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The Right to Prompt Access to Guns in a Time of Violent Unrest

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The looting and violence that occurred in cities across the nation provide new insights into the relation of the First and Second Amendments and raise new questions about the scope of Second Amendment rights. Lawful protests robustly and correctly protected under the First Amendment made it harder to prevent looting and violence that those imbedded in the protests caused. As a result of the civic disorder, more people in jurisdictions with such disturbances wanted firearms. But some of these jurisdictions failed to process licenses for firearms in a timely manner.

Thus, the particular and pressing Second Amendment question presented is whether these delays violate the right of the people to keep and bear arms. Heller expressly held that the right to have a gun at home was of the essence of the Second Amendment, and the right was extended to the states by McDonald v. Chicago. Yet Illinois now imposes lengthy delays to obtain even the licenses necessary to purchase a gun for home or business use. Circuit courts remain divided on whether the Second Amendment right also encompasses the right to carry a firearm outside the home without a showing of special need. But assuming it does, a similar question remains for jurisdictions like Minnesota which face lengthy delays in licensing the right to carry.

This question is not only important practically but theoretically. How is one to decide whether this delay violates the Second Amendment? This essay argues that the First Amendment provides a useful analogy—one that shows that unreasonable delays of providing licenses violate the Second Amendment, just as unreasonable delays in getting a permit for a demonstration violate the First Amendment.

The First Amendment has been suggested before as a source for Second Amendment doctrine. But this essay demonstrates the power of that analogy both in general and in the specific context of civil disorder in which we find ourselves. First, the essay argues that the underlying reason that First Amendment furnishes a good analogy for the Second is that both directly protect natural rights of individual. It shows that James Madison, the drafter of the Bill of Rights, so described *both* rights in an article written shortly after their ratification. It provides the first citation and discussion ever of this important support for the individual rights reading of the Second Amendment, and that article's support for understanding the Second Amendment as encompassing a right of individual self-

defense. Madison's description also demonstrates the strong relation between the structure and presumptively the implementation of these two amendments.

Second, this essay shows that both Amendments are similar in nevertheless allowing the rights to be tempered by particularly powerful reasons related to the common good. Interpreting the Second Amendment by analogy to the First not only helps judges gauge the strength of the common good justification needed to set the natural right aside, but it also has the specific advantage of importing a well-reticulated body of neutral First Amendment principles to help guide a Second Amendment law that is still in its infancy and to which judges may not be as well-disposed because of professional and social position. Neutral principles are important not only within a single right's jurisprudence but across similar rights, because they guard against diminishment of disfavored rights.

In particular, the First Amendment provides a particularly good analogy for considering the delays in licensing firearms. While the First Amendment permits states to require licenses for demonstrations (for reasons of externalities that also underlie licensing requirements for guns), such licenses cannot be unreasonably delayed as that delay effectively undermines the right of free speech. Moreover, the First Amendment suggests that there may need to be exceptions for license requirements for demonstrations in response to breaking news. Delays in licensing guns for self-defense during unrest would make the Second Amendment right as ineffective as would delays in licensing for demonstrations to protest recent events.

Finally, the recent unrest reminds us that the First and Second Amendment interact in yet another way. One of the reasons people feel they need to defend themselves at times of unrest is the Constitution's First Amendment. As officials have noted, one problem in preventing violence and looting is that criminals embed themselves in wholly legitimate protests, making it hard for the police to target them before they get to homes and businesses. That observation shows that a vigorous Second Amendment complements a vigorous First Amendment because protecting the natural right of speech, which includes protest, can make the exercise of the natural right of self-protection more necessary.

Part I surveys the recent unrest and the delays that citizen face getting access to firearms to protect their homes, businesses, and themselves. Part II describes why both theoretically and practically First Amendment doctrine provides the most useful analogy on which to build Second Amendment doctrine, drawing on newly discovered evidence from the Framing. Part III argues that based on First

Amendment analogies, it is a violation of Second Amendment rights not to license firearms in a reasonable time, and that reasonableness must take account of the emergent need for self-defense, which is at its height in times of looting and private violence, just as the First Amendment takes account of the need to demonstrate in response to immediate events and breaking news. Part IV shows that First Amendment protections create additional risks to safety of the kind that the Second Amendment is designed to ameliorate. A country that enjoys robust First Amendment rights of protest needs robust Second Amendment rights if the both the right to speech and to safety are to be protected.

I. Violent Social Unrest, Rising Gun Demand and Licensing Delays

There can be no doubt that recent protests have led to increased violence and looting. In Minneapolis and Kinosha, parts of their downtown have been leveled.[1] In Seattle, a part of downtown was taken over by protestors. [2] The takeover of a so-called autonomous zone in Seattle resulted in killings.[3] In Chicago widespread looting accompanied the first protests against the killing of George Floyd.[4] Portland has seen nightly protests, some of which resulted in property damage and death.[5]

Local politicians, police, analysts, and protestors have all said that outside agitators have exploited protests to cause destruction and looting. For instance, Chicago Mayor Lori Lightfoot, Seattle Mayor Jenny Durkan, and D.C. Mayor

[1] *See* John Aubrey, *Aerial View of St. Paul and Minneapolis Show the Extent of Destruction from Riots*, MINNEAPOLIS STAR TRIBUNE, (June 9, 2020), https://www.twincities.com/2020/06/09/aerial-views-of-st-paul-minneapolis-show-the-extent-of-destruction-from-riots/; Alex McAdams, Kenosha *Unrest Damages More than 100 Buildings, 40 Buildings Destroyed, Alliance Says*, ABC News (Sept. 2) https://abc7chicago.com/kenosha-shooting-protest-looting-fires/6402998/

[2]Ian Schwartz, *Seattle May Durkan, Chaz Has Block Party Atmosphere, Could Turn into a Summer of Love*, REAL CLEARPOLITICS,https://www.realclearpolitics.com/video/2020/06/12/seattle_mayor_durkan_chaz_has_a_block_party_atmosphere_could_turn_into_summer_of_love.htm

[3]Kirk Johnson, N.Y. Times (June 29, 2020) *Another Fatal Shooting in Seattle's 'Chop' Protest Zone*,https://www.nytimes.com/2020/06/29/us/seattle-protests-CHOP-CHAZ-autonomous-zone.html

[4] Heather Cherone, *George Floyd Protests: 1,258 Arrested, 130 Police Officers Injured in Chicago*, WTTW NEWS (June 6). https://news.wttw.com/2020/06/06/george-floyd-protests-1258-arrested-130-police-officers-injured-chicago

[5] Richard Read, *Portland Mayor Calls for Calm after Right-Wing Activist's Death*, L.A. TIMES (Aug. 39, 2020) https://www.latimes.com/world-nation/story/2020-08-30/patriot-prayer-founder-dead-man-in-portland-was-a-supporter For a description of protests elsewhere, see David Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703927

Muriel Bowser have blamed outside agitators for creating chaos.[6] The DOJ and FBI have also indicated that they are investigating those who enter other states to engage in violent riots.[7] High-tech anarchists are organized to the point that they have communicated through encryption, raised bail money in advance, and set up supply lines to distribute weapons.[8] But criminal activity from those inside cities also contributed to the death and the destruction of property.[9] For instance, journalists looked through arrest reports to determine that most of those breaking the law in Minnesota had been from the area. Similar results were found in other areas.[10]

Besides violence that accompanied some of the protests, crime has now substantially increased in some of the cities that were the sites of protest.[11] The Chicago murder rates is up 52 percent over last year with majority of victims members of minority groups. [12] One cause is thought to be a police pullback for fear of causing incidents that may engender more civil disorder.[13]

As a result of this disorder, at least five states, Illinois, Minnesota, Wisconsin, Oregon and Washington saw reports of record-high gun sales, first in

[6] Associated Press, *Day of Peaceful Protests in Chicago Ends with Violent Skirmishes, Injuries and Arrests* (Aug. 16, 2020, 12:29 PM), https://time.com/5879972/chicago-protests-turn-violent/ (quoting Lightfoot as saying agitators "have embedded themselves in these seemingly peaceful protests and come for a fight"); Martin Kaste, *Who Are the Protestors Who Make the Anti-Police Movement Not Entirely Peaceful?*, NPR (July 30, 2020, 4:19 PM), https://www.npr.org/2020/07/30/897345070/who-are-the-protesters-who-make-the-anti-police-movement-not-entirely-peaceful (quoting Durkan as saying that "there has literally been posted on the Internet a call to the fight, with pictures of burning police cars"); Jane Recker, *DC Officials Blame "Outside Agitators" for Protest Violence and Police Show of Force*, WASHINGTONIAN (Aug. 31, 2020), https://www.washingtonian.com/2020/08/31/dc-officials-blame-outside-agitators-for-weekend-violence-police-show-of-force/ (quoting Bowser as saying, "We don't know who they are, who funds them, who organizes them, but they came together to create havoc ."").

[7] Leandra Bernstein, *Extremists on the Left and Right Exploit Peaceful Protests for Chaos, Recruitment*, ABC7 WJLA (June 1, 2020), https://wjla.com/news/nation-world/extremists-on-the-left-and-right-exploit-peaceful-protests-for-chaos-recruitment;.

[8] *Id.*

[9] Brett Murphy et al., *Officials Blame 'Out-of-State' Agitators but Those at the Heart of Protests are Homegrown*, USA TODAY (May 31, 2020, 5:45 PM), https://www.usatoday.com/story/news/investigations/2020/05/31/george-floyd-protest-agitators-mostly-homegrown-not-outsiders/5300362002/.

[10] Murphy et al., *supra* note 9.

[11] Paul Cassell, *Explaining the Recent Homicides in U.S. Cities: The "Minneapolis Effect and the Decline in Proactive Policing*, file:///C:/Users/jom276/Downloads/SSRN-id3690473.pdf

[12] Grace Hauck, *There's Not a Comparable Year: Homicides are Up 52 percent in Chicago, amid Cov-19, with the majority involving people of Color*, USA Today (Sept. 17, 2020) https://www.usatoday.com/story/news/nation/2020/09/17/chicago-covid-shootings-homicides-surge-affecting-people-color/5804396002/

[13] See Cassel, *supra* note 10.

March because of the pandemic and then in June after the George Floyd incident.[14] In Minneapolis, for instance, people lined up for gun permits in Hennepin County, the home of Minneapolis.[15] Stores ran low on guns and ammunition. Over 17 days in June, in Illinois gun permit applications shot up 500%.[16] One gun shop reported sales of 200 guns per day, up from 10 per day,[17] and Illinois' background check numbers dwarf other states.[18] The "vast majority" of those buying guns appear to be doing so for the first time[19]

But in at least two of these states, delays imposed substantial obstacles to getting or carrying a gun. Illinois requires a Firearm Owner's Identification (FOID) Card to purchase or possess firearms or ammunition.[20] Thus, while there is no additional licensing requirement to carry a gun on one's land or business, to get a gun to buy a gun for home or business use one needs a license. If the FOID applicant meets the requirements, the state should issue the 10-year FOID card within 30 days.[21]

Illinois's implementation of its licensing law has been marked by delays and unresponsiveness.[22] The Illinois State Police are not even meeting the statutory requirement of issuing a FOID card within 30 day. Their average is 51 days, and one applicant said he had been waiting 90 days and had had no response.[23]

[14] *E.g.*, David Schuman, *'People Are Really Scared': George Floyd Unrest, Pandemic Fueling Minnesota Gun Sales*, CBS MINN. (June 24, 2020, 10:01 PM), https://minnesota.cbslocal.com/2020/06/24/people-are-really-scared-george-floyd-unrest-pandemic-fueling-minnesota-gun-sales-surge/.
[15] *Id.*; *Overview of Hennepin County*, HENNEPIN COUNTY, MINN. (2020), https://www.hennepin.us/your-government/overview/overview-of-hennepin-county.
[16] Katherine Rosenberg-Douglas, *'Guns Are Flying Off the Shelf.' Permit Applications Up More Than 500% Amid Coronavirus Pandemic and George Floyd Fallout.*, CHICAGO TRIBUNE (June 25, 2020, 5:00 AM), https://www.chicagotribune.com/news/breaking/ct-chicago-illinois-foid-gun-ammo-sales-uncertainty-20200625-pkve27352jagnp4y5dbaubkyoy-story.html.
[17] *Id.*
[18] In 2019, Illinois' number of NICS background checks often hovered around 300,000-500,000 per month. The next-highest numbers came from Kentucky, which almost never cracked the 400,000 mark, and Texas, which was in the 100,000-150,000 range. But in 2020, Illinois' numbers cracked 600,000, even in January; and its numbers for June and July were over 700,000. Second-place Kentucky was nowhere near that, with numbers always lower than 400,000. NICS FIREARM BACKGROUND CHECKS, *supra* note 55.
[19] Schuman, *supra* note 52.
[20] 430 ILCS 65/2. This requirement has been challenged as unconstitutional and the case is pending before the Illinois Supreme Court.
[21] 430 ILCS 65/5, 65/7.
[22] *See* Rosenberg-Douglas, *supra* note 70.
[23] Hickey, *supra* note 73; *see also* Jacob Sullum, *Chicago Residents Wait Months for Permission to Defend Themselves*, CHICAGO SUN-TIMES (Aug. 11, 2020, 10:56 PM), https://chicago.suntimes.com/columnists/2020/8/11/21364540/illinois-gun-license-foid-cards-dandre-bradley-second-amendment-rights-goldwater-institute-sullum.

Minnesota too has experienced delays in issuing the permit to carry a gun. Minnesota law requires that permit-to-carry applicants submit applications in person at county sheriff's offices. [24] However, due to the COVID-19 stay-at-home order, many sheriff's offices closed their service windows.[25] The sheriff's association sought guidance from the state on how to handle the situation.[26] Minnesota counties moved into an appointment system.[27] The county has stated that its decision to approve or deny permit-to-carry applications occurs within the statutory 30-day period, but the appointment itself may be delayed by two months, thus extending waits to ninety days.[28]

II. *Confirming the First Amendment and Second Amendment Comparison*

The Heller Court that held that Second Amendment protected an individual right and compared it in several instances to the First Amendment.[29] Commentators have also suggested this comparison.[30] This section of the essay puts that juxtaposition on a firmer foundation in order to justify cross amendment analogies in building the legal doctrine for the Second Amendment. It introduces rarely cited evidence on the First Amendment and entirely new evidence on the Second Amendment in a form of an essay by James Madison, a key architect of the Constitution and Bill of Rights, in which he sequentially references the natural rights that underlie both the First and Second Amendment.

First, this section provides more evidence that both the First and Second Amendment protect natural rights that may be exercised directly by individuals, not just collectively through institutions like the militia. Second, the section shows that it was contemplated that these rights had effective uses, even if exercised individually and without other people. Third, the section suggests that both rights could be regulated so long as the substance was not abridged or infringed. Finally, the section shows how comparisons, if justified substantively, are very useful

[24] *Gun Permit Information*, RAMSEY COUNTY SHERIFF'S OFFICE (2020), https://www.ramseycounty.us/your-government/leadership/sheriffs-office/sheriffs-office-divisions/administration/gun-permit-information.
[25] *Coronavirus in Minnesota, State Sees Record Spike in Gun Purchases*, *supra* note 55.
[26] *Id.*
[27] *Permit to Carry a Handgun*, HENNEPIN COUNTY SHERIFF (2020), https://www.hennepinsheriff.org/permits-services/permits-public-services/permit-to-carry.
[28] Tyler Olson, *In 'Defund Police' Cities with Rising Crime, Getting a Gun No Easy Task: 'Near-Impossible to Get a Permit'*, FOX NEWS (Aug. 10, 2020), https://www.foxnews.com/politics/in-cities-pushing-defund-police-buying-a-firearm-no-easy-task
[29] See Heller, supra, 554 U.S. at 577, 579, 595, 606.
[30] *See, e. g,* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 20-30 (1996)

jurisprudentially, because importing doctrine from the First Amendment can help guide judges to reach sound and neutral judgments about the Second Amendment.

A. The Natural Rights Origins of Both Amendments

The reason that First Amendment provides a good comparison with the Second is that both protect substantive natural rights. In that respect they differ from most other important rights of the Bill of Rights, which are procedural. Even the Takings Clause is cast in procedural terms: property may be taken but only upon just compensation.[31] The rights are also strongly protected. The First Amendment cannot be "abridged" and the Second cannot be "infringed," differing for instance, from the Fourth Amendment's prohibition on only "unreasonable" searches and seizures.[32]

Support for natural rights reading for both Amendments begins with the text but is bolstered by history. The First Amendment speaks of freedom of speech and freedom sounds in the language of natural right of the individual.[33] The way that James Madison, who introduced the Bill of Rights on the House floor spoke about this right reinforces this view. Madison's notes for his speech expressly reference the First Amendment as a natural right.[34] And perhaps most telling of all is his explication, rarely quoted, of the First Amendment in an essay published shortly after the Bill of Rights' enactment.[35] There he compares various components of the First Amendment to "rights of property" and he does so in Lockean terms that focus on the power of the individual versus the rest of the world:

[31] U.S. CONST. AMEND V.
[32] *Id.* Amend. IV. *See also* Colin Klika, *The First and Second Amendments are Not Mutually Exclusive: A Look at the First and Second Amendments After the Unite the Right Rally in Charlottesville*, 16 RUTGERS L. & PUB. POL 39, 50, (2019) (noting language if very different from prohibition on 'unreasonable searches and seizures"). For discussion of the similarity of meaning of abridge and infringe, see *infra* notes xx and accompanying text.
[33] U.S. CONST. Amend. I. *See also* Lund, *supra* note x, at 20 (noting that the identical phrase "right of the people" occurs in both First and Second Amendments). One textual reason to doubt that freedom of speech only referred to a right at common law is that in one case the Bill of Rights explicitly limited rights to common law rights. *See* U.S. Const. Amend. VII.
[34] James Madison, *Notes for Speech in Congress, [ca. 8 June] 1789, in* 12 THE PAPERS OF JAMES MADISON, at 194 (Charles F. Hobson & Robert A. Rutland eds., 1979) (referring to "natural rights retained--as Speech [and] Con[science]").
[35] *See* Colleen A. Sheehan, *The Measure and Elegance of Freedom: James Madison and the Bill of Rights*, 15 GEO J.L. & PUB. POL'Y 513, 523 (2017). For the first quotation of this essay in a discussion of the First Amendment, see John O. McGinnis, *The Once and Future Property-Based Theory of the First Amendment*, 63 U. CHI. L. REV. 49, 64 (1996)

[Property] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.
In the former sense, a man's land, or merchandize, or money is called his property.
In the latter sense, a man has a property in his opinions and the free communication of them.
He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . .
He may be equally said to have a property in his rights.
Government is instituted to protect property of every sort; as well that which lies in the various rights of individual as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which impartially secures to every man, whatever is his own.[36]

While it may seem strange to the modern ear to call the First Amendment a right of property, that language was the common parole of "English Whigs, an intellectual tradition to which Americans were heirs."[37] Property encompassed all natural rights.[38] Rhetorically, Madison may have been attempting to raise rights like speech to the dignity of the right of property, which enjoyed more established support. [39]

The Second Amendment also directly protects an individual right. The majority in Heller so held and was right in doing so. The crucial textual question is the relation between the prefatory clause "[a] well regulated Militia, being necessary to the security of a free State" and the operative clause, "the right of the people to keep and bear arms shall not be infringed."[40] The argument against the view that the Amendment directly protects an individual right is that it is only protected through the right of state militias to be armed.

[36] *See* James Madison, *Property*, NATL GAZETTE (Mar 27, 1792), reprinted in Robert A. Rutland, et al, eds, 14 THE PAPERS OF JAMES MADISON 266-68 (Virginia 1983).
[37] *See* Laura Underkuffler, *On Property: An Essay*, 100 YALE. L. J. 127, 137 (1990).
[38] *Id*. *See* Madison, *supra* note x, at 268("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.:).
[39] It is interesting to note that today, many people argue that property rights have the same dignity as civil rights, like the First Amendment. Civil rights, rather than property rights, are seen as the paradigm of rights.
[40] U.S. CONST. Amendment II.

Nevertheless, the argument that the right of the people to keep and bear arms is independent of their right to firearms in the context of a militia is stronger as matter of the legal text. First, that prefatory clause does not limit the latter operative clause grammatically, but just announces a purpose.[41] Second, while lawyers at the time did not use the phrase "prefatory clause," the interpretive rule relating to preambles would likely have applied to prefatory clauses.[42] That rule permitted the preamble to modify the interpretation of the rest of the law only if ambiguous, and the right of the people to keep and bear arms is not ambiguous on its face.[43]

But this view of the relation of the clauses in the Second Amendment also gains strength from the showing that that knowledgeable individuals at the time regarded the amendment as directly protecting this individual right and not only collectively through the militia. Surprisingly, some of the strongest evidence for this proposition and the strongest evidence for the individual natural right link between the First and Second Amendments has *never previously* been brought to light.

The evidence is again Madison's essay quoted above. Right after the language discussing the rights of opinion and conscience protected by the First Amendment, Madison adds: "He has a property very dear to him in the safety and liberty of his person."[44] Just as the context of the essay being published shortly after the enactment of the Bill of Rights suggests that the First Amendment is an individual right protected directly by the Constitution (a point confirmed by Madison's speech introducing the Amendment), so it suggests that the Second Amendment protects an individual natural right. The relevant natural rights are mentioned directly after one another, just as the amendments appear one after another in the Constitution. Moreover, the beginning of the essay suggests that the direct exercise of individual rights are being discussed in the passages that follow: "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."[45]

[41] *See* Nelson Lund, *DC Handgun Band the The Constitutional Right to Arms: One Hard Question*, 18 GEORGE MASON CIVIL RIGHTS L. REV. 229, 237, 238 (1998).
[42] *See* John O. McGinnis & Michael Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MY. L. REV. 1321, 1381 (2018). *See also* Eugene Volokh, *The Commonplace Second* Amendment 73 NYU L. REV. 793 (1998) (showing that prefatory clauses were not unusual in rights provisions at time of the Framing and arguing that they should not be used to limit scope of the right in question).
[43] *See* Heller, *supra* note x, at 578.
[44] *See* Madison, *supra* note x, at 267.
[45] *See Id.*

It is true that we do not have a similar endorsement of the natural rights view of the Second Amendment in Madison's speech introducing the House version of the Bill of Rights. And some have argued that the version that Madison introduced there did not as clearly protect an individual right directly as the version ratified, because it was more focused on the militia and the rights of conscientious objectors not to join it.[46] But, whatever Madison's view before the final version was enacted, this essay better represents his views of the content of the Amendment as enacted, because he was surely aware of the final version.

B. Neither Right Need be Exercised Collectively to be Effective

Both amendments contemplate effective use of the natural right by individuals independently. That is, not only may the rights be legally exercised independently of institutions, like a militia or a formal petition for the redress of grievances, they also have a purpose that can *discharged effectively* if exercised only individually. That effective capacity is clear from the First Amendment. The right of free speech to be exercised individually is differentiated from expression exercised either institutionally through the press or collectively through peaceable assembly.[47]

The language quoted above in Madison's essay also shows that the First Amendment, despite claims to the contrary, should be not understood only as collective right in promoting democracy. The First Amendment thus does not offer support, as has been argued, for defining the contours of the Second Amendment doctrine by reference to a collective interest.[48]

The text of the Second Amendment may also illuminate the recognition of the effectiveness of personal use of firearms. One way of explaining the prefatory clause to the Second Amendment is that is reminds us that any regulation depriving people of guns would also be an inappropriate regulation of the militia. [49] But for the reasons discussed above, preventing that inappropriate regulation cannot be understood to exhaust the right, thus making clear that the use of a firearm has an effective individual use.

[46] *See, e.,g.* Lund, *The Past and Future of the Individual's Right to Arms*, *supra* note x, at 33 n. 77.
[47] *Compare* U.S. CONST. AMEND I (abridging the freedom of speech) with i*d.*("the right of the people to peaceably assemble").
[48] Magorian, *supra* note x, at (arguing the collective purpose of the First Amendment suggests the Second Amendment doctrine also should be shaped by serving some collective interest).
[49] Nelson Lund, *The Second Amendment,* Heller *and Originalist Jurisprudence*, 56 UCLA L. REV. 1344, 1352, n. 20 (2009) ("A well regulated militia is one that is, among other things, not inappropriately regulated. The codification of the people's right to keep and bear arms in the Constitution served to prevent Congress from using its Article I authority to adopt inappropriate militia regulations that infringed on 1789").

Madison's reference to the "safety and liberty of the person" again provides powerful supporting evidence, bolstering the view that the right to self-defense is a core purpose of the Second Amendment and thus does not depend on the exercise of Second Amendment rights by others.[50] It refutes the idea of some scholars that the Second Amendment must be read to contemplate that its rights would only be effective when people use their rights in concert to preserve the right to revolution.[51]

There is a debate in constitutional law about whether the meaning of the Bill of Rights as incorporated should reflect the meaning in 1789—the original Constitution or in 1868--the date of the ratification of the Fourteenth Amendment.[52] But that Amendment did not change the nature of the First or Second Amendment rights, because both continued to be regarded as natural rights during the antebellum period. The First Amendment was interpreted as an individual natural right throughout the nineteenth century and came to be understood as an instrument of democratic, collective deliberation only in the progressive era.[53] The most comprehensive study of the understanding of the Second Amendment in the nineteenth century concluded that everyone (with the exception of a single Arkansas judge) who said "anything about the Second Amendment" believed that it was individual right that could be exercised directly.[54] Thus, the natural rights understanding of the First and Second Amendments as applied to the states is similar, regardless of whether the meaning became crystalized in 1789 or 1868.

C. Regulation for the Common Good

Another commonality between the Amendments is that although the Constitution protects freedom of speech and the right to keep and bear arms, these protections do not rule out all regulation of these freedoms. Textually, it prohibits only "abridgement" of the former and "infringement" of the latter." The terms are

[50] *See* Joseph Blocher, *Categorization and Balancing in First and Second Amendment Analysis*, 84 N.Y. U. L. Rev. 375, 424 (2009) (describing confusion in Heller about what value the Second Amendment protects).
[51] As suggested by Gregory P. Magorian, *Speaking Truth to Firepower: How the First Amendment Destablizes the Second*, 91 TEX. L. REV. 49, 52-53 (2012) (seeking to resist self-defense rationale of the amendment and thus narrow its contours).
[52] *See* Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 744-745 (2008)).
[53] *See* Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 18, 122-126 (1991).
[54] *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1444 (1998)

quite similar in that they prohibit undermining the substance of the right by taking some of it away.[55] But they do not prohibit regulation. The language of the Second Amendment itself distinguishes between regulation and infringement.

Moreover, regulation of natural rights for the public good was contemplated at the time of the Constitution.[56] Before society was constituted, people retained their full natural rights, although these rights in turn were regulated by natural law.[57] But after a social compact, their natural rights were subject to regulation by the government,[58] but that regulation must be in the common good or public interest.

As James Wilson stated:

[B]y the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but . . . every citizen will gain more liberty than he can lose by these prohibitions . . . . Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise.[59]

Before the judicial review established by the Constitution and its state predecessors, that judgement of what was "good or wise," or as we would say in the public interest, was left to the legislature or parliament, even if it was believed that they had no power to infringe on the exercise of natural rights that did not interfere with the exercise of liberty.[60] After all, the straightforward argument would run, who better to decide whether regulation was in the public interest than those elected by the public.

[55] Here for instance are the definition in the Webster's dictionary in 1828, one of the few dictionaries of the period where both terms are featured. Abridge is defined most relevantly as " to lesson; diminish; as to abridge labor or abridge power or rights." Infringe is defined as "To break, as contracts, to violate either positively by contravention, or negatively by nonfulfillment or neglect of performance." *See* Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)

[56] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 259 (2017) (discussing ability to regulate natural rights for the common good).

[57] I*d.* at 571.

[58] *See* Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 455 (2004) ("the reasonable regulation of natural rights is essential to their efficacious exercise").

[59] JAMES WILSON, *ON THE HISTORY OF PROPERTY*, IN 1 COLLECTED WORKS OF JAMES WILSON ((Kermit L. Hall & Mark David Hall eds., 2007). *See also* Madison, *supra,* note x, (suggesting that rights could be regulated to promote overall liberty).

[60] Campbell, *supra* note x, at 956 n. 103.

But the distinctive contribution of the Bill of Rights for both the natural right of speech and natural right of self-defense is to make them constitutional rights, subject to judicial review. As a result, these natural rights are no longer at the sufferance of whatever decisions the legislature wants to make.

In the context of the debates over the American Constitution, it is not anomalous that Congress would have been subject to a strong check when natural rights were at stake. While many today may think of the national legislature as their representatives, many of the former colonists believed a government so distant was uneasily reminiscent of the one that they had grown to know and despise—that of the Great Britain.[61] While citizens would be able to send representatives to Washington, Congress as a whole was not constituted by members of their local community or state, naturally raising distrust. That concern was at heart of the Antifederalist demands for a Bill of Rights.[62] Thus, while some have seen a tension in strong judicial oversight of legislative decisions about what is the common good, this tension can be resolved by understanding that a distant, national government was viewed warily by those at whose behest the Bill of Rights was added.[63]

Thus, judicial review of the justifications for abridgements of the rights recognized in the Bill of Rights follows directly from natural rights theory in the context of a new kind of government which was simultaneously thought necessary and yet dangerous. While these observations do not necessarily justify the particular doctrinal formulations, such as strict scrutiny, with which the Supreme Court reviewed laws that trench on First Amendment rights, they do support a substantial and rigorous review.

To be sure, Courts need to recognize the rights as encoded in the Constitution may themselves have boundaries that were understood at the time. Thus, for instance, obscenity was very likely itself outside the bounds of First Amendment

[61] PAULINE MAIER, THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS xvii-xviii (1980) (describing common way that some viewed British and federal power).

[62] *See Book Review*, Paul Fink leman, 70 CORNELL L. REV. 182, 183 (reviewing HERBERT J. STORING, THE COMPLETE ANTIFEDERALIST (1991) ("The recurrent theme of the antifederalists is fear: fear that the national government would usurp the rights of the people; fear that without a Bill of Rights all liberty would be destroyed; fear that the presidency and Senate would lead to an aristocracy. If these fears seem paranoid and outrageous today, it may be because the antifederalists expressed such fears in 1787-88, and thereby helped define the nature of the American Constitution").

[63] Thus, while is true that common good regulation of natural rights was generally done by a majority that should be responsive to majority interest, see Campbell, *supra* note x, at 271.the decision to create judicial review and subject the federal government's regulation of natural rights to that review reflected disquiet about the way the national majority might operate on rights, abridging or infringing them under the guise or regulation.

protection.[64] But even the categorical exclusions of activity that might seem to modern mind be within the scope of one amendment may help us better understand the scope of the other.

This particular comparison disposes of argument that the right to access guns should be confined to use inside the home because the right of self-defense can be equated with obscenity.[65] While obscenity was either outside the first amendment or at best at fringes of its outer bounds, the Second Amendment expressly protects the right to keep and bear arms.[66] Moreover, Madison does *not* key the natural right of safety to a particular geographical location.[67] It would have been extremely peculiar to do so.

D. How the Comparison Between the First and the Second Amendment Promotes Neutrality

There are deep jurisprudential reasons to take advantage of the similar structure of the First and Second Amendments. Deciding cases according to neutral principles is a central ideal of American constitutional jurisprudence.[68] A crucial source of the Court's legitimacy is the nature of its decision making. In defending the Constitution, it was to act by reason and not in the ad hoc manner of ordinary politics.[69] Reason meant applying constitutional principles of generality and equal applicability.[70] Thus, a decision should be rooted on principles that transcend the dispute and the nature of the parties.

[64]Roth v. United States, 354 U.S. 476 (1957). The Roth Court observed that eight states had criminalized the publication of "obscene" materials. *Id.* at 483. As result, the Court concluded that "there is sufficiently contemporaneous evidence to show that obscenity … was outside the protection intended for speech and press." *Id.*
[65] Darrell H.A. Miller, *Guns as Obscenity: Defending The Home Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009)
[66] *See also* Eugene Volokh, *The First and Second Amendments*, 109 COLUMBIA L. REV. SIDEBAR 97-98 (2009).
[67] Miller also argues that the right to have a gun can be confined to the home by arguing that the common law required a duty to retreat when outside the home rather than directly attack an aggressor. But whatever the truth of this claim, the duty to retreat has nothing to do with the right to bear a gun. Miller, *supra* note x, at 1342. One can enjoy that right and still respect a duty to retreat. And the possession of a gun in such circumstances can still contribute to safety when there is no opportunity to retreat and deter attacks in the first place by its presence in open-carry or even by the widespread concealed carry.
[68] *See generally* Eldon J. Eisenach, *Can Liberalism Still Tell Powerful Stories*?, in 11 THE EUROPEAN LEGACY: TOWARD NEW PARADIGMS 47, 48 (2006) (discussing the rise of neutral principles in the mid-twentieth century).
[69] THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Mentor 1961) *See also* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 672-73 (1993)
[70] Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY L.A. L. REV. 67, 77 (2007).

Using the First Amendment to guide the doctrine of the Second where relevant helps advance the neutrality of constitutional decision making in two ways. First, the Second Amendment jurisprudence after Heller is still very much in its infancy, particularly because the Court has decided not any Second Amendment issues since McDonald v. City of Chicago.[71] In contrast, the Court has returned to the subject of free speech again and again, laying down a reticulated set of principles in a huge variety of contexts.[72] It has thus systematically addressed the question of what kind of goods may plausibly circumscribe a natural right and what should be the evidence demanded of the government to show that that the regulation of the natural right is necessary to realize these goods. That analysis can help secure the foundation of Second Amendment doctrine.[73]

Reference to the First Amendment also helps advance the application of neutral principles, because judges as a class are likely more sympathetic to the natural right of expression than to natural right of self-defense. Judges are uniformly lawyers who make their living by words: the natural right to "their opinions" is a source of their livelihood. While some may own guns, there is no occupational reason to expect that they will have such a supportive disposition toward the natural right of self-defense. Indeed, as Justice Antonin Scalia noted in another context: "[W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives." [74] Thus, considering analogies to the First Amendment helps the judiciary appreciate the full weight of what protection a natural right deserves in a context with they are more familiar and with which they more readily sympathize. When there is reason to distrust decision makers, reference to external standards is more necessary.[75] The First Amendment helps provide them in the Second Amendment context.

III. Licensing Delays Under the First and Second Amendments

[71] 561 U.S. 742 (2010). In Caetano v. Massachusetts, 136 S. Ct. 1027 (2016), the Court simply reversed a decision of the Supreme Judicial Court that had held that the Second Amendment did not apply to stun guns because the state court did not appropriately apply the doctrine announced in Heller, but did not address the merits of the question presented in the case.. *Id*. at 1028.

[72] Between 1993 and 2002, the Court decided more free speech cases than any other category of cases in constitutional law other than criminal procedure cases. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1792 n.139 (2004).

[73] *See* Blocher, *supra* note x, at 402 (suggesting advantage of the familiarity of First Amendment doctrine.)

[74] Glossip v. Gross, 576 U.S. 863, 897 (Scalia, J.) (concurring).

[75] *See* SCOTT SHAPIRO, LEGALITY 346 (2011)

The First Amendment provides particularly useful analogies for assessing the constitutionality of delays in licensing guns. Despite its strong history of preventing prior restraints for publications, the First Amendment does permit the state to create a licensing regime for speech, when that speech creates externalities, like burdening traffic or creating noise, as long as the process is content neutral. But it precludes the waiting time for a license from becoming so long as to substantially burden the right. The analogy to the Second Amendment here is direct. Civil unrest and looting give rise to a spontaneous need for self-protection. The Second Amendment cannot permit licensing to be unreasonably delayed in that context.

The Supreme Court has upheld regulations—even prior restraints- on speech that prevent public nuisances so long as they are content neutral.[76] The rationale is that these regulations can be part of reasonable time, place, and manner restrictions that protect vigorous speech, while preventing externalities, like interference with others' interest in peaceful enjoyment.[77] The Court, for instance, has upheld regulations that require advance permits for parades and processions on the grounds that these expressive activities may nevertheless impose social costs, like interference with traffic and excessive noise.[78] The argument for gun licensing is analogous. Under Supreme Court precedent, the states are presumptively permitted to limit gun ownership to people who are not are not felons and have not been adjudicated as having a mental illness,[79] prohibitions that can themselves be seen as prophylactic rules to prevent social harms. Thus, the state has an interest in making sure it can prevent ownership by such people through a licensing system.

But a licensing system in the First Amendment context must have limits on duration. As the Ninth Circuit has stated: "simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and

[76] Members of City Council v. Vincent, 466 U.S. 789, 805 (1984) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

[77] *See* Larry Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. REV. 791, 800 (1993).

[78] Cox v. New Hampshire, 312 U.S. 569 (1941)

[79] Heller, *supra* note x, at 626. The methodology for finding these exceptions has been criticized, see Nelson Lund, *The Second Amendment,* Heller *and Originalist Jurisprudence*, 56 UCLA L. REV. 1344, 1356 (2009), but they are contained in Heller and represent dicta that jurisdictions might legitimately follow.

more press attention, and generate more emotion, than the "same" parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied."[80] The First Amendment right is undermined whether the delay is intentional or not.

For that reason, courts have consistently rejected long delays for licensing demonstrations with one commentator suggesting that the usual limit in time was two days.[81] As another commentator stated, "[t]here is not much incentive in uttering a statement that will not gain consideration due to the untimely nature of the utterance." [82] Thus, it is not only long delays in the abstract that are problematic. When news prompts a demonstration, the delay must be measured by the need to respond expressively, sometimes requiring permission for spontaneous protest. [83]

Just as the First Amendment doctrine permitting licensing systems for demonstrations provides support for Second Amendment doctrine permitting licensing systems for guns, so too do the limitations that courts impose on the delays on getting a license for demonstrations support imposing such limitations on delays in getting a gun license. The Second Amendment right to own a gun at home or in business for self-protection is at its undoubted core.[84] Just as the First Amendment can be abridged by an unreasonable time to get permits to demonstrate, so can also the Second Amendment be infringed by an unreasonable time to get a gun license. In the first case, the citizen loses the opportunity for timely speech and in the second for timely protection. Just as the need for immediate expression in response to a political event helps limit the reasonable duration for a permit in the context of the First Amendment, so does the need for immediate protection in light of civil unrest and looting limit the duration in the context of the Second Amendment.

[80] *See* NAACP v. City of Richmond, 743 F. 2d. 1346 1356 (1994). *See also* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan J,) "([t]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all"); Rosen v. Port of Portland, 641 F.2d 1243, 1252 (9th Cir. 1981) (invalidating under First Amendment one-business-day advance notice requirement to leaflet, picket, or demonstrate at public airport)
[81] *See* Kevin Francis O'Neill, *Disentangling The Law Of Public Protest*, 45 LOY. L. REV. 411, 507 (1999)
[82] Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted*, 56 DRAKE L. REV. 381, 411(2008).
[83] ACLU, *Know Your Rights: Protestor Rights*, https://www.aclu.org/know-your-rights/protesters-rights/ (licenses cannot be required for protests in response to breaking news)
[84] *See* Heller, 554 at 630 (stating that D.C.'s prohibition on having operable guns in the home "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional").

Thus, for instance, the First Amendment case law suggests that the current thirty day waiting period, effectively now substantially longer,[85] for getting a license for home and business use in Illinois is unconstitutional. The case as applied is strengthened by the emergent need for obtaining a gun for protection of home and business created by the greater dangers of violence now present in Illinois. The delay to get a gun cannot reasonably become longer when the need for self-defense is greater, just as the delay for a permit to protest cannot reasonably be lengthened by its proximity to a breaking news event.

Since there is no reported case on the question of such delays we cannot be certain of the defenses that would be offered, but the most likely are not plausible arguments for delay rooted in the common good. First, it might be argued that processing the licenses in a timely manner would cost the state more money in terms of overtime or hiring additional processors. But that is a diffuse cost that can be borne by taxpayers as whole. The cost to constitutional rights is focused and immediate. The cost of processing licenses for demonstrations protected under the First Amendment would never conceivably be held as justification for delay.[86]

Nor can there be an argument that additional waiting time is required because of the unrest. Those precluded from getting a gun for their home or business during a period of unrest are not more likely to be in prohibited classes and in need of more scrutiny. They are in fact less likely, because in a period of civil unrest more law abiding, wholly sane adults will feel the need for protection. Nor is the unrest making people who own a gun at home or a business more dangerous to the authorities who trying to address looting and violence on the streets. In any event, the Second Amendment represents a judgment that individual have a right to look after their own safety.

Finally, there is evidence that long delays are not necessary to run a background check. The federal government runs a National Instant Criminal Background System[87] for gun purchases, which now requires no waiting period.[88]

[85] As discussed above, the average wait time is reported to be 51 days. A colleague at my law school reported he has been waiting for 120 days.
[86] Indeed, courts required the political entities to force taxpayers to shoulder much higher costs, like those for police protection, than those associated with licensing to prevent the heckler's veto, see Kathleen Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 960 (1995).
[87] https://www.fbi.gov/services/cjis/nics
[88] 18 U.S.S. 9222(t). (2000)

The case of the delays in Minnesota is somewhat more complicated. First, the delays experienced there are for obtaining licenses for carrying a gun, not keeping one in the home. The Supreme Court has not held that carrying a gun (at least without showing a special need) is encompassed by the Second Amendment. The circuit courts are divided on the issue and the Court has recently declined the opportunity to resolve the split.[89] Here I will assume that Court would uphold that carrying a gun without a special showing of need is within the ambit of the right, because it seems difficult to argue that the language that includes the phrase "bear arms" would exclude the right to carry a gun.[90]

It should make no difference to the analogy even assuming arguendo that the carrying a gun outside were not thought be within "the core" of the Second Amendment. The First Amendment cases also limit the delays in licensing speech that is sometimes not considered within the core. These cases concern licensing of another kind of First Amendment activity, businesses with sexually themed entertainment like topless bars. Again, these businesses may impose externalities in terms of noise and disruption of the neighborhood. But again, the First Amendment law is also clear: "The core policy. . . . is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech."[91]

An additional argument that Minnesota might make is that the protests provide a reason for their current delay. Some have argued that the presence of guns may deter the exercise of First Amendment rights.[92] Of course, the First Amendment applies to the government, not to individuals, and thus people carrying guns do not violate the First Amendment, even if they make others more worried about speaking. But a more subtle argument would run that the exercise of Second Amendment rights constitutes the kind of nuisance that justifies greater regulation. The problem with this argument is that the Constitution clearly does not regard the carrying of a gun as a nuisance. So far from being a nuisance the exercise of protecting oneself is a natural right.[93] Nor does the Constitution give any priority to

[89] *See* Rogers v. Grewal, 590 U.S. (Thomas, dissenting from denial of cert.) (explaining circuit court split on right to carry).
[90] As held for instance in Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), reh'g en banc denied, 708 F.3d 901 (7th Cir. 2013).
[91] FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228 (1990) (citing Freedman v. Maryland, 380 U.S. 51 (1965)).
[92] Brad Brooks, *Free Speech, Gun Rights on a Collision Course in United States, Some Legal Experts Say, U. S. Legal News*, https://www.reuters.com/article/instant-article/idUSKBN2621TX
[93] *See supra* notes xx and accompanying text.

the First over the Second Amendment: lexical ordering is not priority. Thus, the constitutional way to handle concern that firearms will deter First Amendment rights is to penalize threatening uses of guns which are not justified, and to raise the penalties for the use of guns in crimes that deprive people of constitutional rights, including the First Amendment. In that way the government may maximize both the exercise of rights of speech and self-defense.[94]

Another argument that Minnesota could make for the additional delays in our peculiar circumstances is the Covid crisis. Because of social distancing, Minnesota requires that people make an appointment for the in-person interview rather than just show up at the sheriff's office.[95] In its refusal to temporarily enjoin various virus regulations alleged to trench on constitutional rights, a narrow 5-4 Supreme Court majority has appeared to give great deference to states in the public health crisis.[96] Thus, it rejected the complaints of churches that they were being forced to close down in violation of the First Amendment because they were subject to effectively harsher rules than similarly situated secular institutions, like casinos.[97]

But the situation of delayed licensing is not analogous to restrictions on church attendance. In the recent Supreme Court case, religious congregants were demanding in–person attendance that the state believed might contribute to the spread of the disease. Those demanding a gun license are not asserting any in-person attendance rights. Thus, if there are reasonable alternatives, like talking to people on the telephone or scheduling a zoom meeting, to accomplish the end of in-person meetings, the regulations requiring in-person meeting create an unreasonable delay. Consider this analogy: assume that the sheriff's offices closed because they had been damaged in looting. If alternatives were available to in-person meetings, the delay could not be justified. And in both instances, the delay is particularly intolerable because of the greater need for weapons of self-defense in the circumstances.

Again, a First Amendment analogy is also relevant. The current pandemic would not justify delaying decisions about whether to permit demonstrations, even

[94] The issue here is distinct from the question of whether either the right to protest can be regulated if protestors carry guns or whether guns can be regulated more intensively in spaces around protests. Here the delays affect the right to carry anywhere. On the latter questions, see Klika, *supra* note x, (concluding that each right is independent and cannot be used to justify restrictions on the other).
[95] *See supra* notes xx and accompanying text.
[96] *See, e. g*., South Bay Pentacostal Church v. Newsom, 590 U.S.__ (2020).
[97] *Id.*

if such issues proved relevant to whether permits should be granted because of the peculiar externalities created by protest in a time of pandemic.[98]

IV. *Embedded Violence in Protests: The Intertwining of the First and Second Amendments*

Discussing the recent protests, Mayor Lori Lightfoot of Chicago observed: "what we've also seen is people who have embedded themselves in these seemingly peaceful protests and come for a fight."[99] This comment captures another important connection between First Amendment and Second Amendment rights. The United States has some of the most robust rights of free speech and assembly in the world. Protests take advantage of these rights but so do people primed for destruction and looting.[100] Thus, the very strong protections that American constitutional law affords the First Amendment rights of protests provides another reason for robust protections of the natural right of self-defense protected by the Second Amendment. The intertwining of these rights in the context of political protest and the ensuing danger that results also suggests why free speech doctrine may help illuminate that of the Second Amendment in the context of these protests.

As described above, there can be no doubt that criminals have taken advantage of protests of police brutality to do violence to people and businesses around the sites of protest.[101] Moreover, the very nature of the protests – police brutality – may make police more cautious lest their mistakes give greater fuel to protests which may then lead to more violence.[102] People thus face greater needs for weapons of self-defense than they do in calmer times. They cannot rely as much on police protection. The police are stretched thin and even when present have more difficulty than usual in preventing crime. Brandishing a weapon may

[98] In the case of Minnesota, this challenge gains strength from the regulation that allows sheriffs to issue licenses in cases of emergency. Thus, its own law suggests exception to the in-person requirement, undermining the state's proffered interest in applying these regulations to delay issuance in these circumstances.
[99] Paige Fry & Katherine Rosenberg-Douglas, CHI. TRIBUNE (Aug. 16, 2020) *Accusations Fly between Police and Protestors One Day After Violent Crash Injured Dozens*, https://www.chicagotribune.com/news/breaking/ct-downtown-protests-violent-20200816-v7yrehiibnbkvfpqxsijgz4cme-story.html
[100] See *supra* notes xx and accompanying text.
[101] *See supra* notes xx and accompanying text.
[102] *See* Cassell, *supra* note x at y.

make the difference between a looted or burned down store and a source of livelihood preserved for years to come.

Beyond the factual connection between the exercise of First Amendment rights and the need for Second Amendment rights is their legal relationship. The United States enjoys some of the most substantially protective constitutional doctrine for political free speech in the world.[103] While other nations are more willing to balance considerations of social unrest and expressions of extremism against the right of free speech, the United States categorically protects political speech with few exceptions that must be justified by a compelling need for restraint.[104]

This decision to protect a natural right even at the expense of what might be regarded as common goods of peace and safety has implications both for comparative and domestic law. Comparatively, it underscores the important point that rights cannot be profitably compared across nations if they are separately considered.[105] The United States undoubtedly does have more robust constitutional rights of self-defense than most developed nations in the world, but that is at least in part a package deal. If the state robustly protects some individual rights at the expense of safety, it becomes more reasonable to robustly protect other individual rights related to safety.[106]

Domestically, it highlights the wisdom of considering Second Amendment doctrine in light of the First Amendment in this particular context. The First Amendment's solicitude for spontaneous protest even at the expense of public order calls for similar solicitude for the spontaneous need for self-defense in light of the consequences of that protest. It is wrong to sustain legal doctrines that simultaneously prevent delaying the exercise of one important natural right and yet permit delaying the exercise of another natural right made more necessary by the exercise of the first.

Conclusion

[103] Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture* 4 (2005) file:///C:/Users/jom276/Downloads/SSRN-id668523.pdf.
[104] *Id*.
[105] *See* John O. McGinnis, Foreign to Our Constitution, 100 N.W.L REV. 303, 320 (2020)
[106] *Cf*. David Kopel, at al., *Is there a Relationship Between Guns and Freedom, Comparative Results from Fifty Nine Nations,* 13 TEX. REV. L. & POL. 1, 31 (2008) (suggesting there is a relationship between gun rights and various forms of freedom).

The recent protests and resulting violence put the relation of the First and Second Amendments into bold relief. They should remind us that both amendments protect natural rights that the Framers thought required judicial oversight. Moreover, given that both speech and the use of a gun can be regulated the public interest, the First Amendment provides insights into how Second Amendment doctrine should develop because the First Amendment has been interpreted in analogous situations. Here the close analogy is to licensing the very phenomena—protests—that have given rise to the renewed interest in gun possession. The doctrine against the delays in licensing that undermines the right of the protest should also be applied to delays in licensing that undermines the right of self-defense.