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ARTICLE

SECOND AMENDMENT JURISPRUDENCE ACCORDING TO THE LAWS OF NATURE AND OF NATURE’S GOD AND THE ORIGINAL SECOND AMENDMENT

Matthew J. Clark†

I. INTRODUCTION

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ Justice Joseph Story once called this right “the palladium of the liberties of a republic.”² But from 1791 until 2008, the Supreme Court of the United States said very little about this very important right. In 2008 and 2010, however, the Court decided two cases that set the cornerstone for a Second Amendment jurisprudence that will develop in the near future. In District of Columbia v. Heller,³ the Court held that the Second Amendment protected an individual right to keep and bear arms instead of a collective right that depended on the government organizing a militia.⁴ Two years later, in McDonald v. City of Chicago, the Court incorporated the Second Amendment against the states via the Fourteenth Amendment.⁵ Thus, any state or federal law that infringes on the Second Amendment will now be considered void in a court of law.

However, Heller and McDonald addressed only one application of the Second Amendment, which was the right to keep a handgun in one’s

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1. U.S. Const. amend. II.
2. 3 Joseph Story, Commentaries on the Constitution of the United States § 1890 (1833).
4. Id. at 595.
5. McDonald v. City of Chicago, 130 S.Ct. 3020, 3050 (2010); see Heller, 554 U.S. at 570.
home. The Court has yet to address other issues that it certainly will confront, such as whether the Second Amendment protects the right to carry a handgun in public, whether a person may possess a shotgun, a non-military grade rifle, or even an assault weapon, and so forth. In order to understand how the Second Amendment applies to these issues, one must understand both the text of the Second Amendment and the intent of the men who wrote it and the people who ratified it. The Heller Court said that the Second Amendment “was widely understood to codify a pre-existing right, rather than to fashion a new one.” The founding fathers did believe in pre-existing rights; they called them “unalienable Rights,” which were rights that were given to men by God. Therefore, it is necessary to understand not only the history preceding and surrounding the ratification of the Second Amendment, but also the laws of God that pertain to the rights that the Second Amendment was intended to secure.

Part II develops a Second Amendment jurisprudence according to the Second Amendment itself and the laws of the Creator that the Second Amendment presupposes. Part II begins with the “Laws of Nature and of Nature’s God.” Part II then examines the Second Amendment itself, Heller and McDonald, and the Fourteenth Amendment, which applies the Second Amendment to the states. Based on those principles, Part II concludes by proposing two tests to assist with a Second Amendment analysis: the object test and the infantryman test. Then, Part III applies Part II’s jurisprudence to issues that will arise soon under the Second Amendment, in hope of

6. See infra Part II.B.
7. Chief Justice Marshall stated this same rule in an early constitutional case as follows:
   As men, whose intentions require no concealment, generally employ the words
   which most directly and aptly express the ideas they intend to convey, the
   enlightened patriots who framed our constitution, and the people who adopted
   it, must be understood to have employed words in their natural sense, and to
   have intended what they have said. If, from the imperfection of human
   language, there should be serious doubts respecting the extent of any given
   power, it is a well settled rule, that the objects for which it was given, especially
   when those objects are expressed in the instrument itself, should have great
   influence in the construction. . . . We know of no rule for construing the extent
   of such powers, other than is given by the language of the instrument which
   confers them, taken in connexion with the purposes for which they were
   conferred.
10. Id. para. 1.
offering assistance to those who will wrestle with these issues in the near future.

II: THE LAWS OF NATURE AND OF NATURE’S GOD AND THE LAW OF THE SECOND AMENDMENT

A. The Laws of Nature and of Nature’s God


“In the beginning God created the heavens and the earth.”\(^{11}\) When God made man in His image, He gave man dominion over “the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth.”\(^{12}\) But despite the fact that He gave man dominion over “all the earth,” He still gave man commands as to how man should exercise his dominion,\(^{13}\) thus showing that He still had the authority to govern the world as He pleased. As God said later, “[A]ll the earth is Mine.”\(^{14}\) Because all of creation belongs to God, man has no authority at all unless that authority is given by God.

This concept is well-recognized in our legal heritage. Sir William Blackstone, who was the second-most quoted thinker during the founding era,\(^ {15}\) explained the concept this way: “[W]hen the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be.”\(^ {16}\) And just like the rest of creation, man, “considered as a creature, must necessarily be subject to the laws of his Creator.”\(^ {17}\) Because “man depends absolutely upon his Maker for everything,” Blackstone argued, “it is necessary that [man] should, in all points conform to his Maker’s will. This will of his Maker is called the law

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11. *Genesis* 1:1. All Bible quotations in this article are from the New American Standard Bible unless otherwise indicated.
12. *Genesis* 1:26 (internal quotation marks omitted).
13. See, e.g., *Genesis* 1:28 (commanding man to be “fruitful and multiply” and “subdue [the earth]”); *Genesis* 2:16–17 (forbidding man to eat from the tree of knowledge of good and evil).
16. 1 WILLIAM BLACKSTONE, COMMENTARIES *38.
17. Id. at *39.
of nature." 18 “This law of nature,” Blackstone wrote, “being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this[.]” 19

Blackstone said that God gave man the faculty of reason to discover the law of nature, 20 but that, because of original sin, man’s reason is now “full of ignorance and error.” 21 However, Blackstone continued:

This has given manifold occasion for the benign interposition of Divine Providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature . . . . As then the moral precepts of this law are indeed of the same origin with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together. 22

Blackstone concluded his discussion of the issue by saying, “Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.” 23

Blackstone’s definition of the law of nature—the will of the Creator—was shared by other influential English writers and is reflected in the Declaration of Independence. Sir Edward Coke defined the law of nature as

18. Id.
19. Id. at *41.
20. Id.
21. Id.
22. Id. at *41–42 (emphasis added).
23. Id. at *42.
“that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction,” and was also the same law given to Moses as recorded in the Scriptures.\textsuperscript{24} Likewise, John Locke wrote,

“Human Laws are measures in respect of Men whose Actions they must direct, albeit such measures they are as have also their higher Rules to be measured by, which Rules are two, the Law of God, and the Law of Nature; so that Laws Human must be made according to the general Laws of Nature, and without contradiction to any positive Law of Scripture, otherwise they are ill made.”\textsuperscript{25}

Since the founding fathers drew heavily on this tradition, there is no reason to think that there was any difference between the law of nature as described by Coke, Locke, and Blackstone and the phrase “the Laws of Nature and of Nature’s God”\textsuperscript{26} in the Declaration of Independence.\textsuperscript{27} Thus, the Anglo-American legal and political heritage reflects this truth: all human authority is given by God, but any human law that runs afool of His law is not law at all. Throughout this Article, the terms “law of nature” and “Laws of Nature and of Nature’s God” will be used interchangeably to refer to this concept.

Having established that all authority comes from God and that God gave man authority over creation, the next question is whether God gave man authority over man for the purpose of establishing human governments and human laws. In \textit{Genesis} 9, God made a covenant with Noah and his sons (who populated the entire world), saying, “And from every man, from every man’s brother I will require the life of man. Whoever sheds man’s blood, By man his blood shall be shed, For in the image of God He made man.”\textsuperscript{28} This may be viewed as a mandate for human government, because it is the first

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\textsuperscript{24} Calvin \textit{v.} Smith, (1608) 77 Eng. Rep. 379, 391–92 (K.B.); 7 Co. Rep. 2 a, 12 b. Coke “was a predecessor of Blackstone[ and served as] Attorney General, Chief Justice of the Court of Common Pleas, and Chief Justice of the Court of King’s Bench[]” \textsc{John Eidsmoë}, \textsc{Christianity and the Constitution} 69 (1987).

\textsuperscript{25} \textsc{Eidsmoë}, \textit{supra} note 24, at 62 (quoting \textsc{John Locke}, \textsc{Of Civil Government}, Book II, ch. II \S\ 136 n. (1689)). Locke was the third-most cited thinker by the founding generation. \textsc{Lutz}, \textit{supra} note 15, at 142–43.

\textsuperscript{26} The \textsc{Declaration of Independence} para. 1 (U.S. 1776).


\textsuperscript{28} \textit{Genesis} 9:5–6. God made this covenant after the worldwide flood described in \textit{Genesis} 6–9.
\end{flushright}
time that God gave man authority over man for the purpose of punishing evil.\textsuperscript{29} This commission was given to man before any institutional governments were ever established.\textsuperscript{30}

The Bible tells us in the New Testament passages of Romans 13 and I Peter 2 that human governments are established by God for the purposes of punishing evil and praising good.\textsuperscript{31} Those New Testament passages comport with the commission in Genesis 9. Thus, it appears that God's intention for government was to give governmental authority directly to man first and then to the institutional government.\textsuperscript{32} Although institutional governments are also directly accountable to God,\textsuperscript{33} authority flows from God to the people to the government. Therefore, the government has only the governmental authority given to it by the people, and the people have only the governmental authority given to them by God.

2. On the Issue of Gun Control

The next question, then, is whether the government has authority to prohibit the keeping and bearing of arms. The Laws of Nature and of Nature's God give the government the authority to punish "evil."\textsuperscript{34} The root word for "evil" in Romans 13 and I Peter 2 is the word "\textit{kakos}" in the

\textsuperscript{29} See EIDSMOE, supra note 24, at 61 ("[Locke] based the social compact which government is established upon 'that Pact ion which God made with Noah after the Deluge.").

\textsuperscript{30} Locke called this status of being under the law of nature without a formal government the "state of nature," and argued that "the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation." LOCKE, supra note 25, at ch. II § 7.

\textsuperscript{31} See Romans 13:1–7; I Peter 2:13–14.

\textsuperscript{32} Accord 4 WILLIAM BLACKSTONE, COMMENTARIES *7–8 ("It is clear, that the right of punishing crimes against the law of nature, as murder and the like, in a state of mere nature vested in every individual. . . . In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community.").

\textsuperscript{33} See Romans 13:1, 6 ("[T] hose [governments] which exist are established by God.... [R] ulers are servants of God").

\textsuperscript{34} Romans 13:1–7 (using the Greek verb \textit{kakos}, translated "evil"); I Peter 2:13–14 (using the related term \textit{kakospoyos}, translated "evil doer").
The use of *kakos* may be broadly divided as follows: (a) of what is morally or ethically evil, whether of persons or deeds; (b) of what is injurious, destructive, baneful, [or] pernicious. Thus, there are two types of evil, both of which God has given government the authority to punish: (1) "an act which is innately evil, whether it causes harm to another or not," and (2) an act that "interferes with another's carrying out his duties to God." The question, then, is whether the keeping and bearing of arms is "evil" in either sense of the word.

In considering whether the possession or carrying of weapons is inherently evil—the first type of *kakos*—one should consider whether the Scriptures forbid the possession or carrying of weapons. First, the Bible never says that merely possessing or carrying weapons is wrong. Moreover, Jesus on one occasion commanded His disciples to buy swords, apparently for self-defense. Furthermore, Dr. Wayne Grudem observes that when Peter drew his sword to defend Jesus in the Garden of Gethsemane, Jesus never told Peter to throw his sword away but merely to put it back in its place, because it was not right to fight under those circumstances. Because God never forbade keeping or carrying arms (but rather commanded it at times), the mere keeping or bearing arms is not inherently evil; therefore, the government may not proscribe the keeping and bearing of arms on that ground.


36. *Id.* at 124 (alteration in original omitted) (quoting W.E. VINE, *THE EXPANDED VINE’S EXPOSITORY DICTIONARY OF NEW TESTAMENT WORDS* 380 (John R. Kohlenberger III ed., 1984)).

37. *Id.*

38. *Id.*

39. For an excellent discussion on the Biblical view of weapons and self defense, see Wayne Grudem, *Politics According to the Bible* 201–212 (2010).


42. "Wayne Grudem is Research Professor of Theology and Biblical Studies at Phoenix Seminary in Phoenix, AZ. He holds degrees from Harvard (BA), Westminster Seminary (MDiv), and Cambridge (PhD). He is the author of over fifteen books including the bestselling *Systematic Theology.*" *Id.* at back cover.

43. *Id.* at 203.
However, the second type of *kakos* refers to acts that are “injurious, destructive, baneful, [or] pernicious”\(^44\)—acts that, while perhaps not inherently evil, have the effect of “interfer[ing] with another’s carrying out his duties to God.”\(^45\) Depending on the circumstances, keeping or bearing arms may fall within this category of evil. For instance, if a person is walking down Main Street with a rocket-propelled grenade launcher, the exceptionally dangerous character of this weapon would cause many people to be injured if it accidentally discharged. Even if it did not accidentally discharge, the exceptionally dangerous character of this weapon and weapons like it could cause people to stay home in fear rather than going out and engaging in commerce and working, which are duties to God.\(^46\) Thus, depending on the circumstances, governments may be authorized to regulate the keeping and bearing of arms under the second type of *kakos*.

However, any such regulation of keeping or bearing arms must not run afoul of the right of self-defense. Passages from both the Old and New Testaments support the notion that individuals have the right to use force, including weapons, in self-defense. In the Old Testament, the strongest support for this proposition is found in Exodus 22:2-4, which says:

> If the thief is caught while breaking in and is struck so that he dies, there will be no bloodguiltiness on his account. But if the sun has risen on him, there will be bloodguiltiness on his account. He shall surely make restitution; if he owns nothing, then he shall be sold for his theft. If what he stole is actually found alive in his possession, whether an ox or a donkey or a sheep, he shall pay double.\(^47\)

In this passage, God explicitly says that if one strikes and kills a thief while he is breaking in, then the one who struck him is not guilty of murder. The

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45. *Id.*
46. *See Gen* ensis 1:28 (establishing a duty to “Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over every living thing that moves on the earth”); Exodus 20:9 (establishing a duty to “labor and do all [one’s] work”); 2 Thessalonians 3:10 (establishing the principle that “if anyone is not willing to work, then he is not to eat, either”); see also 4 William Blackstone, *Commentaries* *149* (“*The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land[.]*”).
47. Exodus 22:2.
next verse says there is guilt “if the sun has risen on him.”48 The passage concludes by saying that the thief is required to make restitution.49

Because God explicitly says that the one who struck the thief while catching him in the act shall not be guilty of murder, this passage recognizes a right to use lethal force; the only remaining question is the scope of that right. In context, there are two possible interpretations of this passage: first, one who kills a thief breaking and entering at night is not guilty of murder, but one who kills a thief in the daylight is guilty of murder;50 second, one who kills the thief while catching him in the act is not guilty of murder, but one who kills the thief after the act is guilty of murder.51 The passage continues by saying that the default remedy for theft is restitution.52 If the thief has already stolen property and absconded, then there would be no need to hurt him but only to make him restore what he stole; but if one encounters the thief in the act, then there would be the possibility that the thief would harm the one who caught him. Although there is no need to use self-defense after a thief has already absconded with the owner’s property, there may be the need to use self-defense when catching the thief in the act.53 Moreover, the text itself does not qualify the immunity for killing the thief by saying it must be “at night.”54 Consequently, the phrase “if the sun has risen on him” appears to be a figure of speech meaning “after the event.”55 The context suggests that the second interpretation is correct.

In summary, Exodus 22:2–4 appears to stand for the proposition that one has the right to self-defense when catching a thief in the act of breaking and entering, but not after the event has occurred. Blackstone had a remarkably similar rule regarding the right of self-defense:

50. ZONDERVAN NASB Study Bible 108 (Kenneth Barker et al. eds., 1999).
53. Cf. Locke, supra note 25, at ch. III § 18 (“This makes it lawful for a man to kill a thief who has not in the least hurt him, nor declared any design upon his life, any farther than by the use of force, so to get him in his power as to take away his money, or what he pleases, from him; because using force, where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose that he who would take away my liberty would not, when he had me in his power, take away every thing else.”).
54. Some translations insert the words “at night” into verse 2, but most translations do not include it. Compare Exodus 22:2–4 (CEV, GNT, NCV) with Exodus 22:2–4 (ASV, ESV, KJV, NASB, NET, NKJV, NLT).
55. See ZONDERVAN NASB Study Bible, supra note 50, at 108.
[I]f the party himself, or any of these his relations [such as one’s spouse, child, employee, or anyone to whom one bears a near connection], be forcibly attacked in his person or property, it is lawful for him to repel force by force, and the breach of the peace, which happens, is chargeable upon him only who began the affray. . . . Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.56

Blackstone’s view of self-defense aligns well with the interpretation of Exodus 22:2–4 expounded above. But even if Exodus 22:2–4 stands for the narrower proposition that one has the right to use self-defense while encountering the thief breaking and entering at night, the fact stands that God explicitly says that the one who kills the thief under those circumstances is not guilty of murder. In either case, Exodus 22:2–4 recognizes the right to use force, even lethal force, in certain situations, apparently for the purpose of self-defense.

Likewise, Jesus also appeared to recognize the right of force in self-defense. In Luke 22:35–38, Jesus had the following discourse with His disciples:

And He said to them, “When I sent you out without money belt and bag and sandals, you did not lack anything, did you?” They said, “No, nothing.” And He said to them, “But now, whoever has a money belt is to take it along, likewise also a bag, and whoever has no sword is to sell his coat and buy one. For I tell you that this which is written must be fulfilled in Me, ‘And He was numbered with transgressors’; for that which refers to Me has its fulfillment.” They said, “Lord, look, here are two swords.” And He said to them, “It is enough.”57

56. 3 WILLIAM BLACKSTONE, COMMENTARIES *3–4. Blackstone also reasoned that self-defense was a suitable remedy when the victim needed to repel violence immediately, but if the event had already passed, then the victim’s proper remedy would be through the courts, not in killing the initial aggressor. See id.; 4 WILLIAM BLACKSTONE, COMMENTARIES *184.

In this passage, Jesus explicitly told His disciples to buy swords if they did not have swords. In context, Jesus began this discussion by referring to a time in His ministry where He sent the disciples out “without money belt and bag and sandals,” but the disciples nevertheless “did not lack anything[.]” Luke records that account earlier in his Gospel, in which Jesus sent His disciples out without those things, making the disciples dependent on the hospitality of others. The disciples did not lack anything on that journey probably because the people receiving the disciples knew that they were disciples of Jesus, who at the time was a popular public figure.

However, in the present passage, Jesus gave His disciples the exact opposite instructions, and included the instruction to buy swords if they did not have them. Dr. Grudem explains that “[p]eople commonly carried swords at that time for protection against robbers.” Moreover, Jesus’ command to buy swords and to carry provisions on future travels is immediately followed by the phrase, “For I tell you that this which is written must be fulfilled in Me, ‘AND HE WAS NUMBERED WITH TRANSGRESSORS’; for that which refers to Me has its fulfillment.” This statement appears to be the reason for the change of instructions. In interpreting this statement, Dr. Grudem says, “The fact that Jesus was going to be crucified meant an increasing danger of people attacking the disciples as well.”

This appears to be the most reasonable interpretation in context. The first time Jesus sent the disciples out, they were received gladly, because they were associated with a popular figure. In contrast, in the future, the disciples would not always be received gladly, because they would be associated with the One whom many would consider a transgressor. As a

61. See Matthew 4:23–25; Mark 1:28, 39, 45.
64. GRUDEM, supra note 39, at 202.
65. See supra note 61 and accompanying text.
66. See John 15:18–25 (Jesus telling the disciples that the world would hate them because it would hate Jesus). See also NELSON’S NKJV STUDY BIBLE, supra note 5959, at 1745. Jesus, of course, was no transgressor, but was willing to be treated as a transgressor and suffer a transgressor’s punishment so that man, who was the transgressor before God, could be forgiven. In the same passage from Isaiah that Jesus quoted from in this discussion, it says,
result, the disciples would now be more dependent on themselves than on the good will of others because many would now wish them ill will rather than good will. Consequently, the disciples now would have to provide for themselves and protect themselves. It appears that the disciples misinterpreted Jesus’ command to mean that they were getting ready to fight, which is why Jesus ended the discussion by saying, “It is enough.” Nevertheless, both by the plain statement of Jesus’ command and the context in which He made it, the most reasonable interpretation of this passage is that Jesus was telling His disciples to buy swords for their own protection and to take the swords with them on their future journeys. Thus, Jesus not only permitted but also commanded His disciples to buy swords, apparently for their own protection, confirming that they had the right to defend themselves.

But He was pierced through for our transgressions,
He was crushed for our iniquities;
The chastening for our well-being fell upon Him,
And by His scourging we are healed.
All of us like sheep have gone astray,
Each of us has turned to his own way;
But the LORD caused the iniquity of us all
To fall on Him.

Isaiah 53:5–6.

67. See Nelson’s NKJV Study Bible, supra note 59, at 1745, 1746 (arguing that the disciples misunderstood Jesus’ instructions, as demonstrated by the fighting in the Garden of Gethsemane that risked giving the impression that Jesus’ disciples were seditious).

68. Grudem, supra note 39, at 202; see also Nelson’s NKJV Study Bible, supra note 59, at 1745.

69. One may object that this interpretation is inconsistent with Jesus’ other teachings, such as the command to turn the other cheek and Jesus’ command to Peter to put his sword away in the Garden of Gethsemane. In Matthew 5:38–39, Jesus said, “You have heard that it was said, ‘AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH.’ But I say to you, do not resist an evil person; but whoever slaps you on your right cheek, turn the other to him also.” Dr. Grudem explains,

Jesus is not prohibiting self-defense here. He is prohibiting individuals from taking personal vengeance simply to “get even” with another person. The verb “slaps” is the Greek term rhapizō, which refers to a sharp slap given in insult (a right-handed person would use the back of the hand to slap someone “on the right cheek”). So the point is not to hit back when someone hits you as an insult. But the idea of a violent attack to do bodily harm or even murder someone is not in view here.

Grudem, supra note 39, at 202 (footnote omitted). Moreover, the focus of this passage is on non-retaliation. See Zondervan NASB Study Bible, supra note 50, at 1585. Non-retaliation
Based on the Old and New Testament passages addressed above, the conclusion is that the Bible recognizes an individual right to self-defense. The reason is simple: God gives individuals life and forbids the wrongful taking of life.70 Therefore, the right to life gives rise to the right of individuals to protect their right to life in self-defense. As Blackstone said, "Life is the immediate gift of God, a right inherent by nature in every individual . . . . Both the life and the limbs of a man are of such high value . . . that it pardons even homicide if committed se defendendo, or in order to preserve them."71 Because God gave man the right to live, and because the right to life gives rise to the right to self-defense, governmental regulation of firearms may not infringe upon the right of self-defense.

B. Constitutional Principles

After examining what the Laws of Nature and of Nature's God demand, one must take the analysis one step further. The scope of what governments may do may be further limited by the Constitution and laws made pursuant to the Constitution. Therefore, after examining the Laws of Nature and of Nature's God, one must examine the Constitution as well. As long as the Federal Constitution does not violate the Laws of Nature and of Nature's

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70. Exodus 20:13 ("You shall not murder.").

71. Accord 1 William Blackstone, Commentaries *130.
God, the Constitution trumps federal or state laws whenever they conflict with it.72 The Second Amendment of the Constitution says, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."73

The Supreme Court gave the Second Amendment its first in-depth interpretation in District of Columbia v. Heller.74 In Heller, the District of Columbia (controlled by the federal government, not the states) had generally prohibited the possession of handguns.75 The District could make exceptions, but, even then, firearms were to be kept "unloaded and disassembled or bound by a trigger lock or similar device."76 In considering whether the District violated the Second Amendment, the Court divided the Second Amendment into two parts: the prefatory clause and the operative clause.77 The Court held that the prefatory clause—"A well-regulated Militia, being necessary to the security of a free State"—announced a purpose, which included repelling invasions, suppressing insurrections, discouraging standing armies, and resisting tyranny, but did not limit the operative clause.78 The operative clause—"the right of the people to keep and bear Arms, shall not be infringed"—connoted an individual right to keep and bear arms.79 The Court interpreted the phrase "keep and bear Arms" to mean "the individual right to possess and carry weapons in case of confrontation."80 The Court further explained that the prefatory clause was added to appease Anti-federalist fears that the new federal government would disarm the people, but that it fit perfectly with the operative clause and did not change the scope of the operative clause.81

Applying these principles, the Court held that the District's ban on handguns violated the Second Amendment.82 Furthermore, the Court held

72. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
73. U.S. CONST. amend. II.
75. Id. at 574.
76. Id. at 575 (internal quotation marks omitted).
77. Id. at 577.
78. Id. at 597–98.
79. Id. at 592.
80. Id.
81. Id. at 595–603.
82. Id. at 635.
that the District’s requirement that legally owned guns be disassembled or locked also violated the Second Amendment.\textsuperscript{83} The Court made clear, though, that the right to keep and bear arms was not absolute. The states could still enforce longstanding prohibitions like the prohibition of carrying concealed arms,\textsuperscript{84} prohibition of firearms by felons or the mentally ill,\textsuperscript{85} prohibition of carrying firearms in sensitive places like “schools and government buildings,”\textsuperscript{86} conditions on the commercial sale of arms,\textsuperscript{87} and the prohibition of carrying dangerous or unusual weapons.\textsuperscript{88}  

\textit{Heller} comports well with the law-of-nature analysis and with the text of the Constitution itself, with one exception: \textit{Heller} allows governments to regulate, or even ban, “weapons that are most useful in military service.”\textsuperscript{89} Justice Scalia, quoting \textit{United States v. Miller},\textsuperscript{90} wrote that “the sorts of weapons protected were those ‘in common use at the time,’”\textsuperscript{91} which, by today’s standards, would not include “M-16 rifles and the like.”\textsuperscript{92} Justice Scalia, citing Blackstone and others, argued that this limitation “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”\textsuperscript{93} However, Blackstone never argued that possessing dangerous or unusual weapons was a crime, but only that “riding or going armed with dangerous or unusual weapons” was a crime.\textsuperscript{94} The rationale for this rule was that carrying dangerous or unusual weapons was “a crime against the public peace, by terrifying the good people of the land.”\textsuperscript{95} Thus, Justice Scalia failed to recognize the common-law difference between possessing military-grade weapons and carrying military-grade weapons. Furthermore, Justice Scalia failed to account for the possibility that the reason M-16s and the like were not in common usage in 2008 was

\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 626.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 627.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.} at 627–28.
\textsuperscript{90} \textit{United States v. Miller}, 307 U.S. 174 (1939).
\textsuperscript{91} \textit{Heller}, 554 U.S. at 627.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{4 William Blackstone, Commentaries} *149.
\textsuperscript{95} \textit{Id.}
that federal law heavily restricted such weapons for a long time.\textsuperscript{96} Under Heller's logic, because the Second Amendment protects only weapons in common usage, the government can take whatever weapons it wants out of common usage if it finds the weapons to be dangerous or unusual.

Moreover, Justice Scalia's analysis misses the bigger point: the framers of the Second Amendment intended for the Second Amendment to allow the people to form an effective militia. Responding to the claims that the federal government would use a standing army to oppress the people, James Madison, one of the framers of the Second Amendment,\textsuperscript{97} wrote in Federalist 46,

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. . . . Extravagant as the supposition is, let it, however, be made. Let a regular army fully equal to the resources of the country be formed, and let it be entirely at the devotion of the federal government; still it would not be going too far to say that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the


\textsuperscript{97} David Barton, The Second Amendment 27 (2005).
people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition more insurmountable than any which a simple government of any form can admit of.\textsuperscript{98} Likewise, George Mason, the "Father of the Bill of Rights,"\textsuperscript{99} noted that disarming the people "was the best and most effectual way to enslave them."\textsuperscript{100} Richard Henry Lee, a framer of the Second Amendment in the First Congress, said, "[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."\textsuperscript{101} Theodore Sedwick, another framer of the Second Amendment in the First Congress, also said, "It [is] a chimerical idea to suppose that a country like this could ever be enslaved. How is an army for that purpose to [] subdue a nation of freemen who know how to prize liberty and who have arms in their hands?"\textsuperscript{102} In his \textit{Commentaries on the Constitution}, Justice Story observed that the militia was "the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers."\textsuperscript{103} Justice Scalia's analysis misses the broader point that the prefatory clause did not merely announce the problem that the framers were trying to solve at the time, but rather was intended to expand the scope of the Second Amendment's protection beyond the core right of self-defense. Part of that intention was to protect the right of the people to form an effective militia that was ready to fight an army, whether a foreign army or a tyrannical American army. It is inconceivable that such a militia could fight effectively today without military-grade weapons, which is a point that the \textit{Heller} Court itself conceded.\textsuperscript{104} Thus, \textit{Heller} contains a critical error regarding the regulation of military weapons.

\textit{Heller} was a very important case in Second Amendment jurisprudence. However, because the issue in \textit{Heller} came from the District of Columbia, which was controlled by the federal government (which was limited by the

\begin{itemize}
\item \textsuperscript{98} \textit{The Federalist} No. 46 at 316–17 (James Madison) (Paul Leicester Ford ed. 1898).
\item \textsuperscript{99} \textit{Barton}, supra note 97, at 27.
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.} at 28–29.
\item \textsuperscript{103} \textit{Story}, supra note 2 at § 1890.
\item \textsuperscript{104} District of Columbia v. \textit{Heller}, 554 U.S. 570, 627 (2008).
\end{itemize}
Bill of Rights), the issue of whether the states were bound by the Second Amendment remained open.

Originally, the Bill of Rights bound only the federal government.105 After the Civil War, the Fourteenth Amendment placed new limits on the states. The Fourteenth Amendment forbids any state from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States" or "depriv[ing] any person of life, liberty, or property, without due process of law."106 Section five of the Fourteenth Amendment gives Congress the authority to enforce the provisions of the Fourteenth Amendment.107 Congress has passed a law, 42 U.S.C. § 1983, that allows anyone whose Fourteenth Amendment rights have been violated to sue in federal court.108 Through this avenue, many of the provisions of the Bill of Rights had been "incorporated" against the states.109 Until 2010, the question of whether the Second Amendment should be incorporated against the states remained unresolved.

In 2010, the Supreme Court held in McDonald v. City of Chicago that the Second Amendment was "fully applicable to the states" through the Fourteenth Amendment.110 Like the situation in Heller, the city of Chicago had banned handguns in the city.111 Walking through an incorporation analysis, the Court held that the Fourteenth Amendment incorporated the Second Amendment right recognized in Heller.112 Thus, the Court struck down the city's ban on hand guns.113 Justice Thomas concurred in the judgment but argued that the Second Amendment should be applied to the states via the Privileges or Immunities Clause rather than the Due Process Clause.114

109. The author is a full incorporationist, believing that the drafters of the Fourteenth Amendment intended to apply all the protections of individual rights in the Bill of Rights against the states through the Privileges or Immunities Clause. See generally Martin Wishnatsky, Taming the Supreme Court, 6 LIBERTY U. L. REV. 597, 611–20 (2012) (discussing the original intent of the Fourteenth Amendment).
111. Id.
112. Id. at 3050.
113. Id.
114. Id. at 3058–88 (Thomas, J., concurring in part and concurring in judgment). The author believes Justice Thomas was right.
In sum, the Laws of Nature and of Nature’s God, the Second Amendment, and the Fourteenth Amendment forbid the government from abridging the right to keep and bear arms. The Supreme Court has not yet discussed the full scope of the right to keep and bear arms. What the Court has said is that the government may not fully ban handguns, especially in the home.\textsuperscript{115} \textit{Heller} held that the government may limit (1) the concealed carry of weapons, (2) the issuing firearms to felons and those who are mentally ill, (3) the carrying of firearms in sensitive places like schools or government buildings, (4) the commercial sale of firearms through conditions, and (5) the carrying of unusual or dangerous weapons.\textsuperscript{116} Finally, although the \textit{Heller} Court failed to recognize this principle, the government may not limit the right to keep and bear arms so much that it hinders the right of the people to form an effective militia.

C. The Object and Infantryman Tests—Possible Guides to Future Issues Arising Under the Second Amendment

\textit{Heller} and \textit{McDonald} provided greatly needed clarification to what the Second Amendment forbids governments from doing. \textit{Heller} and \textit{McDonald} were mostly good decisions. Nevertheless, although \textit{Heller} and \textit{McDonald} established the general principles that there is an individual right to keep and bear arms and that the Second Amendment is “fully applicable” to the states,\textsuperscript{117} the only particular application known for certain is that the states may not adopt a complete prohibition of handguns, especially in the home. To the extent that a test would be helpful in evaluating new issues arising under the Second Amendment, so that the federal and state governments may know “before they act the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo,”\textsuperscript{118} two such tests would be useful: the object test and the infantryman test.

1. The Object Test

Under the Laws of Nature and of Nature’s God and the Second Amendment, while states may not abrogate the right of self-defense, they may legislate pursuant to their police powers, namely, the public health,

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\item \textsuperscript{115} District of Columbia v. Heller, 554 U.S. 570, 635 (2008); \textit{McDonald}, 130 S.Ct. at 3050.
\item \textsuperscript{116} \textit{Heller}, 554 U.S. at 626–27.
\item \textsuperscript{117} \textit{McDonald}, 130 S.Ct. at 3026.
\item \textsuperscript{118} United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting).
\end{itemize}
\end{footnotesize}
safety, welfare, and morals. Of those four traditional police powers, the public safety would be implicated the most in gun control laws. Therefore, the question should be whether the object of the gun control law implicates the right of self-defense or the public safety. Legislation abrogating the former should be held unconstitutional, but laws enacted pursuant to the later should be legal.

In the early days of the republic, the object test was Chief Justice Marshall's key to discerning the difference between federal power to regulate interstate commerce and state police powers. In Gibbons v. Ogden, the state of New York granted Gibbons a monopoly for navigating the waters between New York City and New Jersey. Ogden sued, claiming that the monopoly was void under a federal law that was made pursuant to the Commerce Clause. This meant that the Supreme Court would have to construe the Commerce Clause for the first time. In interpreting the Commerce Clause, Chief Justice Marshall said:

If, from the imperfection of the human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

At the time the Supreme Court decided Gibbons v. Ogden, the word "object," as used in this context, meant "[t]hat to which the mind is directed for accomplishment or attainment; end; ultimate purpose." Accordingly, Chief Justice Marshall recognized that the object of a constitutional provision was the interpretational anchor that held the text in place.

119. 16A AM. JUR. 2D Constitutional Law § 344. The police powers to legislate pursuant to the public safety, health, welfare, and morals aligns well with God's purpose for government found in Genesis 9, Romans 13:1–7 and I Peter 2:13–14, discussed supra Part II.A.1.


121. Id. at 1–2.

122. Id. at 186.

123. Id. at 188–89.

124. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at http://1828.mshaffer.com/d/word/object. This is the definition of the word for the purposes of this article.
Chief Justice Marshall went on to hold that the Commerce Clause gave Congress the power to regulate intercourse among the several states. He also said that the Commerce Clause placed the power to regulate commerce among the states in the hands of Congress alone, and that this power included the power to regulate the navigation of waterways. In reviewing Gibbons, Professor Jeffrey C. Tuomala reasons that the object of the Commerce Clause, as Chief Justice Marshall understood it, was to promote "the harmony of interstate commercial interests and probably the protection of the instrumentalities of interstate commerce." Tuomala’s conclusion fits well with James Madison’s, who said, "A very material object of this power was the relief of the States, which import and export through other States, from the improper contributions levied on them by the latter." Thus, Gibbons established that the federal government had exclusive power to regulate interstate commerce. However, that left a significant problem for the states: Gibbons potentially meant that any action a state took that even incidentally burdened interstate commerce could be struck down under the Commerce Clause.

Chief Justice Marshall solved this dilemma in Willson v. Black Bird Creek Marsh Co. In Willson, Delaware created a dam to contain a marsh that was affecting the health and property value of the nearby inhabitants. However, ships could no longer sail through that marsh because of the dam. The issue was whether the dam violated the Commerce Clause. In considering the issue, Chief Justice Marshall said:

The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the

126. Id. at 193.
127. Id. at 196–97.
129. THE FEDERALIST NO. 42 at 275 (James Madison) (Paul Leicester Ford ed., 1898).
130. Tuomala, supra note 128, at 4.
131. Id.
133. Id. at 245–46, 251.
134. Id. at 245.
135. Id.
powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorised by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance. 136

The Court went on to hold that because Congress had not passed an act that conflicted with the Delaware law, there was no Dormant Commerce Clause violation in this case. 137

In other words, the states could properly exercise "a police power [that] might have an incidental adverse affect on interstate commerce," but it was permissible as long as the object of such legislation was within the state police powers, not within the commerce power. 138 Professor Tuomala explains:

Only if Congress passed a law pursuant to its commerce powers (e.g., prohibiting dams on navigable waterways) that conflicted with the state's lawful exercise [of] its police powers would the state law be struck down. It would not be a case of federal commerce power trumping state commerce powers. It would be a case of federal commerce power trumping the state exercise of a police power that unnecessarily interfered with interstate commerce. In effect, if the states in the lawful exercise of a police power impose a burden on interstate commerce, it is for Congress to determine whether the burden on interstate commerce outweighs the benefit of the state's exercise of its police powers. 139

In sum, Chief Justice Marshall used the object test to determine whether a state could validly exercise a police power without violating the Constitution. According to Chief Justice Marshall, if exercising the police power incidentally burdened interstate commerce, it was fine unless

136. Id. at 251.
137. Id. at 252.
139. Id.
140. Id. at 4–5.
Congress decided that the burden was too great. In that case, Congress would have the authority to trump the state law via the Supremacy Clause.

The same framework can apply to gun regulation. The Supreme Court stated that the "core lawful purpose" of the Second Amendment was "self-defense." Furthermore, as Justice Scalia explained, the text of the Second Amendment was meant to guarantee that individuals had the "right to possess and carry weapons in case of confrontation." On the other hand, a state may place certain restrictions on firearms by exercising its police power of protecting the public safety. While a state may not abridge the right of self-defense, it may place certain restrictions on which firearms may be owned, where firearms may be carried, who may carry them, in what manner they may be carried, and which weapons may be carried. Such restrictions are valid as long as they do not abridge the right of self-defense. Furthermore, just as Congress would have the authority to trump the state police powers in the Commerce Clause cases if the state law incidentally burdened interstate commerce, so Congress, pursuant to Section Five of the Fourteenth Amendment, would have the authority to trump a state's exercise of its police power if it created an incidental burden on self-defense.

The distinction between self-defense and the public safety explains much of the Court's reasoning in Heller. Because self-defense is the core of the object of the Second Amendment, a complete prohibition on arms is unconstitutional. When a person keeps a handgun in his home, he does so to protect himself, not to go to war with society. Consequently, handguns in the home implicate self-defense, not the public safety. Moreover, the prohibition on carrying especially dangerous weapons implicates the public safety, not self-defense, because self-defense can be accomplished through the bearing of more conventional arms. Likewise, giving a firearm to a mentally ill person or someone who is a convicted felon implicates the public safety because such people carry a greater risk than most of harming others (albeit unintentionally with the mentally ill) instead of merely

143. Thus, the only authority Congress has to regulate guns is the authority to protect the right of the people to keep guns, not the authority to take guns away from the people. How gross it is that Congress has turned the Constitution upside-down by ignoring its Fourteenth-Amendment duties while misusing the Commerce Clause to do the very thing the Constitution forbids. See, e.g., 18 U.S.C. § 922(g) (2006) (restricting the right to keep and bear arms for certain persons).
defending themselves. The prohibition of concealed firearms may implicate the public safety because it prevents ambushes. Furthermore, the prohibition of firearms in sensitive areas implicates the public safety because people would be more susceptible to harm in those places. Thus, *Heller*’s rules fit well with the distinction between the objects of self-defense and the public safety. Therefore, just as the Marshall Court used the object test to determine the constitutionality of laws in Commerce-Clause cases, so today’s Court should use the same test to determine the constitutionality of laws in Second Amendment cases.

2. The Infantryman Test

While the object test addresses the right to self-defense, which is the core of the Second Amendment, stopping the analysis there would neglect the Second Amendment’s second purpose: to protect the right of the people to form a well-regulated militia. This does not mean that the people would be entitled to possess *every* weapon that could be useful in military service. The Second Amendment protects the right of the people “to keep and *bear* arms.”144 When the Second Amendment was framed, the word “*bear*” meant “*carry*.”145 Thus, “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”146 In other words, the Second Amendment protects arms that a person could *carry*. To the extent that a test is helpful, a court should ask whether the weapon that the government is seeking to ban is one that an infantryman could *carry* for combat. If the answer is yes, then the *possession* of such a weapon is prima facie protected under the Second Amendment.147

In sum, under the object test, gun control laws that abrogate the right to self-defense are illegal under the Laws of Nature and of Nature’s God and under the Second Amendment, but laws that protect the public safety are legitimate exercises of a government’s police powers. However, even if the gun control law passes the object test, the final question is whether the gun control law deprives a person of possession of a weapon that an

144. U.S. CONST. amend. II (emphasis added).
146. *Id.* at 2791–92. As discussed above, Justice Scalia recognized an exception for military-grade weapons. For the reasons discussed above, this exception was error; thus the above-quoted rule is the correct rule.
147. *See infra* Part III.A.
infantryman could carry. If yes, then the government may not ban possession of that weapon.

III. APPLICATION TO MODERN ISSUES

A. The Keeping of Arms

The following subsection deals with the ownership of types of guns, i.e. what kinds of guns people should be allowed to keep. The issue of bearing arms will be addressed infra.

1. Handguns

Both *Heller* and *McDonald* struck down laws that banned, or effectively banned, handguns.148 Furthermore, *Heller* struck down a law that required handguns in the home to be either disassembled or locked. After these two cases, it is unlikely that a state will be able to ban the ownership of handguns for the average person.149

Interestingly, Jesus, the Author of the Laws of Nature and of Nature’s God,150 commanded his disciples to buy swords.151 Dr. Wayne Grudem says that it was common for people to carry swords in Jesus’ day for self-defense instead of relying completely on the protection of the Roman officials.152 Because self-defense is a God-given right,153 and because the Author of the law of nature was commanding His followers to acquire the weapon that was most commonly used for self-defense, it appears that the Laws of Nature and of Nature’s God forbid governments from banning the most standard weapon for self-defense in a society. In the case of the United States, the *Heller* Court observed that this weapon is a handgun.154 Thus, even without *Heller*, *McDonald*, or even the Second Amendment itself, one could argue that the Laws of Nature and of Nature’s God forbid government from preventing handgun ownership.

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149. Issues relating to specific kinds of persons will be addressed infra, Part III.C.
150. “In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through Him, and apart from Him nothing came into being that has come into being.” *John* 1:1–3.
152. See *GRUDEM*, supra note 39, at 202–03.
153. See discussion supra Part II.A.
2. Shotguns

Neither McDonald nor Heller addressed the issue of shotgun ownership. Like handguns, shotguns are more of a defensive weapon than offensive weapon.\textsuperscript{155} Shotguns, while probably more dangerous than handguns, are short-range weapons. The shot is very effective at close-range, but its effectiveness dissipates as distance increases. As a result, a shotgun is probably most effective for in-home defense situations and better suited for self-defense than for assault. Because McDonald and Heller hold that the Second Amendment protects the core right of self-defense,\textsuperscript{156} and because shotguns are highly effective for self-defense, a government may not ban shotgun ownership.

3. Rifles

"Rifles" in this subsection refer to rifles that are not military-grade, such as lever-action rifles,\textsuperscript{157} bolt-action rifles,\textsuperscript{158} and certain types of semiautomatic rifles and carbines that are no longer conventional military weapons.\textsuperscript{159} Rifles like these are desirable because of their range and accuracy.\textsuperscript{160} Because these weapons typically neither have a high magazine capacity\textsuperscript{161} nor are capable of automatic fire,\textsuperscript{162} they are not likely to be the weapon of choice to harm the public. However, because rifles are more effective long-range weapons, they are not likely to be the weapons for in-home defense either.\textsuperscript{163} While they may be used for either, the most likely use for rifles like these is hunting.\textsuperscript{164}

\textsuperscript{155} See David Steier, Guns 101, at 69 (2011).
\textsuperscript{156} See discussion supra Part II.B.
\textsuperscript{157} See Steier, supra note 155, at 51–55.
\textsuperscript{158} Id. at 55–57.
\textsuperscript{159} See id. at 57–58. While the "semiautomatic rifle development was spurred by military needs," civilians also can enjoy "the ability to have fast follow-up shots for target shooting/plinking, or hunting." Id. at 57.
\textsuperscript{160} Id. at 50 (stating that the grooves in the barrel make "the projectile fly more accurately and further").
\textsuperscript{161} See, e.g., id. at 58 (stating that one such rifle, the Russian SKS, had a ten-round magazine that is loaded from the top of the rifle).
\textsuperscript{162} See id. at 59–60 (contrasting "rifles" as discussed in this subsection with automatic weapons, which are largely unavailable to the public).
\textsuperscript{163} See id. at 50.
\textsuperscript{164} Id. at 54 (discussing why hunters love lever guns), 55 (stating that many hunters prefer bolt-action rifles), 57 (stating that civilians find the fast follow-up shots of semiautomatics useful for hunting). Another common use for such a rifle is for sport,
Under the Laws of Nature and of Nature’s God, government may not completely ban hunting. After the flood, God told Noah and his descendants, from whom all of mankind has come, “Every moving thing that is alive shall be food for you; I give all to you, as I gave the green plant.” As a result, man has a God-given right to eat animals. While there are alternatives to meat, if meat is the only source of food available to a person when he is starving, he must possess the means to attain the meat. In other words, he must be permitted to hunt so that he does not starve. Thus, under the Laws of Nature and of Nature’s God, man has a right to hunt. Because a rifle is best-suited for hunting, governments may completely ban the ownership of rifles.

4. Assault Weapons

“Assault weapons” has been a common term referring to classes of weapons in the last several decades, but unfortunately the term has lacked a uniform definition. Local laws have sometimes classified “assault rifles” based on their technical design history, a classification that has been found unconstitutionally vague because “it was considered unreasonable to require persons of ordinary intelligence to trace the design history of a weapon in order to determine its status under the ordinance.” Other laws have defined assault weapons based on magazine capacity, military style, or the weapon’s capacity for automatic fire. In order to avoid vagueness problems, the latter definition is probably the most constitutionally sound definition of “assault weapons.” While the possibilities for analysis under assault-rifle classification are endless, for the sake of brevity, this section will discuss the ownership of military-style automatic and semiautomatic rifles only.

specifically for target shooting. Id. at 54, 55, 57. However, for the sake of brevity, this subsection will focus solely on hunting.

165. Genesis 9:3.


167. Marchitelli, supra note 166, §2[a].


Automatic rifles are rifles that, "after firing a round of ammunition, automatically reload and fire again, performing this sequence repeatedly as long as their triggers are depressed and their ammunition supplies have not been expended."\textsuperscript{170} One such firearm is the M-16, which the United States adopted as its standard military firearm in 1964.\textsuperscript{171} Civilian forms of these weapons exist as semiautomatics.\textsuperscript{172} The AR-15, for example, "is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon."\textsuperscript{173} These semiautomatic weapons cannot "spray fire" like automatics, are not designed to be "fired from the hip" (as would be useful in close-range combat), and are not capable of automatic fire without modification.\textsuperscript{174} Thus, semiautomatic assault weapons, regardless of the fact that they may look like their military counterparts, are not nearly as optimal for "assault" as their automatic counterparts. Consequently, "semiautomatic assault weapon" is an oxymoron.

Applying the principles discussed above, the Laws of Nature and of Nature's God recognize the right to self-defense,\textsuperscript{175} which, as \textsc{Heller} recognized, is the core of the Second Amendment.\textsuperscript{176} However, the government has the police power to protect the public safety.\textsuperscript{177} While assault weapons certainly may be used for self-defense, they are not the most optimal weapons for self-defense. Automatic rifles have the capacity to "spray fire," which increases the chance of collateral damage and hurting innocent bystanders, which is certainly a valid public safety concern.\textsuperscript{178} Moreover, the capacity of assault rifles to hit targets from long distances presents the reasonable possibility that these weapons would be used for offensive instead of defensive purposes. Thus, under the object test alone, a

\textsuperscript{170} See Fully-Automatic Firearms, supra note 96.
\textsuperscript{172} See Steier, supra note 155, at 59.
\textsuperscript{173} Staples v. United States, 511 U.S. 600, 603 (1994).
\textsuperscript{175} See supra Part II.A.
\textsuperscript{176} See supra Part II.B.
\textsuperscript{177} 16A AM. JUR. 2D Constitutional Law § 344.
\textsuperscript{178} See Semi-Automatic Firearms and the "Assault Weapon" supra note 174 (noting the ability of automatic weapons to "spray fire").
court could reasonably conclude that assault weapons are not optimal for self-defense, and therefore a government could ban them.

However, while the core of the Second Amendment is the right of self-defense, the Second Amendment also protects the right of the people to form an effective militia. As stated above, the Founders recognized that the militia was necessary to repel invasions, suppress insurrections, and resist tyranny. The Heller Court itself said, "It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large." Indeed, James Madison's argument that a militia could effectively resist a standing army apparently presupposes that both the army and the militia would be armed with the same weapons. It is difficult to imagine how a modern militia could fight a modern army without modern military-grade arms. Thus, under the infantryman test, most weapons classified as "assault weapons" could be carried by a militia man. Consequently, the Second Amendment protects the right of the people to keep military-grade automatic and semiautomatic rifles, commonly called assault weapons.

B. The Bearing of Arms

As discussed above, the Laws of Nature and of Nature's God recognize the right of self-defense. The need for self-defense does not disappear when one leaves his home. On the contrary, a person is even more vulnerable to attack in public than he is in his own home. In a home, a person has the benefit of walls and locked doors, but enjoys no such protection in public. Because the Laws of Nature and of Nature's God protect the right to self-defense, and because the need for self-defense still exists in public, then the Laws of Nature and of Nature's God demand that a person must have the right to defend himself in public. Consequently, a person must have the means to be able to defend himself in public. Therefore, as a general rule, the Laws of Nature and of Nature's God require that a person must have the right to bear arms, not only the right to keep them.

If any doubt remains from the nature of the argument, specific cases of this law in action are found in Scripture. When Christ told His disciples to

179. See supra Part II.B.
180. Id.
182. See discussion supra Part II.A.
buy swords, He did not tell them to leave them at home but apparently
told them to have swords for self-defense even on their travels.\(^{183}\)
Moreover, Nehemiah made the people bear arms while they worked on
the wall because of an imminent threat of their enemies.\(^{184}\) In that case,
people were not only permitted but required to carry arms in public. Even
when Jesus told Peter to put his sword back in its place, He never told
Peter to stop carrying his sword, but rather forbade him from using it in
that particular case.\(^{185}\) Thus, cases from Scripture confirm that a right to

\textit{bear} arms exists.\(^{186}\)

Moreover, the constitutional analysis yields the same result. In \textit{Heller},
after an extensive historical analysis, the Court concluded that the Second
Amendment protected "the individual right to possess \textit{and carry} weapons
in case of confrontation."\(^{187}\) Thus, under the analyses of the Laws of Nature
and of Nature's God and \textit{Heller}, the right to \textit{carry} arms for purposes of self-
defense may not be infringed. While it may be permissible to regulate the
manner of bearing arms for the sake of the public safety, a concern that will
be addressed \textit{infra}, any such regulation may not destroy the right to carry
arms for self-defense.

In the United States, the gun that is best-suited for carrying is a handgun.
Handguns are easy to carry because they are small. Moreover, handguns are
optimal for self-defense in close-range combat. Consequently, Americans
are more likely to carry handguns for self-defense than any other type of
gun. The first question, then, is whether a government may regulate the
manner of bearing handguns without infringing upon the Second
Amendment.

Many states have laws regulating whether a person may carry a weapon
openly or carry concealed.\(^{188}\) Some states forbid open carrying but make

\begin{itemize}
  \item \(^{183}\) See \textit{Grudem}, supra note 39, at 202–03 (analyzing \textit{Luke} 22:35–38). See also
discussion supra Part II.A.2.
  \item \(^{184}\) \textit{Nehemiah} 4:7–13.
  \item \(^{185}\) \textit{Matthew} 26:51–54; see also \textit{Grudem}, supra note 39, at 194–95; supra note 69
  (analyzing \textit{Matthew} 26:51–54).
  \item \(^{186}\) It is important to remember, though, that this right to bear arms exists for the
  purpose of self-defense, not for the purpose of waging war on society. See discussion supra
  Part II.A.2. See also 4 \textit{William Blackstone}, \textit{Commentaries} *184 ("This right of natural
defence does not imply a right of attacking.").
  \item \(^{188}\) \textit{Steier}, supra note 155, at 113.
\end{itemize}
concealed carrying fairly easy;\textsuperscript{189} others allow open carry but put restrictions in place for concealed carrying.\textsuperscript{190} As discussed above, however, a government may not infringe upon the right to carry for self-defense.\textsuperscript{191} Therefore, if a government forbids open carrying and requires a citizen to receive the government’s permission to carry concealed (or vice versa), that law is illegal: both avenues for carrying have been closed, and even if one can be easily opened (such as when a state has a shall-issue concealed carry policy),\textsuperscript{192} the citizen is still waiting for the government to give him permission to exercise his God-given and constitutionally protected right. Thus, a state may restrict only one of the two avenues of carrying, and only if it has the proper justification for doing so.\textsuperscript{193} The question then becomes whether there is justification for banning either form of carrying.

Concealed carrying raises a public safety concern that is not present with open carrying. When a weapon is concealed, the person carrying the concealed weapon is in a better position to ambush a target because the target does not know that the assailant is armed. Consequently, a legitimate public safety concern may exist with concealed weapons. This may explain why Justice Scalia in \textit{Heller} thought that the state may limit the carrying of concealed weapons.\textsuperscript{194} Therefore, it appears that there is a legitimate justification for regulating the concealed carrying of weapons.

In contrast, the open-carrying of a handgun may frighten people, which could arguably raise a public welfare concern. However, the traditional remedy to prevent gun owners from terrifying the people was to prohibit the carrying of “dangerous or unusual weapons.”\textsuperscript{195} Handguns are common

\textsuperscript{189} See, e.g., TEX. PENAL CODE ANN. § 46.02 (West 2012) (forbidding carrying weapons under most circumstances); TEX. GOV’T CODE ANN §§ 411.171–177 (West 2012) (stating that the government shall issue a concealed carry license if certain conditions are met).


\textsuperscript{191} See supra Part II A–B (discussing the right of self-defense).

\textsuperscript{192} A “shall issue” law is a law “requiring that carry permits be issued to applicants who meet uniform standards established by the legislature.” \textit{Right-to-Carry} 2012, NRA-ILA, http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx (Feb. 18, 2012).

\textsuperscript{193} See discussion supra Part II A (discussing the scope of governmental authority and the right of self-defense).


\textsuperscript{195} 4 WILLIAM BLACKSTONE, COMMENTARIES *148.
weapons that are optimal for self-defense;\textsuperscript{196} they do not fall under the classification of "dangerous or unusual weapons." There is no proper justification for prohibiting the open carrying of handguns; therefore a state may not prohibit open carrying of a handgun. Consequently, while a government may limit the concealed carrying of handguns, it may not prohibit the open carrying of handguns.

Having examined the issue of carrying handguns, the next question is whether a government could regulate or ban the bearing of other kinds of arms. Blackstone wrote "The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land[.]"\textsuperscript{197} In contrast to handguns, which are common self-defense weapons, the regulation of carrying "dangerous or unusual weapons" is rooted in concerns for the public safety and the public welfare, which are within the realm of the police powers.\textsuperscript{198} Under the object test, "dangerous or unusual weapons" are more optimal for assault than for self-defense.\textsuperscript{199} The scope of "dangerous or unusual" weapons would probably include assault weapons as discussed in Part III.A.4, supra. Thus, while a government may not ban the ownership of assault weapons, under the object test, it may regulate, or perhaps even ban, the carrying of such weapons in public. The final inquiry is whether the infantryman test would yield a different analysis.\textsuperscript{200} While an infantryman would need to bear an assault weapon when acting as a militiaman, such as when repelling an invasion, suppressing an insurrection, or resisting a tyrannical army, none of those situations apply to the daily life of a civilian under ordinary circumstances.\textsuperscript{201} Consequently, a citizen could not rely on the Second Amendment's prefatory clause in attempting to carry an assault weapon if the militia was not needed. Thus, while a state may not prevent the ownership of assault weapons, it may prevent the carrying of assault weapons, and perhaps even the entire category of long guns.\textsuperscript{202}

\textsuperscript{196} See supra Part III.A.1.
\textsuperscript{197} 4 William Blackstone, Commentaries *148.
\textsuperscript{198} See supra Part II.C.
\textsuperscript{199} See id.
\textsuperscript{200} See supra Part II.C.
\textsuperscript{201} See supra Part II.B–C.
\textsuperscript{202} "Long guns include both rifles and shotguns and are defined as any weapon that is designed to be fired by bracing the weapon against the shoulder." Steier, supra note 155, at 49.
C. Miscellaneous Applications

This paper assumes that issues relating to the (1) keeping and (2) bearing of arms are the most important questions that need to be addressed, and therefore they were explored thoroughly in Part III.A-B, supra. Part III.C-E discusses miscellaneous issues, such as laws regulating places, times, and people. For the sake of brevity, these issues will not be addressed as thoroughly as the previous issues.

1. Government Buildings

Every person has the right to self-defense.\(^{203}\) However, sometimes the "person" with the right to self-defense is the government itself. Just as a private property owner has the property right to exclude someone who is not welcome on his property, so the government has the right to exclude someone that is not welcome on its property so long as the property is a nonpublic forum. Thus, if a government for reasons of self-defense requires citizens entering government buildings to disarm themselves, the citizens must comply.\(^{204}\)

2. Sensitive Places

Sometimes the concern for the public safety is very high in "sensitive places,"\(^{205}\) such as airplanes (where one shot breaching the plane kills everyone) or schools (where children are unarmed and incompetent to wield weapons).\(^{206}\) In such cases, the government has a right to restrict firearm access to sensitive places because of the unusual threat to the public safety.\(^{207}\) However, as Dr. Grudem observes, "[W]e must remember that . . . these situations are highly controlled areas with very low possibility of a violent attack by one person against another, and in the extremely rare occasions where an attack occurs, it is immediately subdued by the authorities present."\(^{208}\) Unfortunately this is not always true, especially in cases of schools for minors, but Dr. Grudem's analysis is a brilliant policy suggestion. In so-called "sensitive areas," if the citizens are disarmed, the

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203. See supra Part II.A-B.
205. See id.
206. See id. "Schools" here undoubtedly refers to schools for minors. The author is in favor of allowing the carrying of arms on campuses, or at a minimum, allowing the staff and faculty to carry and having heightened security.
207. See id.
208. GRUDEM, supra note 39, at 211.
government should take extra steps to ensure that authorities are present to subdue an aggressor.

3. Places of Worship

The need for self-defense does not disappear when one steps into a place of worship; consequently, the right of self-defense does not disappear when one steps into a place of worship. Moreover, the Second Amendment protects the right to carry arms and does not make an exception for houses of worship. Consequently, laws forbidding carrying firearms into places of worship are illegal because they abrogate the right of self-defense. If houses of worship do not wish to allow firearms into their gatherings, they may exclude people who will not honor their firearms policy. But perhaps in church, the best way to protect the flock from the wolves is to arm the sheep.

4. Background Checks

There is a public safety concern when people with violent histories get guns. Therefore governments may require reasonable background checks before a person buys a gun.

5. Time Restrictions

There is also a public safety concern if someone in the heat of the moment seeks to buy a firearm. A required, short "cool-off" period is permissible to address this concern. Nevertheless, it should not be used to


210. See supra Part II.A.

211. See U.S. CONST. amend. II.

212. In the Colonial Era, both Virginia and Georgia required their inhabitants to take their guns to church with them. Barton, supra note 97, at 30, 32. While these laws went too far in requiring people to carry arms instead of simply protecting their right to carry arms, these early laws show that the idea of carrying guns to church is not unprecedented.

213. See supra Part II.A. C (discussing the government's authority to legislate for the public safety).

214. Cf. Plato, Republic, in CLASSICS OF POLITICAL AND MORAL PHILOSOPHY 34–35 (Steven M. Cahn ed., 2002) (arguing that it would be unjust for a man to give a dangerous weapon back to his friend when his friend is in a "fit of madness"). The author cites Plato's Republic.
delay the purchase of a firearm if the person is seeking it in self-defense and clearly is not in a state of anger. Failure to make this distinction may result in an arbitrary loss of liberty at best and the loss of life at worst.

6. Mentally Ill

The mentally ill, like children, lack the competence needed to properly operate a firearm. That raises a public safety concern that a government may address through restrictions on the mentally ill possessing firearms.\(^{215}\)

7. Felons

The legitimacy of the argument that felons forfeit their right to keep and bear arms ultimately turns on whether the felony involved violence. If it did, then allowing a violent person to have a firearm raises a public safety concern that the government may address. If the felony did not involve violence, though, the state is requiring a person to surrender their unalienable right to self-defense when they never abused that right. That is unjust, and therefore states may not ban firearms for felony convictions that had nothing to do with violence.\(^{216}\)

IV. Conclusion

As the courts address new issues arising under the Second Amendment after *Heller* and *McDonald*, they must construct the Second Amendment not according to their own ideas of what gun laws should be, but rather according to the text of the Amendment itself and according to the God-given right that the Amendment was intended to secure. That is the essence only for the limited purpose of supporting this proposition, not for endorsing the *Republic*; for while Plato was correct in this one instance, he used this one exception to deconstruct the God-given definition of justice and redefine justice his own way. The result of Plato’s fallacy was a state ruled by philosopher-kings. Eidsmoë, supra note 24, at 71. As John Adams wrote to Thomas Jefferson after reading Plato’s works, “My disappointment was very great, my astonishment was greater, my disgust shocking . . . His Laws, and his *Republic*, from which I expected most, disappointed me most.” Id. at 72 (omissions in the original).

215. See Plato, supra note 214, at 34–35 (arguing that it is unjust to entrust someone in a “fit of madness” with a dangerous weapon).

216. See 4 WILLIAM BLACKSTONE, COMMENTARIES *12 (“As to the *measure* of human punishments . . . it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses.”). Consequently, if the punishment of depriving the felon of the right to keep and bear arms has nothing to do with deterring the felon from committing similar felonies in the future, then such a punishment is unjust.
of a true Second Amendment jurisprudence. The government may enact gun-control regulations that are made only pursuant to that government’s just powers (which in a state government would be its police powers, but in a federal government would be its enumerated powers), but only if such regulations would not infringe upon the right of self-defense or deprive a citizen of the possession of a weapon that an infantryman could carry. Hopefully the courts will acknowledge these principles and apply them as they confront new issues, so that they will interpret the Second Amendment faithfully and protect the rights of the people that God has given and the Constitution has secured.