

The Anti-Tyranny, Anti-Faction Aspect of the Second Amendment

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The Supreme Court has ruled that the Second Amendment protects an individual right of self-defense in the home. However, the violent riots and looting in American cities during the summer of 2020 illustrate another purpose underlying the Second Amendment. In addition to protecting an individual right of self-defense, the Second Amendment more generally acts as a limited government provision that serves to check government abuses, as does the rest of the Bill of Rights. In particular, the Second Amendment contains an anti-tyranny provision, protecting the individual against oppression by government-

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sanctioned factions. During the summer of 2020, this oppression took the form of urban anti-police and anti-racism protests that descended into rioting and looting. In various ways, local and state governments gave implicit or explicit sanction to this mob violence, directed against the private property of innocent individuals. Either by denying the violent character of those protests, or by refusing to prosecute lawbreakers, or even by failing to condemn the violence itself, public officials lent the weight of government to this outbreak of violence. Consequently, the only defense available to private property owners came by way of the Second Amendment. This Article will explore this anti-tyranny aspect of the Second Amendment in light of the urban violence of 2020.

I. INTRODUCTION

The debate over the Second Amendment often focuses on the purpose or nature of the Amendment. Commentators argue that it protects an individual right of self-defense, a collective right to maintain state militias, a right to resist tyranny and oppression, or some combination of these. Since the protections of the Second Amendment right to keep and bear arms flow from the purposes and aims of the Second Amendment, a determination of the latter will greatly influence an understanding of the former.

This Article will argue that the Second Amendment is broad enough to encompass more than one purpose or aim. Like the rest of the Bill of Rights, the Second Amendment serves two general goals. First, it articulates and protects an individual freedom. Second, it functions to limit and check the power of government. In this second function, the Second Amendment more specifically serves a unique government-limiting purpose: it affords the individual a vital if not last-chance right to resist tyrannous factions that operate with direct or indirect government support. An examination of the riots and looting that took place in American cities during the summer of 2020 will illustrate this anti-tyranny aspect of the Second Amendment.

The Second Amendment carries a particular force and has special application when individuals must defend themselves and their property against riotous mobs that are not being controlled by law enforcement personnel. The Second Amendment counters faction in two

ways: it protects the individual right of self-defense against violent private factions; and it checks the power of government to oppress its citizens through violent factions. Although the Constitution as a whole embodies a concern about faction, the Second Amendment provides unique protections against the abuses of faction. The need for these protections became evident during the violent campaigns against blacks and white Republicans in the Reconstruction South, just as they became evident during the riots of 2020.

II. THE 2020 RIOTS AND GOVERNMENT-ENCOURAGED FACTIONS

Following the death of George Floyd at the hand of a white police officer in Minneapolis on May 25, 2020, protests occurred across the country.¹ Generally, the protests focused on police brutality and racial injustice. But almost immediately, the protests, largely organized or spearheaded by the Black Lives Matter (BLM) movement, led to or devolved into rioting and vandalism.² And this rioting, conducted with the tacit and sometimes overt approval of local governments, posed a serious threat to lives and private property.³ Indeed, the rioting provided a stark reminder of why the constitutional Framers believed that factions so endangered democratic society.⁴

In Minneapolis, organized protests devolved into violent riots within hours, with private businesses burned and looted.⁵ An area covering three city blocks in South Minneapolis bore the brunt of the destruction, and within days \$55 million in property damage was inflicted

1. See Derrick B. Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

2. See, e.g., Virginia Allen, *39 Photos Capture America's Summer of Riots, Arson, and Looting*, THE DAILY SIGNAL (Sept. 4, 2020), <https://www.dailysignal.com/2020/09/04/39-photos-capture-america's-summer-of-violent-riots>.

3. See generally David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J. LAW & PUB. POL'Y 177, 185–186 (2021) (describing the violence and stating that thirteen people died because of the violence during the summer of 2020).

4. See THE FEDERALIST NO. 10 (James Madison).

5. *Id.* at 185–88 (describing the violence and destruction caused by lack of law enforcement).

by the rioters.⁶ The Minneapolis mayor ordered a police precinct building to be abandoned to the rioters.⁷ Until the Governor called in the National Guard, there was virtually no law enforcement presence in the areas of the city experiencing the rioting.⁸

Not wishing to be perceived as opposing the BLM movement, nor wanting to incur the wrath of valuable constituencies, city officials backed away from arresting or prosecuting the rioters. One particular example of the political attitudes of the protesting community, which were influencing the posture of government officials toward the rioters is instructive. A woman who owned a literary agency called the police when she saw rioting take place outside her building.⁹ When her actions became known, nearly all her employees resigned and many of her clients withdrew their business, all in protest over the woman's call to the police, which was seen as contradictory to the BLM message.¹⁰

City officials largely did not even condemn the violence and destruction, instead concentrating their messaging on supporting the First Amendment rights of the protesters and the anti-racism sentiments of the demonstrations.¹¹ Aside from those who blatantly justified the violence as a proper response to racism and police brutality, many other civic and political leaders simply ignored the violence or refused to

6. *Id.*; see also *Property Damage from Unrest in Minneapolis: \$55M and Rising*, INS. J. (June 5, 2020), <https://www.insurancejournal.com/news/midwest/2020/06/05/571213.htm#:~:text=The%20city%20of%20Minneapolis%20says,go%20up%2C%20city%20officials%20said> (stating that 220 buildings were damaged or set on fire during the first weekend of protests, with that number eventually reaching 1500).

7. Jin Wu, *Protests Continue to Rage After Death of George Floyd*, N.Y. TIMES (last updated Nov. 5, 2021), <https://www.nytimes.com/2020/05/28/us/george-floyd-national-guard.html>.

8. See Joe Barrett, *In Minneapolis, Armed Residents Set Up Patrols Amid Calls to Defund the Police*, WALL ST. J. (July 25, 2020, 1:38 PM), <https://www.wsj.com/articles/in-minneapolis-armed-residents-set-up-patrols-amid-calls-to-defund-the-police-11595698725> (stating that “Minneapolis residents in some areas still recovering from rioting and unrest are forming community watch and security groups, some bearing firearms, to fight a surge of crime in the wake of the George Floyd killing”).

9. Sutherland House, *Burning a Literary City*, Sutherland House Books (June 5, 2020), <https://shush.substack.com/p/burning-a-literary-city>.

10. *Id.*

11. See Barrett, *supra* note 8; see also Bernstein, *supra* note 3, at 187–88.

distinguish it from the lawful protesting.¹² By mid-June of 2020, riots in Minneapolis and St. Paul had inflicted \$500 million in damage to 1500 properties.¹³

Protests and subsequent violence spread quickly throughout the rest of the country.¹⁴ Seattle became a prominent locale when protestors occupied a police precinct headquarters and took over an entire area of the city known as the Capitol Hill district.¹⁵ The occupiers set up barricades to block traffic from this area and refused to allow any police presence.¹⁶ For its part, the city not only abandoned the precinct building but withdrew all police from the area that became known as CHOP (Capitol Hill Occupied Protest).¹⁷ The private property and businesses located within the CHOP zone were left to fend for themselves. Once again, city officials, sympathetic to the BLM movement and not wanting to be seen as in any way unsupportive of it, refused to assert any law enforcement effort against the violence and criminal

12. See, e.g., Virginia Allen, *Iraq War Veteran Likens Portland to Living in a War Zone*, THE DAILY SIGNAL (Sept. 3, 2020), www.dailysignal.com/2020/09/03/iraq-war-veteran-likens-portland-to-living-in-a-war-zone/ (stating that in their denials of the violence occurring, city officials are either “out of touch with . . . reality or [have] a narrative [they] want to promote and ‘clearly . . . [have] [their] own agenda . . .’”).

13. Jeffery Meitrodt, *Rebuilding Could Cost \$500 Million*, Star Trib. (Minneapolis), June 7, 2020, at 1A.

14. As this paper was being written, the most recent outbreak of violence occurred in Kenosha, Wisconsin, where rioters inflicted \$50 million in damage to more than 100 buildings from August 24 through September 2, 2020. Alexis McAdams, *Kenosha Unrest Damages More Than 100 Buildings, At Least 40 Destroyed*, *Alliance Says*, ABC7 CHICAGO (Sept. 2, 2020), <https://abc7chicago.com/kenosha-shooting-protest-looting-fires/6402998/>.

15. See *supra* notes 10–12; see also Bernstein, *supra* note 3, at 189–90 (describing how city officials hindered law enforcement).

16. Christopher F. Rufo, *Anarchy in Seattle: Antifa-affiliated Activists Seize Control of a City Neighborhood and Declare an “Autonomous Zone.”*, CITY J. (June 10, 2020), <https://www.city-journal.org/antifa-seattle-capitol-hill-autonomous-zone>.

17. Police personnel were told not to respond to police calls from CHO unless there was a mass casualty event. Elle Reeve & Samantha Guff, *They Envisioned a World Without Police. Inside Seattle’s CHOP Zone, Protester’s Struggled to Make it Real*, CNN (last updated July 6, 2020, 9:07 PM), <https://www.cnn.com/2020/07/05/us/chop-seattle-police-protesters-public-safety/index.html>.

destruction that occurred within the CHOP zone.¹⁸ In a June 11th *CNN* interview, Seattle Mayor Durkan said that the occupied zone had a “block party atmosphere” and likened it to the “summer of love.”¹⁹

For nearly a month, the city left CHOP alone, until violence within the occupied area escalated to the point of several killings and multiple shootings.²⁰ On June 30th when faced with a protest at her own home, Mayor Durkan vehemently denounced the protest, claiming that it put her family in danger, and called on the City Council to investigate a Council member thought to have organized the protest.²¹ However, Mayor Durkan never took such harsh action against the CHOP protests that caused great damage to local business and properties.²² Nearly a month after CHOP was dismantled, the Seattle Police Chief told local businesses that, because of city policies, the police force would not intervene in any future riots.²³

Portland, Oregon became the site of nightly protests for the remainder of the summer.²⁴ The mayor at first participated in and

18. Seattle Mayor Jenny Durkan encouraged the protests, announcing “We want you to march.” *June 2 Coverage of Nationwide Unrest and Ongoing Protests*, NBC NEWS (last updated June 4, 2020), <https://www.nbcnews.com/news/us-news/blog/2020-06-02-nationwide-protests-over-george-floyd-death-live-n1221821/ncrd122298#blogHeader>.

19. Ian Schwartz, *Seattle Mayor Durkan: CHAZ Has A “Block Party Atmosphere,” Could Turn Into “Summer of Love,”* REAL CLEAR POL. (June 12, 2020), https://www.realclearpolitics.com/video/2020/06/12/seattle_mayor_durkan_chaz_has_a_block_party_atmosphere_could_turn_into_summer_of_love.html.

20. Reeve & Guff, *supra* note 17.

21. See Brendan Kiley, et al., *Seattle Police Clear CHOP Protest Zone*, SEATTLE TIMES (last updated Aug. 12, 2020, 11:35 AM), <https://www.seattletimes.com/seattle-news/seattle-police-clearing-chop-protest-zone/> (discussing the shooting deaths, property damage and loss of business caused by CHOP).

22. For instance, the City Attorney had announced that he would not prosecute many misdemeanor crimes related to the protests. *Dozens of Protesters Arrested by Seattle Police May Never Be Prosecuted*, KIRO 7 NEWS (June 18, 2020, 5:38 AM), <https://www.kiro7.com/news/local/dozens-protesters-arrested-by-seattle-police-may-never-be-prosecuted/TQMXRMHYXBFZ5KZVTMEDU2S4IE/>.

23. David Krayden, *Seattle Police Chief Sends Simple Message to Businesses During Riots: You’re on Your Own*, DAILY CALLER (July 25, 2020, 1:41 PM), <https://dailycaller.com/2020/07/25/seattle-police-carmen-best-businesses-on-your-own-riots/>.

24. See Bernstein, *supra* note 3, at 191–92.

supported these protests.²⁵ Both the mayor and city council members condemned the federal government for using federal agents to defend and protect the federal courthouse in Portland.²⁶ Eventually, a united city council and mayoral administration succeeded in getting federal officials to cease defending the building.²⁷ As of June 23, after just four weeks of protest and rioting, \$30 million in property damage had been inflicted on the city and local businesses.²⁸ According to the acting secretary of the Department of Homeland Security, city officials in Portland turned a blind eye to the violence that had been occurring since the end of May.²⁹ Law enforcement often failed to take any action to stem the violence.³⁰ And when police did make arrests, charges were often dismissed.³¹ The Portland district attorney refused to

25. See William Mansell, *Riot Declared in Portland, Mayor in Crowd as Feds Disperse Tear Gas*, ABC NEWS (July 23, 2020, 5:29 AM), <https://abcnews.go.com/US/riot-declared-portland-mayor-crowd-feds-disperse-tear/story?id=71937598>.

26. Jemima McEvoy, *Portland Bans Local Police From Cooperating With Federal Agents*, FORBES (July 23, 2020, 12:18 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/07/23/portland-bans-local-police-from-cooperating-with-federal-agents/#2b1fc2e13937>.

27. *Id.*

28. See also Rachel del Guidice, *Portland Has Been Rioting Since May. Is There an End in Sight?*, THE DAILY SIGNAL (Aug. 27, 2020), www.dailysignal.com/2020/08/27/portland-has-been-rioting-since-may-is-there-an-end-in-sight/; see also Jordan Lancaster, *Riots, Protests in Portland Cost the City More than \$30 Million*, DAILY CALLER (June 23, 2020, 7:32 PM), <https://dailycaller.com/2020/06/23/riots-protests-cost-portland-businesses-alliance/>.

29. Rachel del Guidice, *'We Will Not Retreat': DHS' Chad Wolf Defends Portland Intervention Amid Riots*, THE DAILY SIGNAL (July 21, 2020), <https://www.dailysignal.com/2020/07/21/we-will-not-retreat-dhs-chad-wolf-defends-portland-intervention-amid-riots/>.

30. See Jeff Manning, *Downtown Retailers Still Reeling from Fiery Riot and City's Meek Response: 'It was chaos,'* THE OREGONIAN (June 27, 2020), <https://www.oregonlive.com/business/2020/06/downtown-retailers-wonder-about-police-reaction-to-rioting-thieves-where-was-the-mayor.html> (stating that the hundreds of police on duty in the city failed to act, with “[s]ome . . . seen on security video sitting on their parked motorcycles, driving by . . . stores, some even peering into shops”).

31. See *supra* note 22.

prosecute hundreds of people who had been arrested for criminal activity associated with the protests.³²

An illustrative example of how individuals felt vulnerable to the rioting and vandalism associated with the protests, especially in light of sympathetic city officials refusing to take law enforcement measures against the rioters, took place in St. Louis. In a photograph that quickly went viral, Mark and Patricia McCloskey were shown standing outside their home holding firearms to ward off potential vandals.³³ A protest march was passing by on the private drive outside their home after dismantling the gate barring entry to the neighborhood, and by this time it had become well known that protests frequently devolved into violence, instigated by members of the protest group.³⁴ The McCloskeys were denigrated as reactionaries and racists for their actions, even though they expressed support for the BLM cause.³⁵ The McCloskeys were later charged with a felony for illegal use of firearms, and the media generally portrayed the McCloskeys as the real public threat to the safety and First Amendment liberties of the protesters.³⁶

Chicago likewise witnessed much violence associated with the anti-racism and anti-police protests.³⁷ As the violence continued, it became known that the state's attorney had decided against prosecuting anyone committing a non-violent crime in connection with the

32. See Richard A. Oppel Jr., *In Portland, A Prosecutor Must Decide: Which Protesters Should Go to Jail?*, N.Y. TIMES (last updated Jan. 6, 2021), <https://www.nytimes.com/2020/08/23/us/portland-protests-prosecute.html?searchResultPosition=27>.

33. Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went on in St. Louis That Day?*, BBC NEWS (Aug. 25, 2020), <https://www.bbc.com/news/election-us-2020-53891184>.

34. *Id.*

35. *Id.*; see also Bernstein, *supra* note 3, at 202–08 (describing individuals' self-help measures taken in response to local law enforcement abdication).

36. Tom Jackman, *St. Louis Couple Who Aimed Guns at Protestors Charged with Felony Weapons Count*, WASH. POST (July 21, 2020, 8:33 PM), <https://www.washingtonpost.com/nation/2020/07/20/st-louis-couple-who-aimed-guns-protesters-charged-with-felony-weapons-count/>.

37. See Bernstein, *supra* note 3, at 193–94 (describing refusal of city to prosecute rioters and looters and the subsequent retreat of police from aggressive law enforcement).

protests.³⁸ The mayor of Chicago eventually used the police to prohibit protests at her own home, stating during a press conference on August 20th that she had a right to ensure that her “home is secure.”³⁹ However, she did not take this approach regarding protests and violence occurring elsewhere in the city.

According to the fiscal watchdog group *Open The Books*, mayors in other cities as well—e.g., Portland, New York, Seattle, San Francisco, Washington, DC—were accused of standing down their police during the outbreaks of violence following the death of George Floyd.⁴⁰ On September 2, 2020, a Trump administration memo directed the federal government to begin investigating the dispersal of federal funds to New York, Washington, DC, Seattle, and Portland—cities that had “permit[ted] anarchy, violence, and destruction” during the summer of 2020.⁴¹ The memo also instructed the Attorney General to identify other cities that had allowed “violence and the destruction of property to persist and [had] refused to undertake reasonable measures” to restore order.⁴² As a result of state and local government

38. For a discussion of prosecutors refusing to or being directed not to prosecute crimes associated with protests, see Matthew Hendrickson, *Kim Foxx Confirms Office Will Err on Side of Dismissing Cases Related to Protests, Curfew*, CHI. SUN TIMES (June 30, 2020, 6:59 PM), <https://chicago.suntimes.com/2020/6/30/21308314/kim-foxx-confirms-office-err-toward-dismissing-cases-related-protests-curfew>.

39. Douglas Ernst, *Lori Lightfoot's Block Filled with Cops in Protest Lockdown; Locals Mock Chicago Mayor's 'Fort Lori'*, WASH. TIMES (Aug. 21, 2020), <https://www.washingtontimes.com/news/2020/aug/21/lori-lightfoots-block-filled-with-cops-in-protest-/>.

40. See Adam Andrzejewski, *\$14.8 Billion In Federal Funding Flows Into Just Five Major U.S. Cities Where Civil Unrest Looms & Police Stand Down*, FORBES (Aug. 8, 2020, 3:54 PM), <https://www.forbes.com/sites/adamandrzejewski/2020/08/08/148-billion-in-federal-funding-flows-into-just-five-major-us-cities-where-civil-unrest-looms--police-stand-down/?sh=49bb62b65345>.

41. Steven Nelson, *Trump Orders Review to Defund NYC, Other 'Anarchist' Cities*, N.Y. POST (last updated Sept. 3, 2020, 9:22 AM), <https://ny-post.com/2020/09/02/trump-orders-review-to-defund-nyc-other-anarchist-cities/>; see Memorandum from Donald J. Trump, President, on Reviewing Funding to State and Local Government Recipients That Are Permitting Anarchy, Violence, and Destruction in American Cities to Att'y Gen. & The Dir. Of the Off. Of Mgmt. and Budget (Sept. 2, 2020) [hereinafter Trump Memorandum].

42. Trump Memorandum, *supra* note 41. According to insurance claims, the property damages inflicted by the rioting across the country affected thousands of

policies, the memo stated, “persistent and outrageous acts of violence and destruction have continued unabated in many of America’s cities.”⁴³ Regarding New York City in particular, the memo stated that “city officials had allowed violence to spike.”⁴⁴ The city had witnessed a 177 percent increase in shootings in July of 2020, compared to the same period a year earlier; and yet as violence surged during June and July of 2020, arrests in the city were down 62 percent compared to the previous year.⁴⁵

Social unrest and violent rioting have occurred many times during the nation’s history. However, perhaps at no other time in history have government leaders and elected officials so acquiesced in and even supported the unrest and violence. All across America, state and local politicians refused to take action against rioters, largely because those officials did not want to be seen as opposing the messages of the organizers of those protests.

Throughout much of the summer, there was a striking absence among state and local officials of any denunciation of the violence and destruction. Thus, because of political alliances of urban government leaders with the protests, and the subsequent silence or acquiescence to the violence that occurred, local and state government became complicit in the riots and the threats posed to property and human safety.⁴⁶

businesses and amounted to up to \$2 billion. *See* Brad Polumbo, *George Floyd Riots Caused Record-Setting \$2 Billion in Damage, New Report Says. Here’s Why the True Cost Is Even Higher*, FEE STORIES (Sept. 16 2020), <https://fee.org/articles/george-floyd-riots-caused-record-setting-2-billion-in-damage-new-report-says-here-s-why-the-true-cost-is-even-higher/>.

43. *See* Trump Memorandum, *supra* note 41.

44. *Id.*

45. *Id.*; *see also* Bernstein, *supra* note 3, at 195–96 (describing New York City’s policy of “light touch” law enforcement and its effect on the escalating violence).

46. Presidential candidate Joseph Biden did not condemn the violence until August 20, 2020; and vice-presidential candidate Kamala Harris supported and contributed to an organization that bailed arrested rioters out of jail. *See* Mary Margaret Olohan, *Biden Silent on Harris Supporting Bail Fund That Helped Rioters After He Condemned Riots, Violence*, DAILY CALLER (Sept. 2, 2020, 6:14 PM), <https://dailycaller.com/2020/09/02/biden-silent-harris-staffers-minnesota-freedom-fund-bailed-riots/>. This political silence mirrored the silence of the media, which continually denied or excused the violence by describing the protests and accompanying riots as “mostly peaceful.” *See* Jarrett Stepman, *Liberal Media Alternate Between Denying and Excusing Rioters and Looters*, THE DAILY SIGNAL (Sept. 1, 2020),

Vulnerable individuals were left with self-help as their only defense.⁴⁷ Consequently, as this paper will demonstrate, the urban violence during

<https://www.dailysignal.com/2020/09/01/liberal-media-alternate-between-denying-and-excusing-rioters-and-looters/>; see also Ben Shapiro, *The Left's Willingness to Tolerate Violence Should Frighten All Americans*, THE DAILY SIGNAL (July 30, 2020), <https://www.dailysignal.com/2020/07/30/the-lefts-willingness-to-tolerate-violence-should-frighten-all-americans/> (stating that “the category of ‘mostly peaceful’ is a brand new invention meant to obscure the simple fact that many of our cultural elites are fine with violence so long as those who engage in such violence have the proper goals This should come as little surprise, given that those same cultural elites have cheered on massive protests in a time of a deadly pandemic, explaining that sometimes politics is just too important to stop a raging disease.”); Mark Hemingway, *Peaceful Riots? Journalism Bows to the Woke Mob*, THE DAILY SIGNAL (July 13, 2020), <https://www.dailysignal.com/2020/07/31/peaceful-riots-journalism-bows-to-the-woke-mob/>; Jordan Lancaster, *CNN Chyron Calls Wisconsin Riots ‘Mostly Peaceful’ As Correspondent Stands in Front of a Burning Building*, DAILY CALLER, (Aug. 27, 2020, 2:07 AM), <https://dailycaller.com/2020/08/27/cnn-chiron-wisconsin-riots-mostly-peaceful-correspondent-burning-building/> (describing a CNN reporter calling protests “mostly peaceful” even as he stood in front of a burning building); William Davis, *NBC Bans Reporters From Using the Word ‘Riot’ in Coverage of Minnesota Riots*, DAILY CALLER (May 28, 2022, 1:55 PM), <https://dailycaller.com/2020/05/28/nbc-riot-minnesota-george-floyd/> (stating that NBC prohibited reporters from using the word “riot” in covering the violent outbursts occurring in Minnesota in the wake of the George Floyd killing, even though rioters had set many buildings on fire and had looted Minneapolis businesses). See generally Andrew Kerr, *Here Are 31 Times the Media Pushed Narratives Downplaying Riots and Looting After George Floyd’s Death*, DAILY CALLER (Sept. 3, 2020, 10:14 PM), <https://dailycaller.com/2020/09/03/media-justified-explained-away-rioting-looting/>. According to one commentator, the media would not run stories detailing the full extent of the violence, because “they are extremely reluctant to produce any coverage which might reflect poorly on the movement and potentially undermine its moral and political legitimacy. R. R. Reno, *The Woke Script*, FIRST THINGS, 61 (Oct. 2020), <https://www.firstthings.com/article/2020/10/the-woke-script>. Moreover, as further reflection of the political nature of the protest factions, the protests and violence were not confined to the police or public institutions, but even extended to religious places of worship, with numerous churches and statues burned or vandalized. See Tony Perkins, *Churches Across the Country Attacked*, THE DAILY SIGNAL (July 18, 2020) <https://www.dailysignal.com/2020/07/18/churches-across-the-country-attacked/>.

47. As an example of vulnerable individuals at the mercy of protesting mobs, a woman at a DC restaurant was surrounded at her table and harassed by protestors because she would not raise her fist to their chant “White Silence is Violence.” The woman, an urban planner, was sympathetic to the protest message and had participated in other Black Lives Matter protests, but because she did not raise her fist under pressure, she was harassed by angry protesters. Mary Margaret Olohan, *Videos Show*

the summer of 2020 reveals an important purpose of the Second Amendment—as a constitutional protection against government-encouraged violent factions.

III. THE LIBERTY PROTECTIONS OF THE BILL OF RIGHTS

A. Introduction

Regarding the purposes underlying the Bill of Rights, one interpretation is that the Bill serves to protect certain individual fundamental rights.⁴⁸ Under this view, the Bill of Rights identifies particular individual freedoms and then creates a constitutional protection for those substantive freedoms.⁴⁹ Another interpretation looks at the Bill of Rights from a different perspective.⁵⁰ This view sees the Bill as a set of provisions designed to further check and control government abuses.⁵¹

According to the second view, the Anti-Federalists, as the primary advocates for the Bill of Rights, sought to achieve a greater assurance that the government created through the new Constitution would indeed be a government of limited powers.⁵² To further secure this limited government, the Bill of Rights specified certain areas in which the government expressly had no power to act or intrude.⁵³ Whereas the rest of the constitutional scheme set out structural provisions for the overall maintenance of limited government, the Bill of Rights articulated specific subject areas in which the principle of limited government was to explicitly prevail.⁵⁴

Crowds of DC Protesters Harassing People at Restaurants: 'White Silence is Violence,' THE DAILY SIGNAL (Aug. 26, 2022), <https://www.dailysignal.com/2020/08/26/videos-show-crowds-of-dc-protesters-harassing-people-at-restaurants-white-silence-is-violence/>.

48. *See generally* PATRICK M. GARRY, LIMITED GOVERNMENT AND THE BILL OF RIGHTS, 10–11 (2012).

49. *Id.*

50. *Id.* at 31–36.

51. *Id.*

52. *Id.* at 19–22.

53. *Id.* at 56–69.

54. *Id.*

The impetus for the Bill of Rights arose from the same set of concerns that motivated the Constitution. These concerns included creating the appropriate structures and checks to keep the new central government sufficiently limited. The Bill of Rights was one more facet to that endeavor, providing additional means through which to keep the government limited.

The framers of the Bill of Rights were very much concerned about individual freedom and the natural rights of the individual, and this concern had inspired the Declaration of Independence and America's break with England.⁵⁵ But the Bill of Rights was also drafted and ratified with a view toward integrating it into the overall scheme of the Constitution. The rights identified in the Bill of Rights were seen as vital, in terms of their capacity, when freely exercised, to keep government limited.

This Article does not suggest that the framers and ratifiers of the Bill of Rights did not care about individual freedoms or the constitutional protection of those freedoms. Indeed, notions of natural rights were very prominent among the framers' political ideas.⁵⁶ There is no historical dispute that the framers saw the Bill of Rights as protecting individual liberty. What this Article does suggest, however, is that another equally important desire inspired the Bill of Rights—a desire to provide additional checks on government abuse and oppression.

Once the Bill of Rights in general, and the Second Amendment in particular, are seen as necessary checks on government excesses and abuses, the scope and nature of their protections and applications will have to accommodate this purpose. And in relation to this goal of checking the power of government, a more specific purpose of the Second Amendment comes to light through the government-sanctioned protests and rioting during the summer of 2020. This purpose involves the Second Amendment as a vital and last-resort protection against the unwarranted actions of government in allowing or facilitating factional violence aimed against individuals who are not part of the government-encouraged faction.

55. *Id.*

56. *Id.* at 10–11.

B. The Second Amendment and Individual Rights

In his argument that the Bill of Rights serves to protect individual natural rights,⁵⁷ Professor Randy Barnett states that natural rights define a moral space or liberty in which individuals should be able to live their own lives, free from interference by other persons.⁵⁸ Recognizing the Second Amendment as protecting an individual right, the Supreme Court in *District of Columbia v. Heller* stated that the Second Amendment protects the right of an individual to keep and bear arms for purpose of self-defense.⁵⁹ Relying on text, history and tradition, the Court ruled that “the right of the people to keep and bear arms” is an individual right.⁶⁰ In *McDonald v. Chicago*, the Court reaffirmed this right and applied it to the states by way of incorporation through the Fourteenth Amendment.⁶¹ The *McDonald* Court characterized this

57. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 14 (2006).

58. Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 669 (1997). Under one view, natural rights “are the set of concepts that define the moral space within which persons must be free to make their own choices and live their own lives if they are to pursue happiness while living in society.” RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 80 (2004). According to Barnett, such rights constitute enforceable claims on other persons, including government officials, “and they are natural insofar as their necessity depends upon the nature of persons and the social and physical world in which persons reside.” Randy Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT 93, 106 (1995) (quoting Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853, 862 (1993)).

59. 554 U.S. 570, 636 (2008). The Court recognized that *Heller* had a constitutional right to lawfully use a handgun. *Id.* at 592. The Court also stated that the right was “implicit in the concept of ordered liberty.” *Id.* at 628–29. However, the Court recognized that the right was not absolute and that a number of restrictions on the right are “presumptively lawful.” *Id.* at 626–27.

60. *Id.* at 579. *Heller* repeatedly analogized the Second Amendment to the First Amendment, thereby indicating that free speech principles give guidance to resolving Second Amendment claims. *Id.* at 582, 591, 595, 625–26, 635.

61. 561 U.S. 742, 130 S. Ct. 3020, 3036 (2010). However, since *McDonald*, the lower courts have differed in their treatment of Second Amendment cases, particularly regarding the appropriate tier of scrutiny to apply. See Josh Blackman, *The First Amendment, Second Amendment, and 3d Printed Guns*, 81 TENN. L. REV. 479, 491 (2014); see also Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 820 (2015) (stating that many lower courts are applying

right as fundamental, holding that “the right to keep and bear arms is fundamental in our scheme of ordered liberty” and is “deeply rooted in this Nation’s history and tradition.”⁶² Although both *Heller* and *McDonald* “characterized the core of the Second Amendment right in terms of self-defense, it did not rule out additional justifications,” such as the preservation of citizens’ ability to resist “in the face of tyrannical state actions.”⁶³

C. The Bill of Rights as Provisions of Limited Government

1. Limited Government in the Constitutional Scheme

To the Framers, limited governmental structures, such as federalism and separation of powers, rather than any specific individual rights provisions, provided the greatest protections for liberty.⁶⁴ The Constitution reflects the idea that political liberty is best fulfilled through checks and balances that limit the powers of government.⁶⁵ While individual rights protect against isolated acts of government misconduct or abuse of power, structural rights protect against systemic and continuing government power of the type that involves an illegal aggrandizement of power.⁶⁶

In *The Federalist Papers*, Alexander Hamilton made a clear distinction between a free government and a republican government.⁶⁷ Individual liberty was seen to depend on “a free and limited government

an intermediate scrutiny approach). Lower courts are also grappling with uncertainty over how to apply historical analysis to Second Amendment cases. *Id.* at 825, 828, 834.

62. *McDonald*, 561 U.S. at 767. The Court rejected the argument that “the Second Amendment should be [treated as] a second-class right.” *Id.* at 780. According to the Court, individual self-defense is “the central component of the Second Amendment right.” *Id.* at 767.

63. Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 639 (2019).

64. The structures also reflected a states’ rights tradition “that extolled the ability of local governments to protect citizens against abuses by central authorities. AKHIL AMAR, *THE BILL OF RIGHTS* 4 (1998).

65. *See* THE FEDERALIST NO. 51 (James Madison).

66. GARRY, *supra* note 48, at 19–21.

67. *See, e.g.*, THE FEDERALIST NOS. 9, 51 (Alexander Hamilton) (referencing the distinction between free governments and republican governments).

structured to prevent any interests from becoming an overbearing majority.”⁶⁸ Whereas free government focuses exclusively on securing specified individual rights, republican government tries to achieve political freedom as a means to securing individual freedom.⁶⁹

A republican government scheme tries to provide a cultural freedom at large, rather than to just simply protecting specific individual rights. By limiting government and restraining it from arbitrary interference into individual and social life, the constitutional structures enable an overall cultural freedom to exist in a society. According to James Madison:

The best chance for justice and security for rights would be to prevent the formation of unjust majorities. And to do that you recommended not a bill of rights but rather structural constitutional arrangements that would encourage the growth of a multiplicity of interests, and devices such as a congressional veto over state legislation.⁷⁰

As Professor Graber notes, the reliance on the Constitution’s structural provisions to protect liberty explains why the Framers often ignored arguments that the specific rights mentioned in the Bill of Rights “lacked clear legal meanings.”⁷¹

2. The Impetus for the Bill of Rights

When he introduced his proposal for a Bill of Rights in the First Congress in June of 1789, James Madison explained that the purpose of this Bill of Rights was “to limit and qualify the powers of

68. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 21 (1999).

69. Bradford P. Wilson, *Separation of Powers and Judicial Review*, in *SEPARATION OF POWERS AND GOOD GOVERNMENT* 68 (Bradford P. Wilson & Peter W. Schramm eds., 1994).

70. ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 65 (1997).

71. Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357, 386 (2007).

government.”⁷² Consistent with the overall focus of the Constitution, the Bill of Rights serves a government-limiting role, containing explicit limitations on government power.⁷³ Although the doctrine of enumerated powers prohibited the federal government from exercising any power not explicitly granted to it by the Constitution,⁷⁴ the Bill of Rights restrained even those enumerated powers from encroaching on areas protected by the Bill.⁷⁵ In this way, the Bill of Rights provides an additional constitutional mandate for limited government by prohibiting government incursion into certain specified areas of the lives of individuals.

Professor Barnett explains that the Constitution limits government in two complimentary ways.⁷⁶ The first way, as reflected by the “Federalist Constitution,” limited government through structural provisions such as separation of powers and federalism.⁷⁷ The second way, reflected by the “Anti-Federalist Constitution,” limited government by providing explicit areas in the Bill of Rights in which

72. James Madison, *Speech to House of Representatives* (June 8, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 81 (Helen Veit et al., eds., 1991).

73. Another aspect of the limited government nature of the Constitution was the fact that the Constitution did not impose any substantial obligations on government—for instance, the Constitution did not mandate that it act in certain manners, nor that it had any discretion to decline to do so. Another way in which the Constitution limited government powers was to create competing centers of power within the constitutional structure, such as separation of powers and federalism. For a general discussion of the structural design of the Constitution and the goals of the framers, see generally JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* (2007).

74. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

75. See Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1189 (1996) (arguing that “[b]y juxtaposing affirmative powers with negative limits, the Constitution’s architecture assumes that, even when the government pursues a permissible goal, the government might sometimes violate individual rights—and thus, the negative limits prohibit otherwise valid exercises of power”). Even though the Constitution granted only limited powers to the federal government, the Anti-Federalists were well aware of historical instances in which limited power had turned into unlimited power, and they argued that the new Constitution did not adequately guard against such an occurrence. David DeWolf, *Ten Tortured Words*, 85 DENV. U. L. REV. 443, 448 (2007).

76. See *supra* note 58.

77. *Id.*

government could not act or intrude.⁷⁸ Thus, the Bill of Rights revolves around the same theme that pervades the original Constitution—limited government.

The Anti-Federalists and other supporters of the Bill of Rights feared that the structural provisions of the Constitution, as drafted and offered for ratification, aimed at achieving limited government would fail to sufficiently control the power of the new federal government, which they feared could commit the same kind of abuses they had experienced under the regime of George III.⁷⁹ Madison also envisioned that the Bill of Rights would serve an educational purpose, helping to “rouse the attention of the whole community” toward the value of liberty and the dangers of government abuses.⁸⁰

In their role of ensuring limited government, the rights protected within the Bill of Rights were those that could be most effective in controlling and limiting government. Not only did the Bill of Rights create limitations to government, but it specifically identified areas of freedom which, when exercised, could be most effective in controlling and limiting government.

D. The Second Amendment as a Government-Limiting Provision

The Bill of Rights specified particular areas in which government could not exert power. The Second Amendment not only limits the power of government to disarm its citizens and render them powerless to defend themselves, but it also provides a necessary means of preventing government from so expanding its power that it crosses the line into either directly aiding or indirectly sanctioning oppressive acts of violence towards its citizens. The Second Amendment provides a means by which individuals and society can resist the improper use of government power to allow violent repression of disfavored groups

78. Randy Barnett, *The Separation of People and State*, 32 HARV. J.L. & PUB. POL’Y 451, 452 (2009).

79. The Anti-Federalists criticized the Constitution for its failure “to provide adequate protection against the operation of these tyrannical drives” of the new government. THE ANTIFEDERALISTS lxiii (Cecelia M. Kenyon ed., 1976). A Bill of Rights “was needed not only to protect the people from their government but also to protect individuals and minorities from the will of the majority,” which could act unjustly and tyrannically. *Id.* at xciii.

80. 1 ANNALS OF CONG. 437 (1787) (Joseph Gales ed., 1834).

within society. In this way, the Second Amendment confers a freedom necessary for the populace's future ability to exert an effective limit or control on government.

The "principal fear to which the Second Amendment responded was that the new federal government would misuse its delegated powers to disarm the citizenry."⁸¹ As Professor Akhil Reed Amar argues, the strategy of the Amendments in the Bill of Rights was to keep agents "of the central government under control."⁸² Similarly, the Second Amendment allows the besieged individual an admittedly last-resort defense against abusive and tyrannical actions by government-encouraged factions, as occurred during the summer of 2020.

IV. THE FRAMERS' FEAR OF FACTIONS

A. The Second Amendment Protects Against Tyrannical Factions

In addition to articulating an individual right to be protected against government infringement, the Second Amendment, by its inclusion in the Bill of Rights, serves as a constitutional provision limiting and checking the power of government. More specifically, and perhaps more uniquely, the Second Amendment provides an essential and maybe even sole constitutional protection against an oppressive and violent faction, particularly if that faction operates with the tacit support or approval of government. As Justice Alito has observed, without the Second Amendment's right of self-defense, "then the safety of all Americans is left to the mercy of state authorities who may be

81. Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207, 209 (2016). A good discussion of the limited government purpose behind the Bill of Rights in general and the Second Amendment in particular can be found at Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle Over the Legitimacy of the Individual Right to Arms*, 70 HASTINGS L.J. 717 (2019). Professor Johnson provides a comprehensive historical analysis of the limited government aims and purposes underlying the Second Amendment. According to Professor Johnson, the goal of "limited federal power remained a core influence on the understanding of the scope and application of the individual right to arms" well into the twentieth century. *Id.* at 750.

82. AMAR, *supra* note 64, at 83 (arguing that juries, guaranteed in no fewer than three amendments, were at the heart of the Bill of Rights).

more concerned about disarming the people than about keeping them safe.”⁸³

The purpose or focus of a right or constitutional provision is vital for determining the scope or application of that right or provision. Only by knowing the purpose of a right can that right be properly enforced. The purpose of a right will also determine what reasonable, if any, restrictions can be placed on that right. For instance, if the purpose of the Second Amendment is to protect an individual’s safety in his or her own home, then weapons like military rifles might not fall within that protection; however, if the purpose of the Second Amendment is to resist government oppression and violent factions, then such weapons might be protected—and they might be protected even outside the home.

Of all the rights contained in the Bill of Rights, the Second Amendment might be the most essential for achieving the most basic aspect of liberty: the ability of a free people to resist oppression. And this oppression can emanate from many sources. It may come directly from government, or from private mobs, or from factions indirectly encouraged by government. Constitutional-era political philosophers like John Locke, William Blackstone, and Adam Smith all tied the right of self-defense to freedom from political oppression, with the right to bear arms necessary for both.⁸⁴ Blackstone wrote that the right to keep and bear arms is the “right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”⁸⁵

Blackstone’s writings about self-defense against the violence of oppression do not refer to an individual’s defense against a home burglar.⁸⁶ He referred instead to an individual’s defense against an

83. *Caetano v. Massachusetts*, 577 U.S. 411, 422 (2016) (Alito, J., concurring). As Justice Thomas stated: “For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.” *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2016) (Thomas, J., dissenting from denial of cert.).

84. NELSON LUND, *THE RIGHT TO ARMS AND THE AMERICAN PHILOSOPHY OF FREEDOM* 4, 8–10, 13 (Heritage Foundation, First Principles No. 62, 2016).

85. 1 WILLIAM BLACKSTONE, *COMMENTARIES* 139.

86. *Id.*

oppressive government seeking to eliminate resistance to it.⁸⁷ This right, contained within the Second Amendment, has been characterized as the right to resist tyranny or as the anti-tyranny protection.⁸⁸ And this right, serving the anti-tyranny purpose of the Second Amendment, may very well trigger protections different from those applicable to an individual right of self-defense in the home. In other words, the anti-tyranny right could entail protections of the right to bear arms outside of the home.⁸⁹

Government oppression, or tyranny, may often be directed against disfavored groups or populations. After the Civil War, for instance, the former Confederate states began confiscating the firearms of the newly freed African-Americans. In response, Congress passed the Civil Rights Act of 1866, codifying the right of the freedmen to keep and bear arms.⁹⁰ Southern blacks and Unionists were being victimized by violent Confederate-sympathizing factions, which led the drafters of the Fourteenth Amendment to protect the rights of blacks and Unionists against these violent factions.⁹¹ Arguing that the southern laws disarmed blacks while keeping former Confederate night riders armed, in part because of the unionist political leanings of blacks, Cottrol and Diamond argue that the Fourteenth Amendment incorporated the Second Amendment in an attempt to protect black Americans from violent factions organized on political grounds.⁹² Thus, to the

87. *Id.* at 144; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES 412.

88. *See, e.g.,* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1634, 1649 (2014).

89. In the aftermath of *Heller*, a contested issue has been whether the right to keep and bear arms also exists outside of the home. *See, e.g.,* Joseph Blocher, Commentary, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218–21 (2014).

90. *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 27, 146 (1998).

91. As Akhil Amar describes the opinions of the framers of the Fourteenth Amendment, “[w]hen guns were outlawed, only Klansmen would have guns.” Akhil Reed Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROB. 103, 110 (2002). Since the factions were operating with the approval of local government, the besieged blacks and Unionists obviously could not count on the police for protection. HALBROOK, *supra* note 90.

92. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 344–46 (1991). The framers’ intent to have the Fourteenth Amendment incorporate the right to keep and

drafters of the Fourteenth Amendment, the Second Amendment was a necessary protection to individuals being oppressed by violent mobs operating under the tacit approval of local government.

Somewhat similar to the Reconstruction era in the South, a century and a half later during the summer of 2020 governments sided with politically-oriented factions against other citizens seeking to defend their property and their lives. And when individual citizens attempted to defend their property with firearms, they were cast as a danger to society and put in jeopardy of facing legal punishment.

Firearms are often depicted as a threat to public safety; and a contrast is often made between safety on one hand and the right to bear arms on the other.⁹³ But often ignored are the safety rights and interests of the individuals or minorities being targeted by violent mobs, as so often occurred during the rioting in American cities during the summer of 2020. Opponents of the Second Amendment create a dichotomy between safety rights and gun rights; but in fact, depending on whose perspective is being considered, this is a false dichotomy. Gun rights may very well serve safety rights.⁹⁴ Second Amendment critics seem to depict individuals with guns in public as marauding gangs of thugs or vigilantes.⁹⁵ But as was the case during the summer of 2020, many of the individuals with firearms were those seeking to defend their homes, businesses, and property from violent rioting mobs.

Critics also deride the argument that the Second Amendment protects a right of revolution against the government.⁹⁶ These critics claim that the drafters of the Constitution, which created a new federal government, surely would not have supported any constitutional means

bear arms reflected their alarm at the prospect of southern blacks and Unionists being disarmed while the marauding mobs of night riders were not. See Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL'Y 17, 23 (2016).

93. See, e.g., Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187, 198–200 (2016).

94. See *id.* at 202.

95. See *id.* at 203.

96. See Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 635–36 (2015).

that allowed for armed rebellion against that government.⁹⁷ However, armed rebellion is not what occurred during the summer of 2020, at least on the part of those individuals trying to protect their property from mobs that were being given almost a free hand by local government officials.

The framers and ratifiers of the Bill of Rights were acutely aware of the dangers of mobs and violent factions.⁹⁸ They had witnessed the prevalence and destructiveness of politically motivated mobs during the Revolutionary period.⁹⁹ Mob rule threatened liberty, wrought anarchy, and undermined the structure of society.¹⁰⁰ Moreover, late eighteenth century Americans, aware of the dangers of mobs, supported the common law public disorder crimes of riot, rout, and unlawful assembly.¹⁰¹ Therefore, it seems particularly logical that the Second Amendment would have envisioned and addressed this danger, especially in light of James Madison's *Federalist No. 10*.

B. Federalist 10 and the Concerns with Factions

In his warnings of the “dangerous vice” of factions and their threat to a democracy, James Madison defined a faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁰² The riotous mobs of the summer of 2020 fit that definition of faction and demonstrate that Madison's warnings of factions have remained relevant through the centuries.¹⁰³ According to Madison, “the instability, injustice, and

97. *See id.* at 659.

98. *See supra* note 78 and accompanying text.

99. *See* BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* 70–71, 134 (1974).

100. *Id.* at 137.

101. *See* Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61, 81–90 (2018).

102. THE FEDERALIST NO. 10 (James Madison).

103. Moreover, given the support and even encouragement given by local governments to the rioters, the Second Amendment becomes even more crucial. As Madison recognized, “the problem of rights was no longer to protect the people as a collective whole from government but to defend minorities and individuals against

confusion” wrought by factions have been the “mortal diseases under which popular governments have everywhere perished.”¹⁰⁴

The problem, as Madison foresaw, was that factions fed off the very goal and foundation of a democracy: liberty. Factions could not be prevented without eliminating the very liberty that gave a democracy its virtue. It was all the freedoms—freedom of speech, association, assembly, travel—that gave life and energy to factions. And to control or eliminate those freedoms would be to eliminate a degree of liberty from society. So if factions cannot be prevented, how might they be controlled so that the liberty of other citizens is not trampled?

Ultimately, when all else fails—when factions descend into violent mobs, disregarding the law and the rights of others, and when law enforcement ceases holding those mobs to account—the only defense may rest in the Second Amendment.¹⁰⁵ When the consequences and actions of factions drift beyond the political and social realms and descend into violent attacks on innocent individuals, and particularly when government discriminatorily fails or refuses to enforce the law against those factions, then the only protection for liberty rests in the individual’s rights under the Second Amendment.

Although Madison in *Federalist 10* addressed factions based on economic interests, he did not confine his concerns to just those types of factions.¹⁰⁶ He addressed factions in terms broad enough to include

popular majorities acting through government.” JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 313 (1996). This is just the situation that arose when property owners had to combat the mobs and rioters that roamed with the tacit acquiescence of local government.

104. *Id.*; THE FEDERALIST NO. 10 (James Madison).

105. Indeed, James Madison foresaw that the Bill of Rights, and in this respect the Second Amendment, may serve a deeper role than just enabling the people to judge the behavior of the government and to know when their legitimate rights were being violated. Madison saw that the Bill of Rights would “best promote the cause of republican self-government if they enabled republican citizens to govern themselves—to resist the impulses of interest and passion that were the root of factious behavior.” JACK M. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 336 (1996). And the Second Amendment right to keep and bear arms might provide the last check against such violent and tyrannical factious behavior. *Id.* Certainly, in this manner, the Second Amendment in particular and the Bill of Rights in general would provide more than a mere “parchment barrier” against infringements on liberty. *See id.* at 316.

106. *See supra* note 102.

those formed through opinions on government and political issues.¹⁰⁷ In defining factions, Madison included those based on noneconomic motives or “passions.”¹⁰⁸ And in his influential writings on the subject, the political philosopher David Hume, whom Madison followed closely, recognized that political factions can often be very violent.¹⁰⁹

Pervading the *Federalist Papers* is the belief that violent domestic factions can pose a danger to liberty and democracy similar to that posed by hostile foreign nations.¹¹⁰ Factions can also threaten property, and Madison considered property rights of the utmost importance, asserting that “the protection of the faculties from which the rights of property originate is the first object of government.”¹¹¹ Therefore, the ideal government was one that controlled factions; and governmental effectiveness was at least partially measured by its ability to control factions.¹¹² Consequently, if government cannot control factions, and as a result fails to protect life, liberty, and property, then there must be some fail-safe means of controlling factions, as provided by the Second Amendment.

107. MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 63 (1987).

108. *Id.* at 64. Likewise, the prominent political philosopher, David Hume, who influenced Madison, broadly envisioned factions as those transcended groups united around just economic issues or interests. *Id.* at 69. According to Professor White, Hume’s views indicate that Madison would have defined faction beyond just those that form around economic interests. *Id.* at 70, 72.

109. *Id.* at 71.

110. GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 106 (1960). Indeed, the *Federalist Papers* 6 through 10 all address “the necessity of the Union to guard against domestic dangers to our safety.” Charles R. Kesler, *Federalist 10 and American Republicanism*, in *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* 20 (Charles R. Kesler ed., 1987).

111. DIETZE, *supra* note 110, at 117. But *Federalist 3* also gives prominence to “safety” as the “higher and more comprehensive” object of government. *See* Kesler, *supra* note 110, at 27. But for either object, the Second Amendment can be seen as the last-course remedy.

112. *See* DIETZE, *supra* note 110, at 120; *see also* Kesler, *supra* note 110, at 23 (stating that a well-constructed republic will tend to “break and control the violence of faction”). The “tyrannical passions” or violent force of factions must not prevail over the rule of law. *Id.* at 29.

Free government “exists to the degree that it controls the effects” of factions.¹¹³ The Second Amendment exists, in part, to retain that freedom if government is incapable or unwilling to control factions. Since a main threat to free government comes from factions, any “constitution providing for free government must furnish a remedy against factions.”¹¹⁴ In the case of the U.S. Constitution, the ultimate and final remedy against violent factions resides in the Second Amendment.

In Madison’s view, a factious spirit brings an “unsteadiness and injustice” to democratic politics.¹¹⁵ Given the importance of avoiding the destructions caused by factions, Madison warned the people not to count on the intervention of others to save them and to be mindful of their own responsibilities.¹¹⁶ Taken to its logical end, the Second Amendment gives the people the final responsibility to defend themselves against the oppression of factions. And since the guideposts of government, as outlined in *Federalist 10*, appear to be the public good and private rights—with the ultimate end of government being the safety and happiness of society—then private rights and the public good merge together in the Second Amendment’s purpose in opposing tyrannical factions and oppressive government support of those factions.¹¹⁷

C. A More Expansive View of the Second Amendment

Much of the existing scholarship on the Second Amendment envisions an either-or scenario regarding purposes of the right to keep and bear arms. Either the right serves the role of protecting state militias, the role of providing personal defense as the Court stated in *Heller*,¹¹⁸ or the role of resisting government or faction tyranny.¹¹⁹ Advocates of

113. DIETZE, *supra* note 110, at 150.

114. *See id.* at 272.

115. *See Kesler*, *supra* note 110, at 31.

116. *See id.* at 32.

117. *See id.* at 33.

118. *Heller*, 554 U.S. at 599 (stating that the central component of the right is personal defense).

119. For a discussion on the anti-tyranny role of the Second Amendment, see Michael P. O’Shea, *The Second Amendment Wild Card: The Persisting Relevance of*

the first and third roles depict the Second Amendment as a collective right, rather than as an individual right.¹²⁰ However, there is no reason why the Second Amendment cannot serve two purposes and protect multiple distinct rights.¹²¹ As argued above, the entire Bill of Rights serves two functions: the protection of specific individual liberties and the more general limitation of government power. Similarly, the Second Amendment can be seen as protecting the individual right of self-defense, along with both the individual and social interest in resisting tyranny and oppression by factions. There may be a civic purpose in deterring tyranny, but there is also an individual purpose, as demonstrated by the individual attempts to resist mob violence and destruction during the urban riots of 2020.

It would be a mistake to think that the Court in *Heller* set out to, and in fact did, provide a complete and comprehensive model of the Second Amendment. A more accurate view is that the Court simply ruled on the facts at hand, and what was at hand was the question of an individual right to keep and bear arms in one's home. *Heller* sought to overturn two District of Columbia handgun laws that restricted petitioner's use and ownership of a handgun for lawful self-defense in the home.¹²² The lawsuit challenged both laws on Second Amendment grounds, even though a prevailing view of the Second Amendment at the time confined the reach and protection of the Amendment to state militia and militia service.¹²³ Thus, for the *Heller* Court to rule as it did, holding that individual self-defense lays at the core of the right to keep and bear arms, it had to accomplish a transformation in existing Second Amendment jurisprudence.¹²⁴ To accomplish such a jurisprudential change, the Court would have to, and did, confine its holding to the facts of the case. Consequently, the decision left many unresolved

the "Hybrid" Interpretation of the Right to Keep and Bear Arms, 81 TENN. L. REV. 597 (2014).

120. See *id.* at 605–607, 616, 618, 623.

121. For an argument that the Second Amendment has more than one purpose, see David T. Hardy, *The Janus-Faced Second Amendment: Looking Backward to the Renaissance, Forward to the Enlightenment*, 18 GEO. J.L. & PUB POL'Y 421, 424, 448 (2020).

122. See *Heller*, 554 U.S. at 576 n.2.

123. See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 69 (2020).

124. *Heller*, 554 U.S. at 599, 630.

questions in its wake, such as all the different kinds of weapons that might be constitutionally protected or whether Second Amendment protections apply on public streets.¹²⁵

Just because *Heller* recognized the individual right aspect of the Second Amendment, given the facts of that case, does not mean that there is not also an anti-tyranny aspect that might be recognized in a case such as might be presented by individuals prosecuted for resisting the actions of a violent mob. The text and history of the Second Amendment seems broad enough to encompass the two different, and yet often complimentary, purposes of individual self-defense and protection against oppressive factions. And if the Second Amendment incorporates different purposes, then its protections may well differ according to the situations and the reasons for the assertion of the right.

V. CONCLUSION

The framers and ratifiers of the Bill of Rights very much believed in the theory of individual natural rights. This theory had greatly inspired the Declaration of Independence and America's break with England. But the ratifiers of the Bill had another reason for including those rights in the Constitution: they wanted the rights to serve an important government-limiting role. Within this role, the Bill of Rights, and the Second Amendment in particular, sought to protect against one of the worst abuses of government—the allowance of violent and tyrannical political factions.

Perhaps like no other time in the nation's history since Reconstruction, the social unrest and violence during the summer of 2020 demonstrated one of James Madison's worst fears: factions that were not only politically aligned, but violent in their actions and indifferent toward liberty and property rights. The anti-tyranny purpose of the Second Amendment reflects a specific role within the more general limitation of government role of the Bill of Rights, and this role influences what particular protections the Second Amendment offers. Thus, the Second Amendment serves to protect individuals and society from

125. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (addressing issue of assault weapons); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (addressing issue of geographic locales in which the Second Amendment may apply).

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the dangers of such factions, particularly when the factions operate with the tacit approval or encouragement of the government.