion.

Justice Kennedy wrote for a plurality of the Court, rejecting the plaintiffs' claim that they were coerced by hearing prayers they did not like, writing, "[R]espondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion."<sup>159</sup> Justice Kennedy added that "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."<sup>160</sup>

More broadly than just the Establishment Clause, Justice Kennedy made it clear that the coercion principle is the underlying foundation to all of the First Amendment.<sup>161</sup> "It is an elemental *First Amendment* principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'"<sup>162</sup> In this discussion, Justice Kennedy quoted *West Virginia Bd. of Educ. v. Barnette*,<sup>163</sup> which was a case asserting the Free Speech Clause and the Free Exercise Clause, but which Justice Kennedy applied here to the Establishment Clause.<sup>164</sup> As the Court declared in that seminal case, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>165</sup> Forbidding government

156. *Id.* at 339 (citation omitted).

157. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

158. *See id.* (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

159. *Id.* at 1826.

160. *Id.* at 1827 (citing *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

161. *Id.* at 1825 (Kennedy, J., plurality).

162. *Id.* (emphasis added) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

163. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

164. *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality) (citing *Barnette*, 319 U.S. at 642).

165. *Barnette*, 319 U.S. at 642.



coercion of thought and expression is the unifying principle underlying the First Amendment.<sup>166</sup>

C. *The Coercion Principle Finds Application in the Second Amendment*

This coercion principle has a corollary in the Second Amendment right to bear arms. The First Amendment gives you a right not to be coerced with respect to your beliefs. This is especially true for religious beliefs since a person can claim the protection of multiple First Amendment provisions. The Second Amendment gives you the ability to meaningfully effectuate that right. That can be seen as a restatement of the anti-tyranny rationale of the Second Amendment. The nature of legitimate government is that it constrains bad behavior on the part of individuals and organizations by the latent threat that such bad behavior will evoke a response of organized, legally sanctioned coercive power. Tyranny—or in its softer forms, government oppression—is government coercion against a person in violation of that person’s rights; such illegitimate government action employs coercion to constrain not only bad behavior, but also good behavior. The right to bear arms against an oppressive government can be restated as the right to be free of illegitimate government coercion.

The interesting expansion on that principle beyond even the reach of the First Amendment is that it applies against *all* oppressors, not just government oppressors. Under the state action doctrine, fundamental rights such as those guaranteed by the First and Second Amendments—along with other enumerated rights, and implied rights as well—can only be asserted against the government, not private actors.<sup>167</sup> The state action doctrine is a cornerstone of constitutional jurisprudence.<sup>168</sup> But analogous to statutes that give rights of action against private actors, perhaps the best

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166. See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citations omitted).

167. See *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.”) (citation omitted); see also *Cal. Retail Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 13, 19-20 (1948).

168. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The state action doctrine has its critics, to be sure, which can approach the issue from different angles. Compare, e.g., Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA L. REV.* 1379 (2006) with Cass R. Sunstein, *State Action is Always Present*, 3 *CHI. J. INT’L L.* 465 (2002). But the doctrine is not going anywhere anytime soon.

known of which applies to hotels, restaurants, and other public accommodations for certain types of discrimination,<sup>169</sup> the Second Amendment contains a self-executing right of action against unlawful coercive intimidation. It facilitates proportionate self-defense against both public and private violence,<sup>170</sup> enabling a form of self-help that is unusual in the law. It goes without saying that a person may only consider using deadly force if confronted with deadly force. As with all laws pertaining to self-defense and defense of others, the level of force must be proportional to the level of force employed by the aggressor.

This right of self-defense would not apply, for example, to one of the few bad-apple police officers in the Deep South in the 1950s and 1960s who would harass, abuse, intimidate, or even falsely arrest black Americans seeking to exercise their civil rights. However, it would apply to a person—whether a private person or a government agent—using deadly force against an American citizen because of that citizen's peaceful religious beliefs or political opinions. In the context of this Article, it means the Supreme Law of the Land secures a right in the Second Amendment to resist unlawful attempts at coercion that would abridge a person's ability to exercise his First Amendment rights, whether under the Free Speech Clause, the Free Exercise Clause, the Establishment Clause,<sup>171</sup> or any other First Amendment interest.<sup>172</sup>

#### VI. EXERCISING FIRST AMENDMENT RIGHTS CAN ENTAIL HEIGHTENED NEED FOR PHYSICAL PROTECTION

Now this Article turns in a more speculative direction. Part II concerned matters the Supreme Court has settled, and Parts III and IV concerned hermeneutics and historical facts about theological beliefs. Part V examined

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169. See Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

170. *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

171. It should be noted that in *Town of Greece*, Justice Clarence Thomas reasserts his long-held position that the First Amendment is a federalism provision and not any sort of fundamental right to disestablishment, 134 S. Ct. 1811, 1835-37 (2014) (Thomas, J., concurring in part and concurring in the judgment). It seems unlikely—if for no other reason than *stare decisis*—that there will be five Justices on the Court anytime in the near future willing to overrule part of *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), to disincorporate the Establishment Clause. Nonetheless, for the reasons Justice Thomas restates in *Town of Greece*, 134 S. Ct. at 1835-37, his view is the original meaning of the Establishment Clause.

172. Although a full discussion is beyond the scope of this Article, it is readily apparent how coercion could chill citizens' exercising their First Amendment rights to assembly or to petition the government. See U.S. CONST. amend. I.

the resurgence of the principle of coercion in First Amendment jurisprudence and its clear relevance to the Second Amendment. The remaining parts of this Article are more prospective than retrospective. They are the “Now what?” of how Christians should regard their own self-defense in America in the twenty-first century. And some who read this material will certainly dispute its argument.

The right to free speech matters little, if no one is willing to speak up and be heard. The same can be said for religious liberty, if people are afraid to practice their faith. There are many issues where no one is disincentivized from sharing their opinion, religious or otherwise. Publicly announcing your support “mom and apple pie” is rather unobjectionable in America. But public support is not so monolithic on most issues.

To the contrary, if something is worth calling a “public issue,” then there are probably at least two widely held opinions on the matter. Most often when those opinions conflict, it will elicit at least some energetic debate. And sometimes the debate stirs deeply held passions, where tempers flare up far beyond what one would characterize as “spirited.” These issues can lead to shouting, protests, and occasionally even riots.

A. *Americans Can Have Legitimate Concern for Physical Retribution for Political Beliefs or Actions*

For instances where a person who is speaking out about a particular issue could evoke extreme anger in others, the speaker could have a reasonable apprehension of physical retribution. Few issues are attended by reactions rising to that level of intensity. But when they do, speakers on one or both sides of an issue can be targeted with various forms of threats and intimidation, and sometimes even actual violence.

Race has historically caused such reactions in this country. Consider the antebellum era. This was especially true after Harriet Beecher Stowe published *Uncle Tom's Cabin* in 1851 and 1852, showcasing to Americans in the northern states the horrors and inhumanity of slavery. The most infamous example of violent reactions to anti-slavery speech before the Civil War was on May 22, 1856, when Congressman Preston Brooks of South Carolina attacked the unsuspecting Senator Charles Sumner of Massachusetts with a metal-topped cane on the floor of the United States Senate, beating him severely.<sup>173</sup>

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173. The Caning of Sen. Charles Sumner, U.S. SENATE, [www.senate.gov/artandhistory/history/minute/The\\_Caning\\_of\\_Senator\\_Charles\\_Sumner.htm](http://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm) (last visited Sept. 18, 2014). It should be noted, however, that this was actually not an

A century later, a similar situation went to the Supreme Court.<sup>174</sup> Alabama's Attorney General demanded that the NAACP turn over to the state a list of all its members and supporters in Alabama, and the NAACP refused.<sup>175</sup> In an opinion by Justice Harlan, the Court held that it would violate the First Amendment rights of NAACP members to subject themselves to that form of forced disclosure to the public, whereby it was expected that private citizens might take actions against those associated with the NAACP.<sup>176</sup>

Beginning with the Civil Rights era that commenced when Rosa Parks refused to sit in the back of the bus on December 1, 1955, race-related violence was again an issue that received national headlines. Black Americans were routinely bullied or beaten, and on occasion even tragically murdered. Birmingham, Alabama provides an illustration of how destructive such opposition to unpopular speech can be.<sup>177</sup> On September 15, 1963, opponents of racial equality firebombed the 16th Street Baptist Church where civil-rights leaders often met, killing four innocent young black girls.<sup>178</sup>

Too much of the history of Black Americans showcases the value of the right to bear arms. It is no surprise that some would say, "[A] Winchester rifle should have a place of honor in every black home."<sup>179</sup> Professor Nicolas Johnson details how the black community did not begin to turn against firearm ownership until the 1960s, attributing this in part to the black community claiming increased government power, which coincided with

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instance of someone facing violence for free speech, which would only apply to a private citizen. Sumner was speaking on the floor of the Senate as a Senator. As such, he enjoys certain constitutional protections not available to private citizens, such as legislative immunity. See U.S. CONST. art. I, § 6, cl. 1 (Speech or Debate Clause). But he was not protected at that moment by the First Amendment. Nevertheless, this instance is one of the most vivid in American history of the dangers a person can face for speaking out on controversial topics, making it an appropriate example here.

174. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

175. *Id.* at 452-54.

176. See *id.* at 462.

177. Jesse Greenspan, *Remembering the Birmingham Church Bombings*, HISTORY HEADLINES (Sep. 13, 2013), <http://www.history.com/news/remembering-the-birmingham-church-bombing>.

178. *Id.*

179. Ida B. Wells, *Southern Horrors: Lynch Law in All Its Phases*, in SOUTHERN HORRORS AND OTHER WRITINGS 49, 70 (Jacqueline Jones Royster ed., 1997).

the Civil Rights era's black leadership becoming part of the American political elite.<sup>180</sup>

The Court in *Patterson* understood and recognized that exercising the First Amendment right to free speech can put someone in a situation where they reasonably fear physical harm.<sup>181</sup> The bombing of the 16th Street Baptist Church tragically demonstrated how real that danger is. The First Amendment is violated not only by direct abridgements of speech, but also by state actions that have a chilling effect on protected speech.<sup>182</sup> This concern is so broad that the First Amendment is violated even by the impediments to speech imposed by burdensome litigation.<sup>183</sup>

These terrible events also highlight why Second Amendment rights should be regarded as vitally important to America's black communities. In the nineteenth century, there were deliberate efforts to disarm blacks to help effectuate their oppression.<sup>184</sup> Both before the Civil War and in the struggle for realizing the racial equality promised by the Reconstruction Amendments for more than a century afterwards, the facts demonstrate the vital importance of the right to keep and bear arms for blacks in America.<sup>185</sup>

#### *B. These First Amendment Concerns Can Also Reach Religious Speech and Actions as Persecution*

Thus, it is evident that people expressing unpopular views have feared violence for those views when the subject matter has been political in nature. In various other countries, aggressors may target others for violence due to ethnicity or religious identity.<sup>186</sup> There can also be sectarian strife

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180. Nicolas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1560-67 (2013).

181. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

182. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997).

183. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (Roberts, C.J., plurality) (citing Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

184. McDonald v. City of Chicago, 561 U.S. 742, 770-73 (2010); see generally STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS (1998).

185. See Johnson, *supra* note 180, at 1491; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 338 (1991); see generally NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS, 1866-76 (2014).

186. For example, there have been incidents of violence in foreign nations targeting Jews, especially in Europe. See William Bigelow, *Report: Worldwide Anti-Semitism Spiked in 2012*, BREITBART NEWS (Apr. 8, 2013), [www.breitbart.com/Big-Peace/2013/04/08/Worldwide-anti-semitism-spiked-in-2012](http://www.breitbart.com/Big-Peace/2013/04/08/Worldwide-anti-semitism-spiked-in-2012).

within a single overarching religion, such as between Sunni and Shiite Muslims.<sup>187</sup> And in other nations, protestors who are followers of various faiths, such as Islam, sometimes engage in violent protests because of a religious message with which they disagree.<sup>188</sup> Current foreign affairs reported by the media bears out the truth of that statement.

Life in the United States has never been characterized by violence over religious propositions. Yet in recent years controversies related to religious beliefs have been opposed with increasing and unprecedented hostility. Much of this aggression and intimidation has been connected with the issue of redefining marriage in America to include homosexual relationships. For example, supporters of California's Proposition 8 reported organized economic boycotts.<sup>189</sup> When the Obama-Holder Justice Department decided to reverse its earlier decision and discontinue defending against constitutional challenges of the Defense of Marriage Act ("DOMA"),<sup>190</sup> King & Spalding, the law firm that had stepped in to serve as legal counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives, dropped Congress as a client,<sup>191</sup> amid reports of pressure

187. See, e.g., Associated Press, *World News Digest: In Iraq, Attacks Raise Fears of Sunni-Shiite Violence*, WASH. POST (Dec. 1, 2013), [www.washingtonpost.com/world/world-news-digest-in-iraq-attacks-raise-fears-of-sunni-shiite-violence/2013/12/01/329be968-5aaf-11e3-a66d-156b463c78aa\\_story.html](http://www.washingtonpost.com/world/world-news-digest-in-iraq-attacks-raise-fears-of-sunni-shiite-violence/2013/12/01/329be968-5aaf-11e3-a66d-156b463c78aa_story.html).

188. For example, Muslims took to the streets in violent protests when the Danish newspaper *Jyllands-Posten* published twelve cartoons depicting the Prophet Muhammad on September 30, 2005. Associated Press, *Chronology of Prophet Muhammad Cartoon Controversy*, FOX NEWS (Feb. 6, 2006), [www.foxnews.com/story/2006/02/06/chronology-prophet-muhammad-cartoon-controversy/](http://www.foxnews.com/story/2006/02/06/chronology-prophet-muhammad-cartoon-controversy/).

189. Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, WALL ST. J. (Dec. 27, 2008), [online.wsj.com/news/articles/SB123033766467736451](http://online.wsj.com/news/articles/SB123033766467736451).

190. 1 U.S.C. § 7 (2012); see generally Curt A. Levey & Kenneth A. Klukowski, *Take Care, Now: Stare Decisis and the Narrowed Exception to the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 381-82, 412-18 (2014).

191. To keep his firm's obligation to defend Congress, former Solicitor General Paul D. Clement resigned from King & Spalding and moved to Bancroft LLC. Ashby Jones, *After King & Spalding Drops DOMA Case, Clement Drops Firm*, WALL ST. J. (Apr. 25, 2011), <http://blogs.wsj.com/law/2011/04/25/after-king-spalding-drops-doma-case-clement-drops-firm/>. Clement's resignation letter reads in part:

I resign out of the firmly-held belief that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters. Defending unpopular positions is what lawyers do. The adversary system of justice depends on it, especially in cases where the passions run high. Efforts to delegitimize any representation for one side of a legal controversy are a profound threat to the rule of law.

from major corporate clients that they would discontinue doing business with King & Spalding.<sup>192</sup> Further, law students at top schools considered it trendy not to take a position as law associates at the firm.<sup>193</sup>

In a disturbing parallel to the NAACP's *Patterson* case,<sup>194</sup> some voters in Washington feared retribution even for signing a petition to put on the ballot a measure related to homosexuality and marriage after seeing the reaction to Prop 8, discussed above. In *Doe v. Reed*, the Supreme Court held in an opinion by Chief Justice John Roberts that, as a facial matter, petition signatures are not ordinarily protected, but could be protected in an as-applied challenge where there is some showing that signing the petition could result in retribution or intimidation.<sup>195</sup> The Court reasoned that it has repeatedly upheld public-transparency laws related to voting to facilitate efforts to prevent fraud, and so would not broadly rule signers' identities protected.<sup>196</sup> Justice Samuel Alito concurred, adding that most petitions are on matters that are not controversial in the slightest, and that he believes, to ensure First Amendment protection is readily available, the threshold showing required for keeping signers anonymous should be a low one.<sup>197</sup> Justice Clarence Thomas dissented, writing that mandatory disclosure severely burdens First Amendment rights and chills citizen participation, and that there are always less restrictive means to satisfy the public interests such as preventing fraud.<sup>198</sup>

Religious expression, like political expression, often requires a certain amount of courage. And such expression is constitutionally protected.<sup>199</sup> "[I]t is immaterial whether the beliefs sought to be advanced . . . pertain to

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*Id.* Clement's courageous and principled act has proven the exception to the rule, however.

192. See, e.g., Jonathan H. Adler, *Did Coke Pressure King & Spalding?*, VOLOKH CONSPIRACY (Apr. 27, 2011), <http://www.volokh.com/2011/04/27/did-coke-pressure-king-spalding/>.

193. See Seth Stern, *Firm's Exit Raises Questions*, CONGRESS.ORG (May 4, 2011), [https://ssl.congress.org/news/2011/05/04/firms\\_exit\\_raises\\_questions](https://ssl.congress.org/news/2011/05/04/firms_exit_raises_questions).

194. See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

195. *Doe v. Reed*, 561 U.S. 186, 201 (2010).

196. *Id.* at 195-200.

197. *Id.* at 202-03, 206-07 (Alito, J., concurring).

198. *Id.* at 228-29 (Thomas, J., dissenting). It is worth noting that as a Black American who grew up in the South decades ago, it is possible Justice Thomas has more firsthand experience with the sort of intimidation and hostility relevant to concerns about signing controversial petitions than any other current Member on the Court.

199. U.S. CONST. amend. I.

political, economic, religious or cultural matters.”<sup>200</sup> As speech that is politically unpopular increasingly owes its unpopularity to expressing traditional religious viewpoints, especially those of observant Christians, Americans are likely to see an increasing number of instances where those religious speakers face court imposed sanctions for their beliefs, unless the Supreme Court reaffirms that the same broad protections other types of speech enjoy equally apply to religious expression.<sup>201</sup>

### C. *Fighting Words Doctrine and Expressing Unpopular Religious Views*

Reactions in some quarters against Christian beliefs on marriage could even implicate the fighting words doctrine. In *Chaplinsky v. New Hampshire*, the Supreme Court recognized a new category of unprotected speech called “fighting words” in a case where a Jehovah’s Witness had been convicted for insulting a local crowd with language that could have led to a violent response.<sup>202</sup> Writing for the Court, Justice Frank Murphy explained that fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>203</sup> An example would be if an adult man were walking in a shopping mall with his eight-year-old daughter, and another grown man were to make an extremely insulting comment criticizing the young girl’s clothing or appearance. If a police officer were to observe the exchange and the father’s expected angry response, the officer would not violate the First Amendment by ordering

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200. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

201. For example, a Christian photojournalist had a fine imposed against her for declining to conduct a photo-shoot for a homosexual commitment ceremony (not a homosexual wedding or civil union, since those did not exist in New Mexico at the time), which was upheld by the New Mexico Supreme Court. See *Elane Photography, LLC, v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (U.S. 2014); see also Ken Klukowski, *Same-Sex Marriage, Religious Liberty Collide in Case Presented to Supreme Court*, BREITBART NEWS (Nov. 8, 2013), <http://www.breitbart.com/Big-Government/2013/11/08/Gay-Marriage-and-Religious-Liberty-Collide-in-New-Supreme-Case-involving-Christian-Photographer>.

202. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-72 (1942). The Court has held that certain types of speech are categorically unprotected by the Free Speech Clause. Other common examples include obscenity, see *Miller v. California*, 413 U.S. 15, 23-24 (1973); defamation, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268-69 (1964); fraud, see *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976); and inciting imminent violence, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

203. *Chaplinsky*, 315 U.S. at 572 (footnote omitted).



the offensive speaker to stop talking and leave the premises, and to arrest the offender if he refused.

“It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>204</sup> The *Chaplinsky* Court then quoted one of its landmark Free Exercise Clause cases, *Cantwell v. Connecticut*, where the Court reasoned, “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>205</sup> The United States Supreme Court adopted the definition of fighting words given by the New Hampshire Supreme Court that under the statute such words are “forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”<sup>206</sup> The Supreme Court also adopted the New Hampshire court’s rationale for a fighting-words exception to the First Amendment, reasoning in part,

The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight.<sup>207</sup>

The Supreme Court upheld the criminal conviction predicated upon the New Hampshire statute.<sup>208</sup>

The attitudes and rhetoric of the political Far Left in America on certain social issues are becoming so caustic and venomous that the possibility is

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204. *Id.* (footnote omitted).

205. *Id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

206. *Id.* at 573 (quoting *State v. Brown*, 38 A. 731 (N.H. 1894)).

207. *Id.* (alteration in original).

208. *Id.* at 574. On a related note, the Supreme Court held that police can stop a person from causing a disturbance when that person’s speech “passes the bounds of argument or persuasion,” and instead could precipitate a riot. *Feiner v. New York*, 340 U.S. 315, 321 (1951). The relevant challenge in this context is that an observant Christian might be expressing views that would have been unobjectionable thirty years ago, but that a virulently hostile, anti-Christian crowd today might react to violently. Under *Feiner*, police would not violate the First Amendment by stopping the speech or removing the speaker.

growing that some zealots for a liberal cause would cite the fighting words doctrine to say that Christians expressing their orthodox biblical beliefs are not protected by the First Amendment. Part VII will discuss several instances of harsh actions taken against Christians—including losing jobs, having fines imposed upon them, and threats of criminal prosecution—for holding a biblical view of marriage that does not embrace homosexuality, polygamy, or polyamory.<sup>209</sup> But much more fundamentally, laws could be

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209. See discussion *infra* Part VII. The United States is currently in the midst of a profound debate between two views of marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). One is focused on children, that each generation in every nation has an existential interest in producing a successor generation that is well adjusted, economically productive, and able to sustain and protect itself. This “conjugal view” of marriage holds that marriage laws are focused on the biological reality that children are created through sexual union between one man and one woman, and that marriage laws exist to bind that man and woman together to create a socially recognized structure for the protection, nurturing, and raising of each child to adulthood. See Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 246, 252-59 (2011). The other is what some scholars refer to as a “revisionist view” of marriage, focused on romantic-emotional bonds between people, which can either be persons of the same sex, or more than two persons. See *id.* at 246-47, 260-75.

Some activists who are seeking to enshrine the revisionist view in law openly admit they seek to abolish the notion of marriage as an exclusive lifelong commitment to a single person. See, e.g., Ari Karpel, *Monogamish*, ADVOCATE (July 7, 2011), [http://www.advocate.com/Print\\_Issue/Features/Monogamish/](http://www.advocate.com/Print_Issue/Features/Monogamish/). One major American newspaper carried the story of a lesbian “throuple”—a three-person union, consisting of two lesbians legally married in Massachusetts (which has revised its marriage laws to include same-sex union), then a third lesbian added through an extralegal private ceremony. David K. Li, *Married Lesbian “Throuple” Expecting First Child*, N.Y. POST (Apr. 23, 2014), <http://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/>. They executed private contracts to imitate the legal benefits of marriage, and one became pregnant through artificial means, and the “throuple” is using additional private contracts to jointly have parental rights of the child between them. See *id.* Recently a federal district court invalidated Utah’s law criminalizing polygamy. See *Brown v. Herbert*, 947 F. Supp. 2d 1170 (D. Utah 2013). The case of this “throuple” shows that this movement to redefine marriage has no limiting principle, as additional news outlets show. See Christine Sisto, *The Odd Throuple*, NAT’L REV. (Apr. 28, 2014), <http://www.nationalreview.com/article/376709/odd-throuple-christine-sisto>. And many of the same media outlets praise the recognition of these unions. See, e.g., James Nichols, *Stephen Colbert Not Happy About Lesbian “Throuple,”* HUFFINGTON POST (Aug. 25, 2014), [http://www.huffingtonpost.com/2014/05/01/stephen-colbert-throuple\\_n\\_5248881.html](http://www.huffingtonpost.com/2014/05/01/stephen-colbert-throuple_n_5248881.html). Others explicitly endorse officially revising marriage laws further to explicitly include multi-person marriages. See, e.g., Jillian Keenan, *Legalize Polygamy!*, SLATE (Apr. 15, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/04/legalize\\_polygamy\\_marriage\\_equality\\_for\\_all.html](http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html). Those who are intellectually honest admit that the right they are seeking to constitutionalize for persons to marry anyone whom they desire and who consents to marry them would include both same-sex and polygamous

enacted forbidding the sharing of the gospel,<sup>210</sup> saying that to tell people that they are sinners in the sight of a holy God is degrading,<sup>211</sup> and mentioning that there is such a place as hell,<sup>212</sup> or that the Bible teaches the guilt of people's sins could justly send them there unless they find forgiveness for their sins,<sup>213</sup> are barbaric concepts. Perhaps such orthodox Christian teaching could be designated by statute to be child abuse if conveyed to children against the millions of American Christians who heed the biblical command to teach their children the gospel from an early age.<sup>214</sup>

It does not take an active imagination to guess at the arguments that would be made, as court rulings against the First Amendment rights of those Christian speakers would quote language straight out of *Chaplinsky*. They would hold "such utterances are no essential part of any exposition of ideas."<sup>215</sup> These naysayers would add that it goes without saying that expressing such beliefs are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"<sup>216</sup> because they are so plainly false that they are incompatible with the "enlightened sensibilities" of our "evolving sense of decency." Imparting such beliefs to children could be labeled "personal abuse [that] is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."<sup>217</sup> If so, this would effectuate a radical inversion of

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and polyamorous relationships. See, e.g., *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), [http://beyondmarriage.org/full\\_statement.html](http://beyondmarriage.org/full_statement.html) (showing more than 300 "LGBT and allied" scholars and advocates—including prominent Ivy League professors—explicitly call for official recognition of sexual relationships involving more than two partners); Transcript, *Sacred: Religion, Sexuality, and the Law*, 16 CARDOZO J.L. & GENDER 637, 652-61 (2010) (remarks of Prof. Nadine Strossen). As of late 2014, the national dialogue on the issue of marriage does not extend to this vast array of possible outcomes if the nation embraces the view of marriage centered around emotional attachment and romantic activity rather than the millennia-old view based on biology and procreation.

210. See *Matthew* 28:18-20.

211. See *Romans* 3:9-23.

212. See *Luke* 12:4-5.

213. See *Romans* 3:24-26; *Ephesians* 2:1-10.

214. See 2 *Timothy* 3:15; cf. *Deuteronomy* 11:19.

215. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

216. *Id.*

217. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

constitutional protection for which this nation was originally founded to guarantee—religious belief free from government intrusion—and would instead join this nation with the growing number of nations where Christians are persecuted for their faith in Jesus Christ. All other faiths cleaving to those, or similar, beliefs could likewise be extinguished.

## VII. INCREASING URGENCY OF SECOND AMENDMENT PROTECTION FOR FIRST AMENDMENT RIGHTS

In light of the discussion up to this point, it is possible that those who exercise their Second Amendment rights will be more assertive in their First Amendment rights. I am not currently aware of empirical studies on this topic, so among other things, this part of the Article suggests a research agenda for social scientists going forward.

### A. *Growing Opposition to Christians at Home and Abroad*

Christians are currently facing terrible persecution around the globe. In Iraq, the media is full of stories of Christians facing execution if they do not convert to Islam.<sup>218</sup> And recent years have seen deeply disturbing stories from Egypt<sup>219</sup> and Nigeria,<sup>220</sup> among other places.

But it is not confined to foreign lands. Opposition to Christian beliefs is growing in the United States. In the past several years, a Christian photographer named Elaine Huigenin was fined in New Mexico because she declined to photograph a same-sex commitment ceremony for two lesbians, at a time when New Mexico recognized neither marriage nor civil

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218. Mary Chastain, *ISIS Buries 500 Yazidis Alive, Orders Others to Convert to Islam or Die*, BREITBART NEWS (Aug. 10, 2014), <http://www.breitbart.com/Big-Peace/2014/08/10/ISIS-Executes-at-Least-500-Yazidis-Burying-Many-Alive-Told-Others-to-Convert-to-Islam-or-Die>.

219. Nina Shea, *American Christians Pledge Solidarity with Persecuted Christians in Egypt, Iraq and Syria*, FOX NEWS (May 7, 2014), <http://www.foxnews.com/opinion/2014/05/07/american-christians-pledge-solidarity-with-persecuted-christians-in-egypt-iraq/>.

220. Peter Clotty, *Nigerian Group Warns of Boko Haram Christianity Attacks*, VOICE AM. NEWS (May 14, 2014), <http://www.voanews.com/content/nigeria-group-warns-of-boko-haram-christianity-attacks/1914722.html>; Robin Harris, *The Kidnapped Nigerian Girls are Christian. Why Doesn't Our Media Say So?*, SPECTATOR (May 8, 2014), <http://blogs.spectator.co.uk/coffeehouse/2014/05/boko-haram-only-kidnapped-the-nigerian-girls-because-they-were-christian>.

unions for lesbian couples.<sup>221</sup> In Colorado, a baker named Jack Phillips is under court order to bake wedding cakes that celebrate gay marriage if asked by a homosexual couple to do so, and has been ordered to undergo “re-education” on this issue,<sup>222</sup> and evidently could face contempt of court if he refuses to do either.<sup>223</sup> Sportscaster Craig James was terminated by Fox Sports because, while a political candidate for U.S. Senate, he said he believes marriage is a union between one man and one woman.<sup>224</sup> The Christian owner of a T-shirt company is facing legal sanctions for declining to print shirts celebrating homosexuality for a gay pride festival.<sup>225</sup> And the Chief Executive Officer of Mozilla lost his position simply because in 2008 he gave a small donation supporting the “Prop 8” measure in California to define marriage as the union between one man and one woman in that state’s constitution,<sup>226</sup> at a time when that was the law in California and both major political parties officially supported marriage as the union of one

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221. See *supra* text accompanying note 201. The Supreme Court denied review in this case. *Elane Photography, LLC, v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). It should also be noted that *Elane Photography* only challenged the New Mexico decision under the Free Speech Clause of the First Amendment, U.S. Const. amend. I, cl. 3, and did not raise whether the state action violated the Free Exercise Clause, U.S. Const. amend. I, cl. 2.

222. Mark Martin, *Crumbling Freedom: Cake Artist Sent to “Reeducation,”* CBN NEWS (Aug. 8, 2014), <http://www.cbn.com/cbnnews/us/2014/July/Crumbling-Freedom-Cake-Artist-Sent-to-Reeducation/>.

223. See Ken Klukowski, *Baker Faces Prison for Refusing to Bake Same-Sex Wedding Cake*, BREITBART NEWS (Dec. 12, 2013), <http://www.breitbart.com/Big-Government/2013/12/12/Christian-Baker-Willing-to-Go-to-Jail-for-Declining-Gay-Wedding-Cake>. It should be noted that the media tried to downplay this story, and that the lack of media attention to such situations may be why more Americans are not yet aware of the religious-liberty implications of this and other current public policy debates. See Ken Klukowski, *Politifact Deserves “Pants on Fire” on Religious Liberty and Gay Marriage*, BREITBART NEWS (July 8, 2013), <http://www.breitbart.com/Big-Journalism/2013/07/08/Politifact-is-Half-Fiction-on-Religious-Liberty-and-Gay-Marriage>.

224. See Ken Klukowski, *Craig James Files Legal Complaint Against Fox Sports for Religious Discrimination*, BREITBART NEWS (Feb. 25, 2014), <http://www.breitbart.com/Breitbart-Sports/2014/02/25/Craig-James-Files-Lawsuit-Against-Fox-Sports-for-Religious-Discrimination>.

225. Valerie Richardson, *High Court Declines Photographer’s Appeal in Gay Marriage Case*, WASH. TIMES (Apr. 7, 2014), <http://www.washingtontimes.com/news/2014/apr/7/high-declines-appeal-over-nm-gay-bias-case/?page=all>.

226. *Mozilla CEO Resigns After Furor Over Same-Sex Marriage*, BREITBART NEWS (Apr. 3, 2014), <http://www.breitbart.com/Big-Government/2014/04/03/Mozilla-CEO-resigns-after-furor-over-gay-rights>.

man and one woman. Although these incidents are not violent, they represent real people facing serious consequences, sometimes imposed by government, for being true to their Christian beliefs.

Moreover, it should also be noted that there has been at least one issue of major violence rising to the level of terrorism. On August 15, 2012, Floyd Lee Corkins, II entered the Washington, D.C. headquarters of the Family Research Council, posing as a young person seeking to apply for an internship.<sup>227</sup> He was carrying a firearm and almost one hundred rounds of ammunition.<sup>228</sup> When building manager Leo Johnson sensed something was amiss and stopped him in the entry hall, Corkins shot him.<sup>229</sup> Yet despite a severe injury to his arm, Johnson managed to wrestle Corkins to the ground and wrest the firearm away from him, and held him at gunpoint until the police and the Federal Bureau of Investigation took control of the scene.<sup>230</sup> Corkins admitted in a signed and videotaped confession that he was a gay-rights activist who believed that people who do not support same-sex marriage should be killed to purge society of such people, and that his intent was to assassinate everyone in the building.<sup>231</sup> He was convicted of committing an act of domestic terrorism, the first such conviction under the local laws of Washington, D.C., and was sentenced to twenty-five years in federal prison.<sup>232</sup>

Although this Article focuses on Christians, it should be noted that Jews are also experiencing hostility that is growing at a frightening rate. Anti-Semitism is on the rise in Europe.<sup>233</sup> And recent protests in New York City<sup>234</sup> and Washington, D.C.,<sup>235</sup> show that there are strong feelings among

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227. Ken Klukowski, *Media Ignore Domestic Terrorist Conviction of Gay-Rights Activist*, BREITBART NEWS (Feb. 11, 2013), [www.breitbart.com/Big-Journalism/2013/02/09/Media-Ignores-Domestic-Terrorist-Conviction-of-Gay-Rights-Activist](http://www.breitbart.com/Big-Journalism/2013/02/09/Media-Ignores-Domestic-Terrorist-Conviction-of-Gay-Rights-Activist).

228. *Id.*

229. *Id.*

230. *Id.*

231. *See id.* (quoting and reproducing the confession document).

232. *See* Ken Klukowski, *Convicted Anti-Christian Domestic Terrorist Sentenced to 25 Years in Prison*, BREITBART NEWS (Sept. 19, 2013), [www.breitbart.com/Big-Government/2013/09/19/Convicted-Gay-Marriage-Domestic-Terrorist-Sentences-to-25-Years-in-Prison](http://www.breitbart.com/Big-Government/2013/09/19/Convicted-Gay-Marriage-Domestic-Terrorist-Sentences-to-25-Years-in-Prison).

233. Jon Henley, *Antisemitism on Rise Across Europe "in Worst Times Since the Nazis,"* GUARDIAN (UK) (Aug. 7, 2014), [www.theguardian.com/society/2014/aug/07/antisemitism-rise-europe-worst-since-nazis](http://www.theguardian.com/society/2014/aug/07/antisemitism-rise-europe-worst-since-nazis).

234. Reuters, *Thousands Take to NY Streets to Protest Israeli Offensive in Gaza*, JERUSALEM POST (July 26, 2014), [www.jpost.com/Operation-Protective-Edge/Thousands-take-to-NY-streets-to-protest-Israeli-offensive-in-Gaza-368957](http://www.jpost.com/Operation-Protective-Edge/Thousands-take-to-NY-streets-to-protest-Israeli-offensive-in-Gaza-368957).

some in the United States against the Jewish State, and perhaps for some against the Jewish people.

*B. Exercising the Second Amendment Can Enhance Exercising Rights to Speech and Religion*

As already discussed, part of the burden on First Amendment rights is anything that chills protected expression. Simply put in the vernacular, people are more likely to keep their mouths shut when they are afraid something bad will happen to them if they speak up. As discussed in Part VI, this is equally true for religious speech as it is for political speech, and is probably true regarding religious practice as well.

That being so, I hypothesize that exercising the Second Amendment right to keep and bear arms would embolden observant Christians and other devout adherents of peaceful faiths in the United States to express and live out their traditional faith. A person with ready access to a firearm is less likely to be concerned that expressing his religiously inspired beliefs will result in suffering physical harm. That is all the more true if the gun owner is proficient in the handling and operation of those firearms.

First, the person would likely be more confident in his ability to successfully defend himself, or others physically present with him, from an attack. Those others regarding whose safety the speaker could be concerned with could be either loved ones or co-believers. The locus for such potential violence could vary, but would primarily either be (1) in a home setting, where the concern is someone forcibly entering your house, or (2) in a public setting wherein a person's beliefs are apparent, such as a church, religious school, or public event tied to the controversial belief, such as a political rally.

But even before considering whether a person could successfully ward off an attack, there is a deterrent effect if would-be aggressors become aware that their intended targets are armed, making such violence less likely. This deterrent effect is similar to the anti-tyranny rationale of the Second Amendment. When the citizens "of a nation are trained in arms and organized, they are better able to resist tyranny."<sup>236</sup> To safeguard against the extremely unlikely event of a tyrannical regime casting off the Constitution

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235. Britain Eakin & Wesley Robinson, *In Washington, Hundreds Protest Israeli Violence in Gaza*, WASH. POST (July 20, 2014), [www.washingtonpost.com/local/dc-protesters-show-frustration-against-us-israel-ties/2014/07/20/c7581c20-1021-11e4-98ee-daea85133bc9\\_story.html](http://www.washingtonpost.com/local/dc-protesters-show-frustration-against-us-israel-ties/2014/07/20/c7581c20-1021-11e4-98ee-daea85133bc9_story.html).

236. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

to rule by force of arms, the Second Amendment creates a credible possibility of armed resistance. This latent threat of armed resistance is what deters a ruler from attempting to ignore democracy and the Constitution, rather than the mobilizing of an armed force that actually precludes tyranny.<sup>237</sup>

This is not to say that Christians possessing firearms would necessarily use them, especially when being persecuted for their Christian faith. The Bible teaches Christians to expect persecution.<sup>238</sup> Many Christians believe that if they are persecuted for the sake of their faith in Jesus Christ, they understand it to be the providence of God that they should face such trials, and that it is the ultimate act of obedience to God and acceptance of his will to quietly accept punishment, including death, for the sake of the gospel.<sup>239</sup>

But those Christians would very likely use those firearms to defend family members or others who are in grave danger. This appears to be the best balancing of tensions between these sets of Christian authority. Consistent with Christian teaching, a Christian can fight to the death to defend those under his care, such as his children; to defend his country in the military or national service; to defend the public in a law enforcement role; or to defend even innocent strangers. A Christian can also generally use lethal force in self-defense when confronted with sufficient force to warrant such a reaction. When targeted specifically because of his Christian faith, a Christian can evade capture,<sup>240</sup> escape troubling situations,<sup>241</sup> and otherwise avoid confrontation.<sup>242</sup> When confrontation is unavoidable, and the attacker is a private party, it seems Christians could come to differing conclusions on the appropriate course of action. And when the unavoidable confrontation is unwinnable and brought by the government in the form of persecution, that is when it might—but I emphasize *might*—cross the line to where a Christian is expected to accept suffering.

The reason for the uncertainty is the system of government that exists in America, a system that under Christian doctrine is established by Divine

237. Nelson Lund, *The Second Amendment, Heller and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1373 (2009); Lund, *Political Liberty*, *supra* note 24, at 115.

238. *E.g.*, 2 Timothy 3:12 (“Indeed, all who desire to live a godly life in Christ Jesus will be persecuted.”); 1 Peter 4:14-16 (“If you are insulted for the name of Christ, you are blessed . . . if anyone suffers as a Christian, let him not be ashamed, but let him glory God in that name.”); *see, e.g.*, Acts 5:27-42.

239. *See, e.g.*, Acts 6:8-7:60.

240. *See, e.g.*, Acts 9:23-25.

241. *Cf.* Acts 19:21-41.

242. *Romans* 12:18.



Providence.<sup>243</sup> In the United States, the Constitution is the Supreme Law of the Land.<sup>244</sup> In the First Amendment, the Constitution provides that the federal government shall not establish a national religion,<sup>245</sup> nor prohibit the free exercise of religion,<sup>246</sup> nor abridge free speech.<sup>247</sup> The rights of religious liberty and free speech apply with equal force against state and local governments through the Fourteenth Amendment.<sup>248</sup> Moreover, in the Second Amendment, the Constitution secures a right to bear arms that was purposefully included in the Constitution,<sup>249</sup> specifically to empower citizens to resist a government that takes up arms to oppress its own citizens by force<sup>250</sup>—a right that applies equally against government at the federal, state, or local level.<sup>251</sup> Therefore, any government action that directly and deliberately targets Christians for their faith is unconstitutional, and thus is irredeemably unlawful. In those instances, a government officer is using power in violation of the true civil authority in this nation. Such an action is not law.<sup>252</sup> That being so, a strong argument can be made that Christians need not regard it as legitimate authority to which submission is owed, and so could resist. The same could be said of the followers of other established peaceful faiths, such as Judaism.<sup>253</sup>

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243. *Romans* 13:1-2 (“Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment.”); see also *Romans* 8:28; *Romans* 13:3-7; 1 *Timothy* 2:1-2; cf. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

244. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

245. *Id.* amend. I.

246. *Id.*

247. *Id.*

248. *Id.* at amend. XIV, § 1; *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Justice Clarence Thomas has written how, as a matter of original meaning, the Establishment Clause was not intended to be applied to the states through the Fourteenth Amendment. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1835-37 (2014) (Thomas, J., concurring in part and concurring in the judgment).

249. *District of Columbia v. Heller*, 554 U.S. 570, 598-600 (2008).

250. *Id.* at 598.

251. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

252. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

253. One prominent Jewish-American jurist, whose parents survived the Holocaust, penned a sobering opinion on the importance of the right to bear arms in a related context. See *Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

Consider two analogies to illustrate this point. During the time the New Testament was written, the Roman emperor was an absolute ruler who possessed unchecked power. If the emperor decreed a new law, but the governor of one of the Roman provinces, who was some prefect or other intermediate-level ruler, decreed a contradictory law, then how should a citizen regard the governor's order? That governor has no inherent authority; he is merely an agent of the emperor, albeit a powerful one. The governor's law is no law at all. In military terms, if a General issues an order for all of his soldiers, and then a Captain serving under the General issues a contradictory order, how should a typical soldier respond? The Captain cannot trump the General; the soldier should regard the Captain's order as illegal. An inferior authority that violates the superior authority is null and void, just as a statute that violates the Constitution is null and void.<sup>254</sup>

But Christians should deal with an unconstitutional infringement upon their First Amendment rights in the same manner as anyone should deal with an unconstitutional authority. There are ways to challenge it with the governmental body that imposed it. Where that is unavailing, the federal courts exist in part to vindicate people's rights through judicial review when presented with a justiciable cause. There is also the political process, whether it is a politician bowing to public pressure or replacing one elected leader with another at the ballot box. Only when the constitutional order fails does a Christian consider civil disobedience.

#### VIII. CONCLUSION

Christians are likely to disagree with one another in good faith on these last points. Some will believe that unjust rulers are still providentially ordained, and thus should be obeyed. Others will believe that the government officer acting *ultra vires* is not a rightful ruler at all, and therefore can be disobeyed by the means the Supreme Law of the Land, also supplied by Providence, prescribes. If faced with physical violence, some will believe that they have a God-given right to self-defense, while others will disagree. Some will respond to private violence, or criminals, differently from public violence, or government, while others will regard them as the same.

This is a conversation the Christian community should have in a thoughtful, deliberate fashion. Indeed, all peaceful communities of faith should discuss it. In an era of increasing and unprecedented hostility to

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254. *Marbury*, 5 U.S. (1 Cranch) 137 at 177.

people of faith in America, and especially observant Christians, the fundamental rights secured by the Second Amendment may be inseparable from those guaranteed by the First Amendment.