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Let My People Go, Part Two: The Second Amendment Political Necessity Defense and the Storming of Capital Hill

Kindaka Sanders

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**LET MY PEOPLE GO, PART TWO:
THE SECOND AMENDMENT POLITICAL NECESSITY
DEFENSE AND THE STORMING OF CAPITOL HILL**

Kindaka Sanders*

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INTRODUCTION

This Article argues that all forms of purposeful lawlessness, direct or indirect, forcible or peaceable, are protected under the Second Amendment. That is, the Second Amendment embraces its own version of the political necessity defense. The argument is simple. The Supreme Court held in *District of Columbia v. Heller* and reinforced in *McDonald v. Chicago* that the Second Amendment embraces a right to rebel against government tyranny and public violence. However, the Court did not provide a defense for vindicating this right. The traditional political necessity defense provides the best framework. Both the traditional political necessity defense and the Second Amendment were created to address government failures and the insufficient laws. The common law necessity defense reflected a fear that the newly formed federal and state governments might abuse their powers and reflected a

* Associate Professor of Law, Texas Southern University Thurgood Marshall School of Law.

concern that governments would not keep pace with popular values or “fundamental changes in public morality.”¹ The necessity defense empowered juries to address these concerns on a case-by-case basis. The traditional political necessity defense more directly reflects the founding fears of government overreach. The political necessity defense absolves an individual for breaking the law as a last resort when the effect of the law or government action is more harmful than breaking the law. Similarly, the Second Amendment right to bear arms was enacted, in large part, as a check on government’s legislative and executive powers. The Framers reasoned that an armed citizenry would prevent government tyranny in the first instance and, if unsuccessful, would provide a vehicle for overturning it. The act of overturning or preventing government tyranny is literally a matter of political necessity.

The Article examines the traditional political necessity defense, extracting elements that are compatible with the Second Amendment and discarding elements that are not. The Article also explores the historical and legal background of the right to rebel and then uses the right to rebel to define the contours of the Second Amendment political necessity defense. Finally, the Article applies the Second Amendment political necessity defense to the storming of the Capitol on January 6, 2020.

Part I of this Article discusses the constitutional basis for the political necessity defense. Part II articulates the political necessity doctrine refined by its Second Amendment underpinnings. Part III applies the Second Amendment political necessity defense to the storming of Capitol Hill.

I. CONSTITUTIONAL BASIS FOR THE POLITICAL NECESSITY DEFENSE

The political necessity defense and the Second Amendment are doctrinal soulmates. They share a common history and rationale. The Declaration of Independence, which informs the Second Amendment, justified the rebellion against the British government as a necessity.² Furthermore, early common law jurisprudence on the necessity defense reflected the colonists’ distrust of British rule and fear of tyrannical government.³ Shaun Martin captures the relationship between the development of the necessity doctrine and the colonist’s fear of tyrannical government:

There was a profound belief, based firmly upon both pre-Revolution experiences and subsequently articulated democratic principles, that substantial disparities often exist between government officials and those under their rule. The need for a jury-centered judicial response to this broad social problem was one of the central precepts upon which the American republic was founded. . . . This shared expectation was the foundation for

¹ Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1542 (2005).

² See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³ Martin, *supra* note 1, at 1540–41.

subsequent judicial developments, including the articulation of the necessity doctrine. Colonial experience had created a consensus that, even in the new republican United States, fundamentally divergent opinions nonetheless could and would develop between the government and the governed. This belief was not merely based upon the infirmities of British rule, but also was founded upon the more general nature of government itself. Common law jurisprudence accordingly developed with a keen sense of the continuing danger of unchecked governmental power, notwithstanding the presence of broad structural constraints upon such abuses established by the Constitution and Bill of Rights The legislative and executive branches could not be entirely trusted to do what was right. Democratic rule necessitated that juries be allowed to acquit a criminal defendant notwithstanding his clear noncompliance with a validly enacted law and the presence of an executive decision to prosecute him.⁴

The Second Amendment was framed for similar reasons. The right to rebel derives from the Founders' fears of government overreach. The right allows citizens to forcibly resist government efforts to impose tyrannical rule. It applies against government agents and political bodies; the acts of government agents; and the promulgations and policies of political bodies. The right to rebel, for instance, applies against a cop trying to prevent a citizen from lawfully voting or a police department policy to disarm all Blacks in a particular neighborhood.

A. The Second Amendment and the Right to Rebel

The Second Amendment includes two interrelated but distinguishable rights: the right to rebel and the right to self-defense. The former is a right that authorizes both independent and collective force against the government and, more particularly, government officials, who undertake or threaten unconstitutional actions or promulgations to impose its will on the citizenry.⁵

The traditional doctrine of self-defense is straightforward. It provides an affirmative defense to an actor who employs physical force to repel an immediate physical threat to her safety or the safety of her family members.⁶ Traditional self-defense applies when the targets are common attackers, burglars, or law enforcement

⁴ *Id.* at 1540–42.

⁵ The Second Amendment and its central rights, including the right to self-defense and the right to rebel, grew out of the natural rights philosophy adopted by the Founders. This philosophy is reflected in the nation's founding documents.

⁶ Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 737 (2015).

officials using excessive force.⁷ In contrast, the right to rebel—considering the types of threats that provoked the framing of the Second Amendment—applies only to defensive or preventive force taken against the government.⁸ The right to rebel is a tighter doctrinal fit with the Second Amendment than self-defense because the initial purpose of the Second Amendment was to check potentially corrosive government power, not to protect against private citizens.⁹ Said differently, the right to rebel is inherently political, while self-defense evokes notions of a home defender and a common criminal.

The two rights also support different interests. The fundamental interests protected by the right to rebel relate to freedom and liberty, whereas the interests protected by the right to self-defense include preservation of life and bodily integrity.

The right to rebel also features a moral component that differentiates it from self-defense and other defensive rights. Self-defense, for example, focuses on the objective reasonableness of the actor's actions and not on the actual intent of the perceived aggressor.¹⁰ Discounting the perceived assailant's intent means that a defender could assault or even kill an individual she wrongfully perceives as a deadly threat and still be justified in the killing.

The right to rebel, by all indications, is a moral right pitched in black and white. The moral nature of the right suggests that it applies only to situations where government actors are morally blameworthy in fact.

David Kopel, however, believes that the right to rebel and self-defense are a part of the same continuum. He argues:

[T]he Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.¹¹

Other scholars include the right to rebel within the doctrine of self-defense as the doctrine was understood at the time of the ratification of the Second Amendment. Don B. Kates and Clayton E. Cramer note:

[S]elf-defense had a broader meaning than it is usually conceived of having today. Self-defense included not only defense

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; see also *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

¹⁰ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 212–13 (8th ed. 2018).

¹¹ Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 *IND. L.J.* 939, 946 (2011) (quoting David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 *BYU L. REV.* 1359, 1454 n.358 (1998)).

against apolitical crime but also against assassination, genocide, and other politically-motivated oppressions—what Algernon Sidney called “the violence of a wicked magistrate who, ha[ving] armed a crew of lewd villains,” subjects the people to murder, pillage, and rape.¹²

Professor Darrell Miller includes self-defense against police officers under the rubric of the right to rebel. He interprets the Second Amendment as authorizing what he terms retail rebellion, a component of the general right to rebel.¹³ According to Miller, retail rebellion encompasses individual acts of defense against public violence, including “threatening police officers, resisting arrest, cop killing.”¹⁴ Miller’s concept of retail rebellion also includes the use of physical force or, at least, the threat of physical force to prevent unlawful disarmament by law enforcement officials.¹⁵

In many instances, the right to rebel and the right to self-defense overlap. Some government actions trigger both rights. “Cop killing,” for example, might be justified under the right to rebel because police officers are government officials.¹⁶ It might also be justified as self-defense because the self-defense doctrine does not distinguish between law enforcement and common assailants.

On the other hand, if a citizen uses violence to prevent an unlawful arrest or stave off disarmament, his actions implicate the right to rebel only. He uses force to guard against government oppression that threatens liberty interests. He does not use it to repel an immediate physical attack.

Whatever the contours of the right to rebel, it is clear that there is in fact a right to rebel implicit in the history of the Second Amendment. The Supreme Court’s opinions in *District of Columbia v. Heller*¹⁷ and *McDonald v. City of Chicago*¹⁸ confirmed the existence of the right.

1. The Historic Right to Rebel

The right to rebel derives from the history of the Second Amendment and the natural rights philosophy that shaped its historical development.¹⁹ The *Heller* and *McDonald* opinions discuss, and even go as far as adopting the tone of, this natural rights philosophy. Darrell Miller observes that the Court’s “sweeping natural law

¹² *Id.* at 957 (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1345 (2009)).

¹³ *See id.*

¹⁴ *Id.* at 941.

¹⁵ *Id.* at 941–43.

¹⁶ *Id.* at 966.

¹⁷ *See* 554 U.S. 570 (2008).

¹⁸ *See* 561 U.S. 742, 749–50 (2010) (incorporating *Heller* against the states).

¹⁹ *See* Miller, *supra* note 11, at 957.

rhetoric pulses with anarchy”²⁰ and portions of the *Heller* opinion “seem giddy with revolutionary fervor.”²¹

In both *Heller* and *McDonald*, the Court underscores the Second Amendment’s inaugurate role as a check on government tyranny, a role accomplished by ensuring an armed citizenry prepared to hold the government accountable at gunpoint.²² The *Heller* Court noted the Second Amendment was, in large part, provoked by the American colonists’ pervading fear of government tyranny.²³ Quoting David B. Kopel, the Court expressed that the impetus behind the Second Amendment was “to deter tyranny and allow popular revolution to unseat a tyrant.”²⁴ Obviously, the tyranny to be deterred encompassed more than immediate threats to physical safety.

Furthermore, the Court’s language in *Heller* evokes Second Amendment concepts that outstretch traditional notions of self-defense: “[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny”; “‘the natural right of resistance and self-preservation’ is a right ‘protecting against both public and private violence.’”²⁵ The *Heller* Court also reasoned that “history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”²⁶

In *McDonald*, the Court reaffirmed that the right to keep and bear arms for self-defense is fundamental.²⁷ It is a right “deeply rooted in [our] history and tradition.”²⁸ In reaching this conclusion, the Court reviewed the role of the Second Amendment in empowering Americans to resist government tyranny at various junctures in the Country’s history.²⁹ The centerpiece of the Court’s historical analysis focused on Reconstruction. The Court, in quoting Stephen Halbrook, recounts that Reconstruction-era Republicans passed the Fourteenth Amendment to help protect “the right of freedmen to keep arms in opposition to searches and seizures of arms by state militias”³⁰ because the municipal police officer, in conjunction with state militias, “terrorized freedmen, sometimes alone, sometimes in collusion with unofficial citizen patrols and groups like the Klan.”³¹ The *McDonald* Court observed that

²⁰ *Id.* at 947.

²¹ *Id.* at 940.

²² *See Heller*, 554 U.S. at 570; *McDonald*, 561 U.S. at 767.

²³ *Heller*, 554 U.S. at 598.

²⁴ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYUL REV. 1359, 1390 (1998).

²⁵ Miller, *supra* note 11, at 940 (quoting *Heller*, 544 U.S. 570 (2008)).

²⁶ *Heller*, 554 U.S. at 598.

²⁷ *McDonald*, 561 U.S. at 767–68.

²⁸ *Id.* at 768.

²⁹ *Id.* at 770–80.

³⁰ Miller, *supra* note 11, at 965 (quoting STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 69 (1998)).

³¹ *Id.* at 943.

African Americans “had as much to fear from Southern law enforcement as they did from terrorist organizations like the Klan.”³²

The import of the Court’s historical reference here cannot be overstated. Congress essentially authorized Blacks to use lethal force to defend themselves against disarmament. The obvious implication is that Black southerners were constitutionally empowered to use deadly defensive force against government officials to protect their persons, property, freedom, and constitutional rights, particularly their right to bear arms. Taken together, the Second Amendment afforded Southern Blacks the right to rebel against rogue (tyrannical), Southern law enforcement officials.

At least one scholar agrees that the Court’s analysis in *McDonald* has far-reaching implications. Professor Darrell Miller notes *Heller* and *McDonald* “suggest that the people ratified both the Second Amendment and the Fourteenth Amendment with the understanding that they codify a previously natural, individual right to arm oneself in self-defense against government threats, and not only to arm oneself, but to use those arms in opposition to tyranny.”³³

Joseph Story, an authority the majority quotes in *Heller*, wrote in 1833:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.³⁴

The Second Amendment emanated, in part, from the English Bill of Rights. The English Bill of Rights resulted from the British Crown’s repeated attempts to disarm English citizens to quell dissent.³⁵ *Heller* acknowledges this history. The Court explains that the English Bill of Rights germinated from episodes where King Charles II and King James disarmed their political opponents to quash political dissent.³⁶ This history left Englishmen wary of government efforts to regulate firearms.³⁷ In response, English citizens appended a provision to the English Bill of Rights precluding the British government from disarming citizens.³⁸ The provision established the principle that freemen were empowered to defend themselves against the British government.³⁹

³² *Id.* at 959.

³³ *Id.* at 947.

³⁴ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (1833).

³⁵ *Heller*, 554 U.S. at 592–93.

³⁶ *Id.*

³⁷ *Id.* at 593.

³⁸ *Id.*

³⁹ *Id.*

According to the *Heller* Court, similar colonial experiences with the British Crown influenced the American Bill of Rights.⁴⁰ Specifically, the Court attributed the genesis of the Second Amendment to early colonial incidents in which the British monarchy repeatedly attempted to disarm groups of American colonists to suppress resistance to British rule.⁴¹ According to the Court, “members of Congress feared that the federal government would duplicate the tyranny of the British Crown by disarming the citizenry, in order to further a particularized world-view enforced by military rule.”⁴² The Court also stated, “[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”⁴³

Additionally, the Supreme Court in *Heller* invoked the work of noted legal scholars, like William Blackstone and Joseph Story, in articulating what essentially is a right to rebel.⁴⁴ The Court adopted Blackstone’s characterization of defensive rights to determine that the right to bear arms is based upon “the natural rights of resistance and self-preservation” available to people “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”⁴⁵

The common law right to resist an unlawful arrest also evidences the historical right to rebel. The right to resist an unlawful arrest authorizes force against law enforcement officials who endeavor to arrest individuals without probable cause or warrant. This right, particularly in its manifestation as an affirmative defense to assault, battery, and homicide charges, is probably the purest, structured application of the natural rights philosophy underlying the right to rebel in western jurisprudence.

Under English law, an Englishman had a right to use physical violence to prevent his unlawful arrest or the arrest of another.⁴⁶ Importantly, the right was not rooted in self-defense.⁴⁷ It was not designed to protect against physical injury or death.⁴⁸ Instead, the right to resist an unlawful arrest is steeped in the doctrine of provocation, which acknowledges the innate offensiveness of acts of government-propagated tyranny.⁴⁹ Miller notes, “[a] person arrested illegally (or who witnessed such an illegal arrest) was ‘provoked’ by the threat to liberty and had a right to respond with force.”⁵⁰

⁴⁰ *Id.* at 594–95.

⁴¹ *Id.*; *Events Leading to the American Revolution*, PBS, http://www.pbs.org/wgbh/amex/patriotsday/peoplevents/e_conditions.html [<https://perma.cc/VQ64-26NA>] (last visited May 8, 2023).

⁴² Sanders, *supra* note 6, at 707 (citing *Heller*, 554 U.S. at 598).

⁴³ *Heller*, 554 U.S. at 599.

⁴⁴ *Id.* at 593–94, 608.

⁴⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *144.

⁴⁶ See Craig Hemmens & Daniel Levin, “*Not A Law at All*”: *A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1, 8–12 (1999).

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ Miller, *supra* note 11, at 948.

Englishmen considered an unlawful arrest to be an affront to the Magna Carta and, thus, an affront to all Englishmen.⁵¹

The English common law right to resist an unlawful arrest legitimizes the notion that psychological or moral injury caused by injustice can, at least in some instances, justify the use of physical force. It recognizes the damage to human dignity, the assault on the conscious, and the disturbance of the social sense of right and wrong caused by government acts of subjugation. The right even recognizes that a threat to liberty, dignity, and fairness interests can be so egregious that a citizen would be justified in using the most extreme use of force, deadly force, in response. That is, the right to resist an unlawful arrest, if undermined enough, could justify murder.⁵² In sum, the right to resist an unlawful arrest acknowledges and vindicates the idea that real injury can issue from a government abuse of power, even in the absence of a physical threat, that would license the use of physical force in response.

The American common law adopted the English right to resist an unlawful arrest.⁵³ The American right to resist an unlawful arrest originally included the possibility of exculpating a defendant for murder.⁵⁴ However, American common law courts later curtailed the use of the defense in murder cases.⁵⁵ They also adjusted its rationale by featuring liberty and self-defense interests as the predominant justifications instead of “provocation.”⁵⁶ However, as Miller notes:

[A]t the time the people ratified the Second Amendment, violent, sometimes even deadly, resistance to an unlawful arrest had long been an established part of Anglo-American jurisprudence. In fact, according to some cases, even technical defects with an arrest could strip the law officer of his authority and leave him in no better position than a common assailant.⁵⁷

The English common law right to resist an unlawful arrest also helped to shape the Second Amendment. As Miller observes, “[t]he same four generations of Englishmen that recognized the right to bear arms recognized the right of persons to use force to resist an illegal arrest.”⁵⁸ Likewise, English common law was a precursor to the Second Amendment.⁵⁹ One of the founding tenets of the English Revolution and, by extension, the American Revolution was “the belief that the will to resist

⁵¹ *R v. Tooley* [1710] 92 Eng. Rep. 349, 353 (KB).

⁵² *See Miller, supra* note 11, at 943.

⁵³ *Hemmens & Levin, supra* note 46, at 13.

⁵⁴ *See Miller, supra* note 11, at 943.

⁵⁵ *Id.* at 953.

⁵⁶ *Id.* at 948, 948 n.65.

⁵⁷ *Id.* at 943.

⁵⁸ *Id.* at 948.

⁵⁹ *See id.*

arbitrary authority in a reasonable way is valuable and ought not to be suppressed by the criminal law.”⁶⁰ Any number of English laws and the American common law, including the right to resist an unlawful arrest, reflect this view.⁶¹

Both the right to rebel and the common law right to resist an unlawful arrest are circumscribed forms of rebellion that balance the need for social order with the mandates of individual liberty and freedom. Although these resistance rights are constrained forms of anarchy, they are checked in scope and discouraged in occurrence by the criminal justice process.⁶² Those who rely on these rights will be arrested, charged, and adjudicated by a jury of their peers.

The history of Western thought also suggests a Second Amendment right to rebel. Thirteenth-century theologian Thomas Aquinas is credited with first articulating the right. As Joseph DiPiero notes, “[A]quinas employed Ancient Greek methods of reasoning from universal principles of natural law and Aristotelian notions of tyranny to develop his theory of justified rebellion.”⁶³ Aquinas argued:

A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler, as the Philosopher [Aristotle] states (Polit. iii, 5; Ethic. viii, 10). Consequently, there is no sedition in disturbing a government of this kind, unless indeed the tyrant’s rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant’s government. Indeed it is the tyrant rather that is guilty of sedition, since he encourages discord and sedition among his subjects, that he may lord over them more securely; for this is tyranny, being conducive to the private good of the ruler, and to the injury of the multitude.⁶⁴

Seventeenth-century philosopher John Locke, whose theories on natural rights and government inform many American ideas about government, asserted if the rulers fail to protect the natural right to “life, liberty, and property,” the “people could justifiably overthrow the existing state and create a new one.”⁶⁵

⁶⁰ *Id.* at 955 (quoting Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1137 (1969)).

⁶¹ *See generally* R v. Tooley [1710] 92 Eng. Rep. 349 (KB); Miller, *supra* note 11, at 948; Hemmens & Levin, *supra* note 46, at 26.

⁶² *See* Martin, *supra* note 1, at 1540, 1542.

⁶³ Joseph DiPiero, Note, *The Common Law of Rebellion*, 48 GEO. J. INT’L L. 605, 607–08 (2017) (quoting Heiner Bielefeldt, *The Right to Resist*, in INTERNATIONAL HANDBOOK OF VIOLENCE RESEARCH 1097, 1098 (Wilhelm Heitmeyer & John Hagan eds., 2003)).

⁶⁴ *Id.* (quoting ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, 42-2 (The Fathers of the English Dominican Province trans., Burns Oates & Washbourne Ltd. 2d rev. ed. 1981) (1485)).

⁶⁵ PETER N. STEARNS, HUMAN RIGHTS IN WORLD HISTORY 48 (1st ed. 2012); JOHN

The American Declaration of Independence could not be clearer about justified rebellion. Indeed, the entire document is a powerful, poetic, and reasoned explanation of what is essentially the right to rebel. It decrees in pertinent part:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—*That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government,* laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁶⁶

2. The Modern Right to Rebel

The modern right to rebel derives from or, rather, is confirmed by the originalist methodology the Court uses in *Heller* and *McDonald*. In *Heller*, the Court described its interpretive approach as one that aims “to fetter judicial discretion by forcing judges to imagine what the words of the Constitution would have meant to an ordinary person at the time they were ratified.”⁶⁷ This approach disallows the weighing of costs and benefits of a constitutional right, the practicality of implementing the right, or the consideration of untoward, even absurd, repercussions.⁶⁸ As the majority asserted in *Heller*, “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.”⁶⁹ The crux of the Court’s methodology is that whatever the Second Amendment meant when it was ratified, is what it means now. Thus, if the Second Amendment contained a right to rebel when adopted, then it does so now.

In both *Heller* and *McDonald*, the Supreme Court was explicit in finding that self-defense is the “central component”⁷⁰ of the Second Amendment. In *McDonald*,

LOCKE, SECOND TREATISE OF GOVERNMENT, 101–03 (C. B. Macpherson ed., 1980) (1690) (defining tyranny as “*the exercise of power beyond right . . . And this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private separate advantage*”).

⁶⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

⁶⁷ Miller, *supra* note 11, at 942.

⁶⁸ *Id.* at 942–43.

⁶⁹ *Heller*, 554 U.S. at 634.

⁷⁰ *Id.* at 599; *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 544 U.S. at 559).

the Court emphatically stated that self-defense is not only a fundamental right, but also a natural right that long preceded the adoption of the Second Amendment and that the Second Amendment simply codified this pre-existing natural right.⁷¹ The Court was less explicit in delineating the right to rebel, but originalism aside, the Court's self-defense analysis clearly implicates the right to rebel in every manner aside from name. As Miller points out:

Heller and *McDonald* appear to suggest that the people ratified both the Second Amendment and the Fourteenth Amendment with the understanding that they codify a previously natural, individual right to arm oneself in self-defense against government threats, and not only to arm oneself, but to use those arms in opposition to tyranny.⁷²

As discussed in detail in the last section, the Court's opinions in both *Heller* and *McDonald* traverse centuries of court cases, state laws, scholarship, legal philosophy, legislative debates, and historical episodes.⁷³ All the sources the Court discusses evidence a historical right to rebel and, by extension, a modern one. That is, originalism by its very nature means that what a right meant historically, it means at the moment of interpretation. The *McDonald* Court's invocation of the role of the Second Amendment during Reconstruction, for example, offers proof of the modern right to rebel. As Miller writes:

If one of the principal aims of the Civil Rights Act of 1866 and the Fourteenth Amendment was to allow freedmen to arm themselves in order to repel unreconstructed Southern law enforcement, then it seems that modern individuals would enjoy a constitutional right to publicly arm themselves in case they need to threaten, to resist, or even to fire upon police officers who violate the law.⁷⁴

Furthermore, as Miller notes as a logical consequence of the originalist methodology the court uses in *Heller*, the opinion "sanction[s] individual acts of armed rebellion against a [government agent] . . . whenever that officer exceeds his authority in a way that a person construes as despotic or tyrannical" and "[i]t could be cited even to support efforts to cow, or even kill" government officials.⁷⁵

⁷¹ *McDonald*, 561 U.S. at 819 (Thomas, J., concurring) (citing *Heller*, 544 U.S. at 592).

⁷² Miller, *supra* note 11, at 947.

⁷³ See *Heller*, 544 U.S. 570; *McDonald*, 561 U.S. at 742.

⁷⁴ Miller, *supra* note 11, at 943.

⁷⁵ *Id.* at 947.

All in all, the Court's language in *Heller* and *McDonald* and the sources the Court leans on for support describe a Second Amendment that guards against more than immediate, physical threats and is calibrated to empower citizens to rebel against broader government oppression.

The contemporary right to rebel against the government seems preposterous as a practical matter. It would seem to give every radical rabble-rouser, self-professed revolutionary, and every religious extremist the authority to topple the government for what essentially amounts to government hypocrisy and unfaithfulness to the principles underlying the Second Amendment. The disturbing scope of the right to rebel is a valid critique. Government hypocrisy regarding the nation's founding principles is pervasive. Furthermore, it is not wrong to believe the right to rebel invites anarchy, nor is it beyond the pale to argue that the right is irreconcilable with the Country's stability or even with the well-being of the majority of citizens. Yet, the *Heller* and *McDonald* Courts' undiluted commitment to originalism tethers the Court precariously to a modern right to rebel.

On the other hand, constitutional rights are subject to some government regulation and judicially imposed restrictions. As the Court states in *Heller*, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”⁷⁶ The Supreme Court cited to several state restrictions on the right to bear arms, including the prohibition of grenades, automatic weapons, explosives, etc.⁷⁷ In *Heller*, the Court noted other acceptable regulations, including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁷⁸

Whether these types of restrictions are truly consistent with a strict originalist approach is another matter altogether, requiring a detailed analysis that exceeds the scope of this Article. Suffice it to say that many of the restrictions the Court has upheld regarding the right to bear arms, like state statutes prohibiting grenades and automatic weapons—weapons necessary in the modern age to actualize the intent of the Second Amendment—are difficult to square with a strict originalist methodology which leads one to question the Court's absolute commitment to the approach. One relevant example is the *Heller* Court's unexplained proclamation that there is no right to wage wholesale war against the government.⁷⁹ As Miller notes, “*Heller* provides no clue as to why this should be, other than an unsatisfactory ‘because we say so.’”⁸⁰

⁷⁶ *Heller*, 554 U.S. at 626.

⁷⁷ *Id.* at 712–13 (Breyer, J., dissenting); 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, 38–39 n.129 (2016).

⁷⁸ *Heller*, 554 U.S. at 626–27.

⁷⁹ *Id.* at 586.

⁸⁰ Miller, *supra* note 11, at 946.

In his general advocacy of justifiable rebellion, Thomas Aquinas provides a philosophical basis for prohibiting wholesale war against government. Aquinas argued that “there is no sedition in disturbing a government” turned tyrannical, “*unless* indeed the tyrant’s rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant’s government.”⁸¹ Aquinas’ philosophical caveat to justifiable rebellion balances the damage government tyranny wreaks on the populace against the social costs of overthrowing that government.⁸² This concept of balancing the harm of rebellion against oppression works exactly like the traditional political necessity defense’s balance of harms element. Consequently, the concept philosophically supports the *Heller* Court’s proclamation that there is no right to wage war against the government. However, there is no support for such a balancing prerequisite in Second Amendment jurisprudence or the nation’s founding documents.

Even presuming there is no right to wage wholesale war against the government, the right to respond forcibly to individual acts of government tyranny obtains nonetheless. This right to rebel encompasses several rights, including, but not limited to, the right to resist an unlawful arrest; the right to use deadly force to prevent disarmament; the right to use deadly force against government officials who threaten excessive deadly force; the right to resist oppression and attacks on the Constitution; the right to resist political imprisonment; and, arguably, the right to riot.

Although these sub-war rights left unfettered could lead to chaos, the specter of prosecution and the threat of conviction greatly mitigate the potential anarchical effects. That is, the right to rebel would likely gain its character from its sister rights, the right to resist an unlawful arrest and the right of self-defense, which both operate as affirmative defenses that have to be established by the defendant, not simply negated by the prosecution. In other words, the defendant would have to prove that he acted within the circumference of the right to rebel instead of the prosecutor having to prove the opposite.⁸³ This burden, along with the uncertainty of one’s fate when left in the hands of a jury of one’s peers, will discourage many brazen and unreasonable acts of rebellion and other abuses of the right.

Critics will also undoubtedly question the existence of the right to rebel. They will certainly argue that the *Heller* and *McDonald* Courts never meant to import a right to rebel into the Second Amendment. However, the Court in both cases explicitly determined that the Second Amendment did not create any new rights, that it simply codified natural rights already in existence.⁸⁴ It is uncontested that one of

⁸¹ DiPiero, *supra* note 63, at 608 (quoting ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 42-2 (The Fathers of the English Dominican Province trans., Burns Oates & Washbourne Ltd. 2d rev. ed. 1981) (1485)) (emphasis added).

⁸² *Id.*

⁸³ Miller, *supra* note 11, at 967.

⁸⁴ *Heller*, 554 U.S. at 592; *McDonald v. City of Chicago*, 561 U.S. 742, 809 (2010) (Thomas, J., concurring in part and in judgment) (quoting *United States v. Cruikshank*, 92 U.S. 542, 551 (1876)).

the central purposes of the Second Amendment at the time it was adopted was to enable an armed response to potential government tyranny.⁸⁵

Furthermore, in both *Heller* and *McDonald* the Court unequivocally found that self-defense was the central component of the Second Amendment.⁸⁶ It is clear from the sources the Court relies upon that the concept of self-defense had a wider girth when the Second Amendment was adopted than it does now. Also, the *Heller* Court confirmed that the right to self-defense applies irrespective of whether the source of the confrontation is public or private.⁸⁷

Thus far, the discussion in this Article concerning the right to rebel has focused primarily on individual acts of government tyranny, like a police officer attempting to arrest a citizen unlawfully. But what does the Second Amendment have to say about duly passed but oppressive laws such as the Fugitive Slave Act, anti-miscegenation laws, and the white supremacist doctrine of “Separate but Equal”? Is the Second Amendment applicable to anti-American domestic policies such as COINTELPRO and other covert government operations meant to sabotage the leadership of community leaders like Dr. Martin Luther King Jr. and neutralize organizations like the Negro Improvement Association?⁸⁸ In other words, what does the Second Amendment have to say about socially oppressive laws passed by Congress, state legislatures, and municipal government via the democratic process and subversive policies adopted by agencies like the FBI?⁸⁹ These laws and policies violate the letter or spirit of the Constitution and undermine the principles of liberty and justice on which the country was founded.

B. The Right to Rebel and the Violent Veto Power

Be it an official government law or policy or a rogue government agent misusing his power, the “natural rights of resistance and self-preservation” equally apply to all forms of oppressive government conduct. The right to rebel applies to situations where the actor uses physical force to counteract a government actor’s unlawful use of force or restraint, e.g., when an officer unlawfully arrests a citizen. However, the right to rebel applies equally where an actor uses physical force to curtail the effects of duly passed laws and legally promulgated policies that threaten liberty interests. Examples include the disproportionate federal sentencing guidelines that helped to fuel mass incarceration, voter suppression, felon disenfranchisement, the “rationalized fear” use-of-force standard which places a greater burden of care on civilians than

⁸⁵ *Heller*, 554 U.S. at 593–94.

⁸⁶ *Id.* at 599; *McDonald v. City of Chicago*, 561 U.S. at 767 (quoting *Heller*, 544 U.S. at 559).

⁸⁷ *Heller*, 554 U.S. at 594.

⁸⁸ See generally Kristen Hoerl & Erin Ortiz, *Organizational Secrecy and the FBI’s COINTELPRO—Black Nationalist Hate Groups Program, 1967–1971*, 29 MGMT. COMM’N Q. 590, 594–97 (2015).

⁸⁹ See generally *id.*

on trained police officers, and policies such as the ones that have led to the militarization of police forces around the Country and the quasi-occupation of minority communities.⁹⁰ This Article refers to a citizen's right to use force in such situations as "the violent veto power" of the Second Amendment. The violent veto power, as coined here, refers to the Second Amendment right to use purposeful violence to check or redress government tyranny that manifests as laws, policies, or other legal pronouncements, particularly those that threaten liberty interests. Like an unlawful arrest at English common law, tyrannical laws or policies amount to attacks on the Constitution itself. An attack on the Constitution is an attack on democracy which, ultimately, is an attack on the country. Thus, the violent veto power is theoretically situated to protect democratic government.

Hubert "Rap" Brown, the fifth chairman of the Student Nonviolent Coordinating Committee, remarked in 1967 that "[v]iolence is as American as cherry pie."⁹¹ The violent veto power of the Second Amendment offers an obligatory amen to this point of view.

The idea of the violent veto power is deeply rooted in American history. The Stamp Act Riots of 1765 and the Boston Tea Party were among the earliest examples of violence dispatched to protest a duly passed law.⁹² The biggest Western example of the violent veto power is the American Revolution, which overturned British rule due to oppressive British laws and policies like the Stamp Act, taxation without representation, and general warrants.⁹³ Indeed, the Second Amendment was drafted, in part, to prevent political tyranny of the brand that inspired the American Revolution.⁹⁴

Heller and *McDonald* verify the violent veto power. That is, the cases confirm that the Second Amendment right to rebel applies to more than physical government

⁹⁰ See Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113–14; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020> [<https://perma.cc/LBB6-LTL5>]; *Disenfranchisement Laws*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws> [<https://perma.cc/JC96-C7ER>] (last visited May 8, 2023); Kindaka J. Sanders, *The New Dread, Part I: The Judicial Overthrow of the Reasonableness Standard in Police Shooting Cases*, UCLA CRIM. JUST. L. REV. 21, 28; Rashawn Ray, *How 9/11 Helped to Militarize American Law Enforcement*, BROOKINGS (Sept. 9, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/09/09/how-9-11-helped-to-militarize-american-law-enforcement/> [<https://perma.cc/HQF2-6FZZ>].

⁹¹ CHARLES E. COBB, JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED 7 (2014).

⁹² Christopher Klein, *The Stamp Act Riots*, HISTORY (Aug. 31, 2018), <https://www.history.com/news/the-stamp-act-riots-250-years-ago> [<https://perma.cc/5BV3-MMTZ>]; History.com Editors, *Boston Tea Party*, HISTORY (Sept. 20, 2022), <https://www.history.com/topics/american-revolution/boston-tea-party> [<https://perma.cc/8Z7X-5Y87>].

⁹³ Martin Kelly, *The Root Causes of the American Revolution*, THOUGHTCO. (Feb. 17, 2020), <https://www.thoughtco.com/causes-of-the-american-revolution-104860> [<https://perma.cc/FD7T-YDAK>].

⁹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

threats. The *Heller* and *McDonald* Courts describe the Second Amendment's central rights as "natural right[s] of resistance and self-preservation" available to people "when the sanctions of society and laws are found insufficient to restrain the violence of oppression."⁹⁵ The quote is from William Blackstone, who the *Heller* Court declared the "preeminent authority on English law for the founding generation."⁹⁶ Blackstone's reference to "insufficient" laws connotes the absence of effective or enforced laws or the absence of laws altogether that would protect citizens from oppression.⁹⁷ Said differently, Blackstone's definition and, in turn, the Court's interpretation of central Second Amendment rights suggest that the presence, absence, or insufficiency of laws is foundational in determining whether citizen force is justifiable.⁹⁸

Furthermore, Blackstone's phrase, "violence of oppression," connotes much more than a physical assault on an individual's person. Instead, the term "oppression," as used by Blackstone, is a political term implying tyranny, abuse of power, and deprivation of freedom. The term itself comes from the Latin *oppressus*, which is the past participle of *opprimere*, meaning in Latin, "to press against," "to squeeze," to "suffocate." In fourteenth-century England, "oppression" meant the "action of weighing on someone's mind or spirits."⁹⁹ The Cambridge English Dictionary defines oppression as "a situation in which people are governed in an unfair and cruel way and prevented from having opportunities."¹⁰⁰ Thus, when Blackstone writes of oppression, he is clearly talking about mental and spiritual tyranny of the sort meted out by governments and monarchs.

In the end, the *McDonald* and *Heller* Courts' use of Blackstone's passage about insufficient laws and oppression to describe the "central component" of the Second Amendment directly connects Blackstone's "natural right of resistance" to the violent veto power of the Second Amendment.¹⁰¹ In other words, the natural right of resistance, available when the laws fail to protect citizens from government oppression, justifies the use of the violent veto power.

The concept of self-defense prevailing at the time of the nation's founding also evidences a Second Amendment violent veto power. At the time:

[S]elf-defense had a broader meaning than it is usually conceived of having today. Self-defense included not only defense

⁹⁵ BLACKSTONE, *supra* note 45, at *144.

⁹⁶ *Heller*, 554 U.S. at 593–94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

⁹⁷ See BLACKSTONE, *supra* note 45, at *144.

⁹⁸ John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111–12 (2007).

⁹⁹ *Oppression*, ONLINE ETYMOLOGY DICTIONARY (Sept. 4, 2019), <https://www.etymonline.com/word/oppression>.

¹⁰⁰ *Oppression*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/oppression> (last visited May 8, 2023).

¹⁰¹ *Heller*, 554 U.S. at 599; *McDonald v. City of Chicago*, 561 U.S. 742, 767, 767 n.15 (2010) (quoting *Heller*, 544 U.S. at 559).

against apolitical crime but also against assassination, genocide, and other politically-motivated oppressions—what Algernon Sidney called ‘the violence of a wicked magistrate who, ha[ving] armed a crew of lewd villains,’ subjects the people to murder, pillage, and rape.¹⁰²

David Kopel notes:

[T]he Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.¹⁰³

In more colorful and less objective language, John Brown would have described the violent veto as most appropriate to counter:

[T]he extreme wickedness of persons who use their influence to bring law and order and good government, and courts of justice into [the] disrespect and contempt of mankind . . . fiends clothed in human form . . . [who] have come to be a majority in our national Legislature, and . . . pass unjust and wicked enactments, and call them laws.¹⁰⁴

C. The Violent Veto Power and the Political Necessity Defense

The Second Amendment right to rebel, which embraces the violent veto power, and the political necessity defense complement each other. Both the violent veto power and the political necessity doctrine anticipate democratic failures and offer counter-measures that bypass the political process in deference to more essential American values.¹⁰⁵ To elaborate, in the words of Shaun P. Martin, “the necessity doctrine enshrines a direct participatory response to the problem of normative electoral failure.”¹⁰⁶

¹⁰² Miller, *supra* note 11, at 957 (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1345 (2009)).

¹⁰³ *Id.* at 946 (quoting Kopel, *supra* note 24, at 1454 n.358).

¹⁰⁴ JOHN BROWN ET AL., *A JOHN BROWN READER* 61 (Susan L. Rattiner & Michael Croland eds., 2021).

¹⁰⁵ See Martin, *supra* note 1, at 1590.

¹⁰⁶ *Id.*

It anticipates that a “fully functional American political system may fail to conform executive and legislative norms to prevailing popular principles.”¹⁰⁷ Similarly, the violent veto power applies “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”¹⁰⁸ The violent veto power, like the necessity defense, assumes that the democratic process in and of itself is insufficient to prevent government tyranny. Why would there be a right to rebel if the Founders had full faith in government and American democracy?

Furthermore, Blackstone’s “natural right of resistance,” which the Supreme Court in *Heller* found to be the central component of the Second Amendment, evidences the complementary relationship between the violent veto power and the political necessity defense.¹⁰⁹ Indeed, Blackstone’s description of the natural right of resistance is a compelling description of the Second Amendment political necessity defense itself: a “natural right of resistance” is available to an actor “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”¹¹⁰

To elaborate, Blackstone’s description, “when the sanctions of society and laws are found insufficient” to “restrain the violence of oppression” combines ideas that animate the common law necessity doctrine: the failure of the law to provide an equitable prescription for the defendant’s situation and the political character of the violent veto power, i.e., thwarting government oppression.¹¹¹ That is, to prevail on a general claim of necessity, the existing law must be insufficient to cover the exact situation the actor finds himself. In other words, the law has to be an unreasonable (insufficient, oppressive) alternative for a defendant to prevail on a necessity claim.

Blackstone’s phrase, “the violence of oppression,” highlights the political nature of Blackstone’s version of self-defense, thus completing Blackstone’s articulation of what is essentially a political necessity defense.¹¹² As discussed in the section above, when Blackstone wrote the passage, the term ‘oppression’ connoted political oppression, although the *Heller* Court must have interpreted “oppression” both as physical force and emotional, psychological, and spiritual government violence.

Furthermore, the violent veto power and the political necessity defense complement each other because both doctrines share the principle of veto. The necessity defense gives an actor a circumstantial veto over a particular law. That is, the necessity defense carves out a one-time exception to a specific law when breaking that law produces less social harm than following it. The political necessity defense transforms a jury into “a quasi-legislative or executive body that can, in effect, veto duly promulgated policies” without the safeguards of accountability to the electorate,

¹⁰⁷ *Id.*

¹⁰⁸ BLACKSTONE, *supra* note 45, at *144.

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008).

¹¹⁰ BLACKSTONE, *supra* note 45, at *144.

¹¹¹ *See id.* at *144.

¹¹² *Id.*

including elections and the need to justify the decision making that characterizes the legislative and executive branches.¹¹³

The veto principle in the violent veto power is more expansive than the veto principle of the political necessity defense. The veto principle of the necessity defense contemplates a one-time exception to a particular law, while the violent veto principle aims to subvert the law or policy altogether. The *Heller* Court's description of Second Amendment self-defense illustrates the distinction.¹¹⁴ To this end, it is helpful to view contemporary self-defense as a form of necessity. For self-defense, the harm to be avoided is an assault on the non-culpable party, the harm caused is an assault on the culpable party, and the lack of reasonable alternatives involves the absence of government actors to prevent physical harm to the non-culpable party. The Court's definition of Second Amendment self-defense, Blackstone's definition, supports this characterization.

Blackstone's definition posits the "natural right of resistance and self-preservation."¹¹⁵ Blackstone must have viewed this "natural right" on a continuum that seats both resistance and self-preservation.¹¹⁶ That is, "resistance" seems to connote resisting government tyranny. On the other hand, "self-preservation" signifies self-defense as we know it. The *Heller* Court confirms this interpretation. The Court noted that Second Amendment self-defense applies to both "public and private violence."¹¹⁷ "Self-preservation" and private violence connote contemporary self-defense.¹¹⁸ The phrases "natural right of resistance" and "public violence" connote the right to resist (rebel).¹¹⁹ Whereas the self-preservation terminology of Blackstone's framework suggests a situational veto power over specific existing laws, including murder and most brands of assault, "the violence of oppression" aspect of the framework suggests that the culprits to be resisted are government officials and government bodies. In any event, all three doctrines—necessity, self-defense, and the violent veto power—share the veto principle.

Finally, the violent veto power comports with the political necessity defense because the violent veto power necessitates the political necessity defense. That is, the relationship between the violent veto power and the political necessity defense is like the relationship between the Second Amendment right to self-defense and the affirmative defense of self-defense. Just as the defense of self-defense is how one charged with assault, murder, or other violent crime vindicates one's right to self-defense, the defense of political necessity is how one charged with rioting, prison escape, assault, conspiracy, sedition, or other tumultuous crime vindicates one's right

¹¹³ Cohan, *supra* note 98, at 122.

¹¹⁴ *Heller*, 554 U.S. at 599, 628–29.

¹¹⁵ BLACKSTONE, *supra* note 45, at *144.

¹¹⁶ *See id.*

¹¹⁷ *Heller*, 554 U.S. at 594.

¹¹⁸ *See id.* at 594–95.

¹¹⁹ *See id.* at 593–94.

to rebel and, by extension, one's right to use force to resist arbitrary and oppressive laws, policies, and promulgations. Said differently, the violent veto is the protected right, and the political necessity is the best means to vindicate it in a court of law.

II. THE POLITICAL NECESSITY DOCTRINE AS REFINED BY ITS CONSTITUTIONAL UNDERPINNINGS

The Second Amendment substantially changes the elements of the traditional necessity defense. The right to rebel, and more particularly the violent veto power, refines the elements of the traditional necessity defense, redeeming the radical potential inherent in the common law necessity defense.

That is, despite the radical potential of the common law necessity defense, courts have used the elements of the defense to “deliberately limit[] the contours of the necessity defense in a manner designed to ensure that the doctrine is effectively employed only in cases that do not challenge the existing social order.”¹²⁰

United States v. Schoon, in which the Ninth Circuit prohibited the use of the necessity defense in all indirect civil disobedience cases by affirming the conviction of protestors who invaded an IRS office in protest of U.S. involvement in El Salvador,¹²¹ exemplifies the obstacles courts erect in the path of the political necessity defense.¹²² The sections below will describe why the Ninth Circuit's conclusions in this leading case on political necessity are inapplicable to the Second Amendment-based political necessity defense.

A. Balance of Harms

The Second Amendment substantially alters the constitutional scope of the Ninth Circuit's balance of harm analysis. The Ninth Circuit's blanket position regarding the inherent harmlessness of promulgations enacted through lawful democratic procedures is inconsistent with almost every aspect of the Second Amendment. The Court's view implies that government tyranny cloaked in lawful enactments creates no social harm.¹²³ This view flies in the face of the right to rebel because fear of government-inflicted harm and the need for an extrajudicial remedy was the *primum mobile* of the Second Amendment.¹²⁴

Furthermore, the *Schoon* Court's decision with respect to the balance of harm factor conflicts with the history and traditions of the country. As discussed in Part I above, at least one of the country's founding events was spurred by a violation of

¹²⁰ Martin, *supra* note 1, at 1589.

¹²¹ *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991) (opinion amended on Aug. 4, 1992).

¹²² See Cohan, *supra* note 98, at 115.

¹²³ *Schoon*, 971 F.2d at 196–97.

¹²⁴ *Heller*, 554 U.S. at 598–99.

rights deemed so fundamental that the harmlessness of the violation, indeed even its net benefit, was utterly irrelevant. The Tea Act of 1773 actually decreased the price of tea.¹²⁵ However, the Founders considered British Parliament's passage of the act without colonial input to be "taxation without representation" and thus a violation of their rights as Englishmen.¹²⁶ "Taxation without Representation" was deemed a discrete and insular harm unto itself apart from any damage the act in operation may impart.¹²⁷ In fact, it was considered such an egregious violation that it spawned a bloody revolution that ultimately resulted in the birth of this nation.¹²⁸

Other American traditions also militate against the idea of harm cast by the *Schoon* court. Like "taxation without representation," the common law right to resist an unlawful arrest is based on conceptual harm operating independently of actual harm.¹²⁹ Because the basis for the common law right to resist an unlawful arrest was that an unlawful arrest was an affront to the Magna Carta and thus a wound inflicted on all Englishmen,¹³⁰ Englishmen and later early Americans were able to summon violence purely as response to this virtual wound, irrespective of whether they were the target of the injustice. That is, it was not the deprivation of freedom that an unlawful arrest occasioned or the physical force that might be used to accomplish the deprivation that offended. The very nature of the violation itself justified violence or even murder, in response.¹³¹

To say that the balance of harm factor must be relaxed to retrofit the common law political necessity defense to accommodate its constitutional cousin, is not to say that any harm will suffice to establish a Second Amendment political necessity defense. The Declaration of Independence acknowledges this point:

*Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.*¹³²

¹²⁵ History.com Editors, *Tea Act*, HISTORY (Sept. 25, 2019), <https://www.history.com/topics/american-revolution/tea-act> [<https://perma.cc/5AD7-F2U5>].

¹²⁶ *Id.*

¹²⁷ DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21–23 (1998).

¹²⁸ Klein, *supra* note 92.

¹²⁹ Sanders, *supra* note 6, at 721–24.

¹³⁰ R v. Tooley [1710] 92 Eng. Rep. 349, 353 (KB).

¹³¹ Miller, *supra* note 11, at 948.

¹³² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

The Declaration of Independence itself contains a balancing of harms. The amount of harm necessary to justify “throw[ing] off” a government has to exceed “light and transient causes.”¹³³ Instead, “a long train of abuses and usurpations” is required.¹³⁴ “Throw[ing] off” the government represents the far extreme of actions justifiable out of political necessity.¹³⁵ That is, the use of revolutionary-level violence would require the kind of tyranny exercised by British Parliament and the King of England over the colonists. This Article, however, is not concerned with these extremes of government tyranny and revolutionary responses but, instead, with the gradients in between. Be that as it may, the Declaration provides some ground to believe that the Second Amendment political necessity defense contains a balance of harm, or better stated, a proportionality requirement.

Furthermore, a requirement of concrete harm can be deduced from the nature of the “central component”¹³⁶ of the Second Amendment, which is self-defense. The doctrine of self-defense has historically required the threat of physical harm to justify any physical response and a deadly threat to warrant deadly force.¹³⁷ To the extent that Second Amendment political necessity can be viewed as a species of spectral self-defense,¹³⁸ the type and volume of violence employed in its name needs to be reasonable, and proportionate to the extent of the government overreach. For example, while an oppressive law resulting in the unlawful death of thousands might justify an extremely prejudicial use of force, the unlawful arrest of a single actor that is limited to the force needed to consummate the arrest might only justify enough force to escape it. Likewise, the unlawful arrest of a group of protesters may warrant nondeadly physical violence applied to a limited number of government actors, where an unconstitutional law resulting in the unlawful conviction and sentencing of millions may justify an extremely prejudicial use of force.

The legal, doctrinal, and social history of the Second Amendment counsels the manner and degree of violence that can be employed in its name. For instance, legal precedents such as *Heller* that interpret the Second Amendment suggest the types of harms that may warrant the use of deadly force.¹³⁹ According to the *McDonald* Court, the Second Amendment was created and utilized to stave off disarmament, implying that citizens could employ deadly force for the same purpose.¹⁴⁰ The

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

¹³⁷ *See, e.g.*, John J. Dvorske et al., 16 N.C. INDEX 4TH HOMICIDE § 78 (self-defense, defense of others, and stand your ground); Jennifer A. Brobst, CRIM. OFFENSES AND DEFENSES IN ALABAMA § 25:5 (2022); Lewis R. Katz et al., BALDWIN’S OH. PRAC. CRIM. L. § 88:7 (3d ed. 2022) (discussing various state law self-defense laws requiring threat of imminent force).

¹³⁸ *See infra* Part III.

¹³⁹ *Heller*, 554 U.S. at 628 (discussing the need for a firearm to protect against harms to self, family, and property present inside of a home).

¹⁴⁰ *See McDonald v. City of Chicago*, 561 U.S. 768–69 (2010).

founding fears that shaped the Second Amendment also suggest the types of threats warranting deadly force. The founding fear of a police state (standing army) suggests that military-style occupation of a community as a means of abridging freedom and discouraging dissent constitutes a threat on par with death, warranting commensurate force.¹⁴¹ Similarly, the founding fear of government searches and seizures based on general warrants suggests that the Framers contemplated the use of weapons to repel such invasions.¹⁴²

The Declaration of Independence also provides insight into the types of harms that might justify deadly force. These harms include laws and policies enacted without the consent of the governed, obstructions that prevent the passage of protective laws, and gross negligence¹⁴³ with respect to the passage of such laws.¹⁴⁴

The harm element, the first element of the Second Amendment political necessity defense, can be clarified as reading: a present or ongoing threat to the constitution or a violation of an individual or group's fundamental rights.

B. Reasonable Alternatives

The right to rebel is a right of last resort. The Declaration of Independence which informs the Second Amendment right to rebel makes this clear:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute

¹⁴¹ RADLEY BALKO, *THE RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 12–14 (2013).

¹⁴² *See id.*

¹⁴³ *See* THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776). In the Declaration of Independence, Thomas Jefferson complains of what basically amounts to gross negligence by the Crown: “He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.” *Id.*

¹⁴⁴ THE DECLARATION OF INDEPENDENCE para. 2, 4, 6 (U.S. 1776) (stating “[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them . . . He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures”).

Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.— Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government.¹⁴⁵

Thus, the traditional political necessity defense’s reasonable alternative element is inherent in the constitutional political necessity defense. William Blackstone described this as “when the sanctions and laws are found insufficient to restrain the violence of oppression.”¹⁴⁶ *Heller* specifically invoked Blackstone’s commentary that these rights include “the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’”¹⁴⁷ The passage implies that justifiable force under the Second Amendment requires the law or its enforcers to be unavailable, wanting, non-existent, or ineffective. In other words, the passage acknowledges that the rule of law should be the first line of defense and that extrajudicial action is unwarranted if such laws find effect.

Furthermore, the entire purpose of the political necessity defense is about necessity. The very notion of “necessity” implies that alternatives are limited. The nature of the concerns regarding the Second Amendment suggests that the right to rebel is a right of last resort. For example, the Declaration of Independence acknowledges that “[g]overnments long established should not be changed for light and transient causes.”¹⁴⁸

The principle of last resort constrains the Second Amendment political necessity defense. However, the defense might yet be available in some instances where theoretical alternatives to violent confrontation exist. That is, the Second Amendment is not satisfied by the availability of theoretical alternatives. Unlike the *Schoon* court’s *per se* rule establishing the political process a reasonable alternative, the Second Amendment states that “[r]easonable must mean more than available; it must imply effective[ly].”¹⁴⁹

The Ninth Circuit’s holding in *Schoon* that the political process is always a reasonable alternative does not comply with the Second Amendment.¹⁵⁰ For one, such a view is dismissive of the circumstances underlying the country’s founding. That is,

¹⁴⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁴⁶ Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 274 (2020) (quoting BLACKSTONE, *supra* note 45, at *121).

¹⁴⁷ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (quoting BLACKSTONE, *supra* note 45, at *145–46 n.42).

¹⁴⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁴⁹ Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1180 (1987).

¹⁵⁰ *See id.*

the American Revolution, according to the Founders, occurred because the Founders deemed Britain's political process to be inadequate.¹⁵¹ Suppose one followed the *Schoon* court's wisdom. In that case, one might have to conclude that the American Revolution was premature because British parliament represented an adequate alternative to rebellion, particularly since the colonists were treated no different than other similarly situated British subjects.

The Crown analogized the colonists' lack of direct representation with landless Englishmen residing in England who did not elect their representatives.¹⁵² The British government argued that the English right to representation in Parliament did not demand direct representation, an argument unrefuted by the colonists who, after the revolution, went on to set up governments with the same system of landed representation.¹⁵³ The colonists insisted that their situation was different, because they were not in Britain.¹⁵⁴ But similar arguments could be made by any class of citizens who lack the voting strength to elect representatives that represent their interests. Similarly, there were less tumultuous alternatives for the Founders to acquire the desired representation or influence in British government than the Boston Tea Party, the Stamp Act Riots, and the American Revolution. Could not the colonists have purchased land in England or simply moved back to England to foster a more tightknit alignment of interests with their Parliamentary representatives? The point is that the Founders' calculus of alternatives to violent rebellion should inform the Second Amendment political necessity defense's version of the reasonable alternative element.

The idea that turbulent, extrajudicial political protest is justifiable when the elected, or appointed representatives fail to represent the interest of a class of people has roots stretching back even further to pre-colonial England.¹⁵⁵ The clear implication of this history is that the political process is not always a reasonable alternative to extrajudicial action.

To summarize, the Second Amendment requires only a weak relationship between the victim(s) of the government overreach and the political process. The Second Amendment political necessity defense considers the political power of the affected group, the political process' past success in addressing the concerns of the affected group, and the future likelihood that the political process will remedy the

¹⁵¹ See SMITH, *supra* note 127, at 22–23.

¹⁵² *The Stamp Act and the American Colonies 1763–67*, U.K. PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislative scrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/the-stamp-act-and-the-american-colonies-1763-67/> [<https://perma.cc/72VL-ZUHY>] (last visited May 8, 2023).

¹⁵³ *Id.*; *The First Legislative Assembly*, NAT'L PARK SERV., <https://www.nps.gov/jame/learn/historyculture/the-first-legislative-assembly.htm> [<https://perma.cc/R56W-CEJH>] (last visited May 8, 2023).

¹⁵⁴ OSCAR THEODORE BARCK JR. & HUGH TALMAGE LEFLER, *COLONIAL AMERICA* 533–37 (2d ed. 1958).

¹⁵⁵ See DAVID CRESSY, *BONFIRES AND BELLS: NATIONAL MEMORY AND THE PROTESTANT CALENDAR IN ELIZABETHAN AND STUART ENGLAND* 141 (1989).

harm. Remember, the Founders began the American Revolution because they did not have any political power or representation in parliament.

C. Direct Causal Relationship

The *Schoon* court's requirement that a defendant establish a direct causal relationship between the criminal act and the abatement of the political harm must be reconfigured to accommodate the constitutional implications of the Second Amendment political necessity defense. Even the common law requirement that a defendant establish a "reasonable" relationship between means and ends must be updated to host constitutional strictures.

The *Schoon* court found that criminal acts of protest not directly aimed at the law infringed upon are not likely to immediately change the law or policy that is the target of the criminal act.¹⁵⁶ The court reasoned that "it takes another *volitional* actor not controlled by the protestor to take a further step; Congress must change its mind" and that "[i]f the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct."¹⁵⁷ However, in the words of Stephen Bauer such a finding is "contrary to American political history" because "[h]istory abounds" with examples of otherwise criminal acts of indirect protest "that have changed laws and policies."¹⁵⁸ Bauer cites "[p]articipants in the suffragette movement, the freedom riders' movement, the labor movement, the Boston Tea Party, and the antiwar protests of the 1960s" as examples that "all helped to shape American public policy."¹⁵⁹

Forcible acts of indirect political protest have also forced the hand of government. The Stamp Act riots of 1765 led to the repeal of the Stamp Act within a year of its passage.¹⁶⁰ The black riots and urban upheavals of the 1960s ultimately provoked the passage of the Civil Rights act of 1964 and the Voting Rights Act of 1965.¹⁶¹

Also, the Rodney King riot in the early 1990s produced a provision in the Comprehensive Control Act of 1994, allowing the Department of Justice to sue police departments that were chronically inept at reining in excessive force.¹⁶² Professor Frank Zimring explains that "[t]he role of the Rodney King incident as inspiration for this small but important federal program to review and reform the performance of problematic local police departments was by far the most important legacy of the event."¹⁶³

¹⁵⁶ United States v. Schoon, 971 F.2d 193, 197–98 (9th Cir. 1991) (opinion amended on Aug. 4, 1992).

¹⁵⁷ *Id.* at 197 (citations omitted).

¹⁵⁸ Bauer & Eckerstrom, *supra* note 149, at 1181.

¹⁵⁹ *Id.* at 1181, n.49.

¹⁶⁰ Klein, *supra* note 92.

¹⁶¹ Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1554 (2004).

¹⁶² FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 13 (2017).

¹⁶³ *Id.*

More importantly, the *Schoon* Court's holding and reasoning regarding direct causation are completely at odds with the Second Amendment. The Second Amendment right to rebel does not demand a direct causal relationship between rebellion and the ends it seeks. Taking up arms against a government official or institution to disrupt an oppressive government policy requires the same chain of events as indirect civil disobedience. Regarding both approaches, a third party, be it an official, institution, or legislative body, must act to change the offending promulgation. The only relevant difference between the approaches is the nature of the impetus setting the chain of events into motion. Physical force catalyzes the one, and political pressure mobilizes the other. Other than this, the causal relationship between the two are the same. As such, the court's ruling to the contrary is inapplicable in the context of the Second Amendment political necessity defense.

The violent veto power's broader spectrum of impact also undermines the Ninth Circuit's reasoning. The violent veto power of the Second Amendment has more direct effects and, thus, a closer causal relationship with harm abatement than indirect civil disobedience. The violent veto power's greater direct effects are due to the type of circumstances that would typically justify violent action in the first place. These circumstances usually involve substantial deprivations of freedom like slavery, and the individuals affected will prototypically be American citizens. In contrast, the criminal acts that protesters undertake to influence foreign policy (such as the U.S. Ecuadorian foreign policy the *Schoon* defendants were protesting) only indirectly affect foreign citizens.¹⁶⁴ Similarly, unconstitutional domestic policies like *de jure* segregation create less substantial and durative deprivations of freedom than slavery which would unquestionably justify the violent veto.¹⁶⁵

The aim of the violent veto power is not merely to change an oppressive law or policy, which is traditionally the goal of indirect civil disobedience, but also to extricate those individuals immediately under the law's claw. So, while an act of forcible protest cannot immediately change government policy, it can ameliorate the law's effect on the victim. For instance, Nat Turner's rebellion against slavery also secured his and others' immediate freedom.¹⁶⁶

Indirect causation is not the only causal argument courts lodge against the political necessity defense. Many courts cite the statistical improbability that a given criminal act will eradicate the targeted social ill as grounds to deny the defense. In essence, these courts employ a practicality argument, limiting the defense's availability to its apparent social utility. This argument might seem logical at its extremities

¹⁶⁴ See *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991), *as amended* (Aug. 4, 1992) (discussing the difference between direct and indirect protest, and how the protests here were not directly violating the challenged law).

¹⁶⁵ See generally Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990) (discussing Supreme Court treatment of slavery and *de jure* segregation).

¹⁶⁶ See Jeffrey M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of Prigg v. Pennsylvania*, 123 PENN. ST. L. REV. 103, 112 (2018).

but falls flat when folded in half. The practicality argument only succeeds where general social utility is the lone dimension to be considered. The Second Amendment appends another layer to the analysis forcing social utility, as a singularity, to share its orbit. That is, the right to rebel is independent of social utility. The right, as a natural right, justifies itself.

Like the *Schoon* court's view of direct causation, most courts are blind to the Country's history and traditions.¹⁶⁷ Considering the United States' background, including the history of the Bill of Rights, which codifies the Declaration of Independence, it is counterintuitive for courts to deny a defense because the probability of success is less than the likelihood of failure.

The United States was born from an implausibility. The American Revolution was fought against great odds. The British empire at the time boasted the greatest economic and military force the world had ever seen.¹⁶⁸ The colonials were outnumbered, overwhelmed, and under-armed.¹⁶⁹ They, nevertheless, beat the odds and won the war.

The against-all-odds ethos that spurred the American Revolution was fortified by the Revolution's success. This ethos spread across generations, color lines, and creeds. It remains a central trait of American democracy today. Thus, in a way, it is un-American for any court to deny a civil disobedient or forcible resistor's access to the political necessity defense simply because the likelihood of success is low.

Furthermore, the Supreme Court's reasoning in *Heller* suggests that the Court, if it were to be logically consistent, would eliminate any probability of success requirement. In *Heller*, the Court pondered whether the Second Amendment had outlived its usefulness.¹⁷⁰ The purpose of the Second Amendment was to guarantee an armed citizenry as a check on potential government tyranny. If the check should fail, the Second authorized citizens to use those arms to overthrow the tyrannical government entity. The Court considered that citizen militias armed with the limited types of weapons previously determined by the Court to be allowed under the Second Amendment would be futile against the modern American military with its automatic weapons, missiles, tanks, and explosives.¹⁷¹ As a result, the Court asserted that the Second Amendment may be defunct, but that did not change their interpretation of the amendment.¹⁷²

¹⁶⁷ See *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991) (opinion amended on Aug. 4, 1992) (discussing the difference between direct and indirect protest and how the protests here were not directly violating the challenged law); see generally *The Battle of Saratoga and the French Alliance*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/essays/the-battle-of-saratoga-and-the-french-alliance> [<https://perma.cc/7H2R-9GKT>] (last visited May 8, 2023); see generally Luke Morgan, *The Broken Branch: Capitalism, the Constitution, and the Press*, 125 PENN. ST. L. REV. 1 (2020).

¹⁶⁸ *Mankind: The Story of All of Us: Revolutions* (HISTORY Channel television broadcast Dec. 12, 2012).

¹⁶⁹ BILL OF RIGHTS INST., *supra* note 167.

¹⁷⁰ *District of Columbia v. Heller*, 544 U.S. 570, 627–28 (2008).

¹⁷¹ *Id.*

¹⁷² *Id.*

As noted by Miller, “[t]he Court breezily dismissed that point, stating that the individual right had not lapsed simply because the ‘fit’ between the right and its actual effectiveness had loosened in the past two centuries.”¹⁷³ In the Court’s own words, “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”¹⁷⁴ The clear implication is that the Second Amendment right to rebel need not be effective, probable, or even plausible in achieving its desired end to justify its existence. As such, any probability requirement a court imposes on an analysis of the Second Amendment political necessity defense would be theoretically unconstitutional because the Second Amendment political necessity defense is part and parcel of the right to rebel, which eschews probability of success.

The Second Amendment does not seem to imply a casual requirement, much less place any clear limitations on it. Indeed, the Second Amendment does not register as practical at all. It seems to reflect an ethos that values the good fight more so than certainty of victory. It invokes the words of founding father Patrick Henry, who famously stated, “give me liberty or give me death!”¹⁷⁵ The Second Amendment is not a compromising amendment.

A requirement related to likelihood of success is inconsistent with the history of the country and the underlying implications of the Second Amendment itself. For one, what were the chances that the Stamp Act Riots would lead to a repeal of the Stamp Acts? Or, more importantly, that the American Revolution would end in the defeat of the world’s greatest superpower?

The Second Amendment itself suggests a marginalized casual requirement if the Amendment is indeed premised on what Joseph Story phrases a “strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”¹⁷⁶ That is, the notion that the Second Amendment “enable[s] the people” to successfully engage a standing army, especially today’s armed forces, is premised on an ever-evolving impossibility.

Nevertheless, it seems to be an essential feature of American law to retreat to reasonableness when a rule lacks firmness. So, it can be predicted that courts will ultimately require that there be a reasonable relationship between the criminal act and the abatement of the harm. This, however, will be a triumph of policy not particularly justifiable on doctrinal grounds.

The refined causation element can be described as: an act reasonably calculated to set the events in motion that would abate the harm.

¹⁷³ Miller, *supra* note 11, at 956.

¹⁷⁴ *Heller*, 554 U.S. at 634.

¹⁷⁵ Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution Is a “Suicide Pact”*, 20 WM. & MARY BILL RTS. J. 287, 317 (2011).

¹⁷⁶ STORY, *supra* note 34, at 708.

D. Imminent Harm

The last element of the traditional political necessity defense the *Schoon* court evaluated was the imminency requirement.¹⁷⁷ The imminency requirement requires that the harm posed to the resistor is imminent at the time of the intervention.¹⁷⁸ The court acknowledged that imminence was not a part of its *per se* rule, conceding that the imminent harm element of the political necessity defense could be satisfied by indirect civil disobedience.¹⁷⁹ Many state courts challenge efforts to establish this prong. Some of these courts have held that the necessity defense does not apply to continuing systematic wrongs such as systemic racism.¹⁸⁰ Other courts limit the defense to “emergency” situations in which the urgency of the moment overwhelms the defendant’s decision-making capacity.¹⁸¹ Some state courts also preclude the necessity defense in “ongoing situations that present only the risk of future catastrophe . . . for example, when the evil allegedly prevented by the defendant’s conduct is the continuing danger of a nuclear accident.”¹⁸²

Both types of restrictions are incompatible with the Second Amendment. While the Second Amendment can certainly be read to require imminent harm, imminence under the Second Amendment is not synonymous with the assertion that a social wrong must be in progress, spontaneous, or asystematic. The concerns giving rise to the Second Amendment, as explained by Joseph Story, a source relied on by the Supreme Court, provide guidance:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.¹⁸³

Here, Story suggests that the Second Amendment contains both the right to disrupt and upend, and the right to anticipate and prevent. The first part of the passage describes the second right, the right to anticipate and prevent, as a “moral check” against government abuse of power. The “moral check” power of the Second Amendment undermines imminency limitations many states impose on the traditional

¹⁷⁷ *United States v. Schoon*, 971 F.2d 193, 197–98 (9th Cir. 1991) (opinion amended on Aug. 4, 1992).

¹⁷⁸ *Id.* at 198.

¹⁷⁹ *Id.* at 197.

¹⁸⁰ Martin, *supra* note 1, at 1574.

¹⁸¹ *Id.* at 1572.

¹⁸² *Id.* at 1573.

¹⁸³ STORY, *supra* note 34, at 708.

political necessity defense. First, the “moral check” power establishes that the right to rebel is always active and requires no particular oppression or deprivation to set it in motion.¹⁸⁴ That is, gun ownership is a light form of force or, better stated, a type of duress or assault that prevents governments from running amuck, similar to a citizen holding a gun to someone’s head to prevent them from attacking the citizen.

More importantly, Story suggests citizens may employ force to resist tyranny before the government accomplishes any physical harm or harm to life or liberty interests. A government’s “usurpation” of the power of the people frequently occurs before the government actually uses the usurped power.¹⁸⁵ Thus, the mere threat of harm is sufficient to authorize some level of force under the right to rebel, even absent emergency. As discussed later, the Second Amendment may impose a proportionality requirement that restricts the type and extent of force allowable. However, the right to rebel as a check on government tyranny clearly authorizes some level of force to prevent tyranny, not just to unseat the tyrant. In other words, the Second Amendment presupposes that governments are inherently dangerous. A government’s very existence constitutes a threat. Additionally, most government tyranny represents “ongoing situations that present only the risk of future catastrophe.”¹⁸⁶ As a result, state courts must waive this requirement when a defendant asserts the constitutional version of the political necessity defense.

The Second Amendment also does not contain an “emergency” limitation. The emergency limitation many states impose on the political necessity defense requires a spontaneous response at the onset of the perceived wrong.¹⁸⁷ Such a limitation would automatically exclude organized responses to government tyranny. But how could one organize a spontaneous response? The emergency limitation contravenes the plain language of the Second Amendment, which expressly contemplates organization. The Second Amendment reads “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁸⁸ The language “militia” and “well regulated” undermine any claim that a wrong be followed immediately by spontaneous, uncontrollable, and disorganized action. Someone would have to gather the militiamen, who were just ordinary citizens, create a plan of attack, and finally execute the plan. Thus, the Second Amendment political necessity defense can bear no “emergency” requirement.

Many state courts also bar the political necessity defense when the social harm is systemic.¹⁸⁹ However, systematic government oppression represents the very type

¹⁸⁴ See *id.* at 708–09.

¹⁸⁵ See generally Mary Strong, Note, *Protections Against Tyranny: How Article V Should Guide Constitutional Interpretation*, 96 IND. L.J. 337 (2020) (discussing founding intent behind limiting federal power).

¹⁸⁶ See Martin, *supra* note 1, at 1572–74 (discussing the imminence standard).

¹⁸⁷ *Id.*

¹⁸⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 913 (2010) (Breyer, J., dissenting).

¹⁸⁹ Martin, *supra* note 1, at 1574.

of tyranny the Second Amendment was designed to prevent in the first case and reverse if successful. The founding oppression provides a case in point. The Declaration of Independence states, “when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism, it is [the people’s] right, it is their duty, to throw off such Government.”¹⁹⁰ This description might as well be the very definition of systemic oppression.

Arguably, the imminence requirement is superfluous. That is, the Second Amendment enlarges the concept of harm and, by extension, imminence. For example, the English common law right to resist an unlawful arrest, which informs the Second Amendment, is based on intangible harm.¹⁹¹ Liberty interests also did not anchor the right. Instead, the right initially rested on a provocation rationale. British courts considered an unlawful arrest an offense against the Magna Carta and, by extension, an injury against every Englishmen. That is, an English citizen—any English citizen and not just the arrestee—was harmed by an unlawful arrest.¹⁹² The upshot is that the Second Amendment cognizes harm based on principle.

By extension, an immediate harm occurs when the government passes an oppressive law or acts in offense to protected rights. Interpreting the idea of imminence in this manner all but obliterates the requirement.

In sum, any imminency requirement under the constitutional political necessity defense necessarily includes ongoing or systematic harm as potentially fulfilling the requirement. Ongoing and systematic threats led to the American Revolution and the adoption of the Second Amendment. As a result, the Second Amendment political necessity defense’s concept of harm subsumes the traditional political necessity defense’s imminency element. The harm element of the Second Amendment political necessity defense can be clarified as requiring: a present or ongoing threat to the Constitution, or a violation of an individual or group’s fundamental rights.

E. Contours and Limitations of the Constitutional Political Necessity Defense

The elements of the traditional necessity defense refined by the Second Amendment reveal a less restrictive political necessity defense. This more expansive political necessity defense does not require actual harm, and it does not envision the political process as an exclusive alternative to forcible resistance. Also, it does not demand a direct causal relationship between the criminal act and the abatement of the social harm, nor does it exclude nonemergencies, non-spontaneous responses, or systemic ills. However, the refined elements of the traditional political necessity defense do not directly yield the Second Amendment political necessity defense. Refining the elements reveals more of what the Second Amendment political necessity

¹⁹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁹¹ Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129 (1969).

¹⁹² R v. Tooley [1710] 92 Eng. Rep. 349, 353 (KB).

defense is not, rather than what it is. In addition to broadening the traditional political necessity defense, the Second Amendment imposes its own limitations.

However, *Heller* and *McDonald* provide little guidance regarding the elements of the right to rebel. Indeed, the decisions provide no more analysis of the Second Amendment right to rebel than of the Second Amendment right to self-defense.¹⁹³ So, while the Court's analysis in these landmark cases provides the foundation for a constitutional political necessity defense through the right to rebel, it provides almost no guidance as to the defense's contours and limitations.¹⁹⁴

Common sense judicial construction holds that a law's scope is limited by its purpose.¹⁹⁵ That is, if a particular application of a law exceeds its rationale, then the overage has no legal justification. As a result, the history, rationales, and philosophical tenets underlying the Second Amendment also circumscribe the Second Amendment political necessity defense.

Mining for limitations that the Second Amendment imposes on the traditional necessity defense reveals a doctrine that is in some ways narrower than the traditional necessity defense. The Second Amendment limits the notion of harm to government violations of fundamental American rights. The Amendment also mandates that the amount of force used is proportional to the harm threatened. Lastly, the Amendment cognizes only intentional harms or, at the very least, constitutional injuries caused by gross government negligence.

An analysis of Second Amendment history and political philosophy suggests that the Second Amendment political necessity defense requires the presence of a law or policy that abrogates a clear constitutional right. The Second Amendment principles, including taking up arms to combat government tyranny, are serious and weighty. Consequently, otherwise criminal uses of force should appeal to principles similarly as worthy. Such principles register almost exclusively as constitutional guarantees.

Furthermore, constitutional violations triggering the right to rebel do not necessarily require damage to an individual or group's life or liberty interest. Arguably, actionable harm proceeds directly from a government's passage of legislation or adoption of a policy that threatens constitutionally protected rights. This view derives from one of the progenitors of the right to bear arms, the right to resist an unlawful arrest. According to the English right to resist an unlawful arrest, physical force was justified to prevent an unlawful arrest, not because of the deprivation of freedom or bodily injury but because an unlawful arrest was considered to be a "provocation" justifying a violent response.¹⁹⁶ The notion of exculpatory "provocation"

¹⁹³ See *District of Columbia v. Heller*, 554 U.S. 570, 592–93 (2008); *McDonald*, 561 U.S. 742.

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (stating, in a First Amendment case, "[w]e cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech.").

¹⁹⁶ *R v. Tooley* [1710] 92 Eng. Rep. 349, 353 (KB).

is based on the idea of metaphysical harm. Metaphysical harm results when government actors, executives, or bodies act in a way that offends a country's vaulted principles.¹⁹⁷ The offense must be so great that it causes witnesses to it to become immediately enraged. Regarding the English right to resist an unlawful arrest, the sacred doctrine was the Magna Carta.¹⁹⁸ If such a doctrine were applicable to the Second Amendment political necessity defense, it would mean the only thing that a litigant would have to establish to prove the element of harm was that the government blatantly violated a bedrock constitutional principle such as freedom of speech, freedom of association, freedom of religion, the right to be free from cruel and unusual punishment, and the right to be free from unreasonable searches and seizures.

Next, the Second Amendment imposes a proportionality requirement on the Second Amendment political necessity defense. As distinguished from a balance of harm requirement, a proportionality requirement is consistent with the beliefs that sparked the Second Amendment. A balancing of harm requirement weighs the legal and social harm created by a criminal act against the social harm abated by the criminal act. On the other hand, a proportionality requirement requires that the level of force used by the actor matches the egregiousness of the constitutional violation.¹⁹⁹

The Declaration of Independence speaks to the need for proportionate revolution force: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly, all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."²⁰⁰

Furthermore, one of the country's founding sentiments was "the belief that the will to resist arbitrary authority in a *reasonable way* is valuable and ought not to be suppressed by the criminal law."²⁰¹ The quote indicates that the level of force used to combat a constitutional violation must be reasonable, meaning commensurate to the threat. For instance, deadly force might be justifiable under the Second Amendment political necessity defense to resist law enforcement officials who have arrested a citizen, transported her to a black site, and subjected her to enhanced interrogation techniques. However, only nondeadly force may be used to liberate a citizen arrested for violating a newly promulgated municipal law that prohibits citizens from maliciously using the phrase "fuck the police" in public and private.

The closer the aggrieved government action gets to the "long train of abuses and usurpations" that inspired the American Revolution, the more justified are levels of force approaching revolutionary force.²⁰² That is, the Second Amendment

¹⁹⁷ See *id.* at 350 ("[W]here the liberty of the subject is invaded, it is a provocation to all the subjects of England."); Sanders, *supra* note 6, at 718.

¹⁹⁸ *Id.* at 353.

¹⁹⁹ DRESSLER, *supra* note 10, at 212.

²⁰⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁰¹ Miller, *supra* note 11, at 955 (emphasis added) (quoting Chevigny, *supra* note 191, at 1137).

²⁰² See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

proportionality requirement considers the historical intransigence of the harm. It is also sensitive to the history of “usurpations” that discrete groups subjected to a particular form of government oppression have experienced. This interpretation is consistent with the Declaration of Independence:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.²⁰³

In sum, the Second Amendment proportionality requirement demands a showing that the type and degree of force used or threatened was proportionate to the magnitude and duration of the violation. On this score, conservative extremists would have to establish either a history of political-process impotence or the inability of the political process to address future threats. In other words, the constitutional political necessity defense is calibrated to protect the underdog, the group for which the political process is unlikely to provide recourse. To this extent, the lobbying power of groups like the NRA would have to be considered.

Lastly, the Second Amendment political necessity defense includes an intentionality requirement. Most of the language related to the toppling-tyranny function of the Second Amendment refers to despots and tyrants, tyranny and oppression.²⁰⁴ Such language suggests that the Framers of the Second Amendment primarily feared intentional, malicious, arbitrary, grossly negligent,²⁰⁵ and conspiratorial government conduct. An intentionality or gross negligence requirement reflecting these original fears might thus be in order. The requirement, the last element of the Second Amendment political necessity defense, can be stated as follows: the government’s acts or omissions must be grossly negligent, intentional, malicious, arbitrary, and/or conspiratorial.

The *Heller* Court’s discussion of the historical events that prompted the Second Amendment also provides some insight into the possible contours of the Second Amendment political necessity defense:

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias

²⁰³ *Id.*

²⁰⁴ THE DECLARATION OF INDEPENDENCE para. 2, 5, 29 (U.S. 1776).

²⁰⁵ *Id.*

loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.” 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This right has long been understood to be the predecessor to our Second Amendment.²⁰⁶

The Court implies that the right to rebel, and the Second Amendment political necessity defense by extension, applies to government disarmament and efforts to quash political dissent. Conservative extremists will, no doubt, have a field day with this interpretation. Under this interpretation, few, if any, restrictions on gun ownership are allowed, and an actor may be able to use some degree of force to challenge laws that impose restrictions. That is, if an actor meets the other elements of the Second Amendment political necessity defense. However, groups wishing to rely on the defense must be able to point to a long history of violatory restrictions on gun ownership.

To summarize, the contours of the political necessity defense derive from two related processes: (1) refining the traditional political necessity defense to meet constitutional strictures and (2) mining for limitations the Second Amendment might impose on the traditional necessity defense. Processing the traditional political necessity defense through the Second Amendment expels the traditional political necessity defense’s balance of harms factor, eschews its concept of the political process as a *per se* reasonable alternative to criminal action, allows an indirect causal relationship, and extends the defense to acts taken to abate systematic wrongs and threats of future harm. On the other hand, the Second Amendment limits the notion of harm to government violations of fundamental rights, mandates that the amount of force used is proportional to the threatened harm, and cognizes only intentional harms or, at the very least, constitutional injuries caused by gross government negligence.

The constitutional refinement of the elements of the traditional political necessity defense and the restrictions the Second Amendment imposes on the defense are distillable into five elements: (1) a present or ongoing threat to the Constitution or a violation of an individual or group’s fundamental rights; (2) the failure of the political process regarding the rights offended; (3) an act reasonably calculated to set the events in motion that would abate the harm; (4) a showing that the type and

²⁰⁶ District of Columbia v. Heller, 554 U.S. 570, 592–93 (2008).

degree of force used or threatened was proportionate to the magnitude and duration of the violation; and (5) evidence that the government's acts or omissions were grossly negligent, intentional, malicious, arbitrary, and/or conspiratorial.

F. Political Necessity as a Fundamental Right

Many state courts have ruled that the necessity defense does not cover crimes committed out of political protest. These courts go further than the Ninth Circuit, holding that the political necessity defense is unavailable not just in cases of indirect civil disobedience but in all cases.²⁰⁷ These courts would have to relent when defendants assert the Second Amendment version of the political necessity defense. That is, the Second Amendment right to rebel, which houses the political necessity defense, is a fundamental right and, thus, applicable to the states.

The Second Amendment political necessity defense's nature as a fundamental right follows from the character of the other Second Amendment rights. The Supreme Court determined that the Second Amendment rights explicitly discussed in *Heller* and *McDonald*, namely self-defense and the right to bear arms, are fundamental and thus applicable to the states.²⁰⁸

As discussed in Part III, the political necessity defense falls within the concept of self-defense as understood when the Second Amendment was conceived. Self-defense, according to the *Heller* Court, applies to both "public and private violence." As David Kopel points out:

[T]he Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.²⁰⁹

Even if construed as a distinct right from the right to self-defense and the right to bear arms, the right to a defense based on political necessity is due the same fundamental status as its companion rights. This is so for two reasons. The first reason derives from a simple syllogism: the Second Amendment is applicable to the state via the Fourteenth Amendment.²¹⁰ The right to rebel is a part of the Second Amendment.

²⁰⁷ See, e.g., *Commonwealth v. Averill*, 423 N.E.2d 6, 7–8 (Mass. App. Ct. 1981); *People v. Krizka*, 416 N.E.2d 36, 38 (Ill. App. Ct. 1980); *State v. Cozzens*, 490 N.W.2d 184, 190–91 (Neb. 1992).

²⁰⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010) (incorporating *Heller* against the states).

²⁰⁹ Miller, *supra* note 11, at 946 (quoting Kopel, *supra* note 24, at 1454 n.358).

²¹⁰ 5 SCOTT W. GAYLORD ET AL., *FEDERAL CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT* 64 (2d ed. 2017).

The political necessity defense is an extension of the right to rebel. Thus, the political necessity defense is applicable to the states.

Secondly, as demonstrated in Part II, the right to rebel is an independent right. It is inextricable from the nation's founding history, implicit in its founding principles, and one of the primary purposes of the Second Amendment. The Supreme Court has determined that rights entrenched in the history and traditions of the United States are fundamental rights.²¹¹

Furthermore, the lessons the Founders gleaned from King George's efforts to disarm the colonists and a host of other historical episodes attest to the fundamental nature of the right to rebel.²¹² So does the Declaration of Independence and its revolutionary rhetoric. The Reconstruction Congress's inclusion of the right to bear arms in the Civil Rights Act of 1866 to enable the newly freed to resist disarmament and resist tyrannical southern law enforcement officials provides other evidence.²¹³ As such, the right to rebel is a fundamental right along with the political necessity defense it houses.

III. APPLICATION: THE INSURRECTION ON CAPITOL HILL

The storming of the U.S. Capitol on January 6, 2021, provides an interesting test case for how the Second Amendment political necessity defense could operate in a modern political environment.

Supporters of former President Donald Trump invaded the Capitol building with the apparent goal of overturning Trump's defeat in the 2020 presidential election.²¹⁴ The attack on the Capitol sent shockwaves around the world.

For months, Trump and a host of other republicans trumpeted claims that the Democratic Party stole the presidential election of 2020.²¹⁵ Trump's son called for "total war."²¹⁶ Interestingly, weeks before the election, Trump laid the groundwork for contesting the election results by almost any means necessary. In June 2020, Trump suggested that if he lost the election, it would be the result of voter fraud, which was a serious problem according to him and the Republican Party.²¹⁷ The real

²¹¹ *Id.*

²¹² See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

²¹³ See *supra* Section I.A.1.

²¹⁴ Melissa Block, *The Clear and Present Danger of Trump's Enduring 'Big Lie'*, NPR (Dec. 23, 2021, 5:00 AM), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election> [<https://perma.cc/R5VH-M4SE>].

²¹⁵ *Id.*

²¹⁶ Josh Wingrove et al., *Biden Tightens Hold on Race as Trump Hopes for Court Victories*, BLOOMBERG L. (Nov. 6, 2020, 12:25 AM), <https://news.bloomberglaw.com/us-law-week/biden-tightens-hold-on-race-as-trump-hopes-for-court-victories> [<https://perma.cc/AY4J-KGFZ>].

²¹⁷ Maegan Vazquez & Donald Judd, *Trump Predicts 'Most Corrupt Election' in US History While Making False Claims About Mail-in Voting*, CNN (June 23, 2020, 9:32 PM), <https://edition.cnn.com/2020/06/23/politics/donald-trump-mail-voter-fraud-most-corrupt-election/index.html> [<https://perma.cc/BKM3-SRA3>].

problem is that the historical record is virtually devoid of evidence to support the claim.²¹⁸ However, this did not stop Republican officials from making the allegations. It was almost like Trump was setting up a plan B, a nuclear option, in the event he lost the election. He did.

When the election results came out, President Trump immediately disputed them and vowed not to accept them.²¹⁹ His administration filed several lawsuits contesting the results, all but one of which the host courts dismissed.²²⁰ Trump also investigated declaring martial law to re-hold the election.²²¹

Trump then pressured Republican state officials around the country to replace slates of Biden electors with electors who would declare Trump the victor.²²² He also demanded that lawmakers investigate faux irregularities, including conducting signature matches for ballots that were mailed in.²²³ Finally, Trump launched his biggest power grab. He attempted to force former Vice President Mike Pence to overturn Biden's victory.²²⁴ When Pence responded, sanely, that he did not have the power or authority to do it, Trump labeled him a traitor and placed a political price on his head, one that would morph into a literal one.²²⁵

²¹⁸ Hope Yen & David Klepper, *AP FACT CHECK: On Jan. 6 Anniversary, Trump Sticks to Election Falsehoods*, PBS (Jan. 6, 2022, 2:11 PM), <https://www.pbs.org/newshour/politics/ap-fact-check-on-jan-6-anniversary-trump-sticks-to-election-falsehoods> [<https://perma.cc/6SWR-MP5Q>].

²¹⁹ Lauren Egan & Shannon Pettypiece, *Trump Says Election 'Far from Over' as He Vows to Fight Results*, NBC NEWS (Nov. 7, 2020, 5:27 PM), <https://www.nbcnews.com/politics/2020-election/trump-says-election-far-over-he-vows-fight-results-n1246934> [<https://perma.cc/76A9-GV8F>].

²²⁰ William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/5HN6-BAVB>].

²²¹ Claire O. Finkelstein & Richard Painter, *Invoking Martial Law to Reverse the 2020 Election Could Be Criminal Sedition*, JUST SEC. (Dec. 22, 2020), <https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/> [<https://perma.cc/MQX2-UJE2>].

²²² Zeke Miller et al., *Trump Tries to Leverage Power of Office to Subvert Biden Win*, AP (Nov. 20, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-local-elections-arizona-7174555c2545f8afb69f0ce2ac0b2156> [<https://perma.cc/D7ZA-3KEP>].

²²³ *Id.*; see Lisa Cavazuti & Cynthia McFadden, *80 Million Americans May Vote By Mail In This Election. Here's How Most States Verify Their Identities*, NBC NEWS (Oct. 14, 2020, 4:02 PM), <https://www.nbcnews.com/politics/2020-election/80-million-americans-may-vote-mail-election-here-s-how-n1243377> [<https://perma.cc/UH6Q-X6M8>].

²²⁴ Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html>.

²²⁵ Peter Nickeas, *Pro-Trump Supporters Have Flooded DC to Protest President's Election Loss*, CNN (Jan. 6, 2021, 4:33 PM), <https://www.cnn.com/2021/01/06/politics/pro-trump-supporters-dc-protest/index.html> [<https://perma.cc/SWW8-KA6Y>].

Finding himself out of options, the President called on his supporters, who had begun to plan the assault on the Capitol several weeks prior, to attend a protest rally near the Capitol on the day Congress was set to confirm Biden's victory.²²⁶ A 200-year tradition of the peaceful transfer of power was under threat.²²⁷

Thousands of Trump supporters flooded the capital city in the days and morning leading up to the insurgency.²²⁸ The rioters met up with their leader on the morning of the mayhem at the Ellipse within the National Mall.²²⁹ The Ellipse is located a few blocks away from the Capitol Building.²³⁰ Several Republicans addressed the crowd, including Eric Trump, Donald Trump Jr., and Trump advisor and former New York Mayor Rudy Giuliani.²³¹ Giuliani called for "trial by combat."²³²

Trump's speech was laced with violent imagery.²³³ He repeated false allegations that the election was stolen and declared he would "never concede."²³⁴ He encouraged

²²⁶ Garrett M. Graff, *Behind the Strategic Failure of the Capitol Police*, POLITICO (Jan. 8, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/01/08/capitol-police-failure-456237> [<https://perma.cc/9LKX-677K>].

²²⁷ Jacob Jarvis, *Trump Branded 'Tinpot Tyrant,' over 'Thinly Veiled Threat' on Peaceful Transfer of Power*, NEWSWEEK (Sept. 24, 2020, 7:04 AM), <https://www.newsweek.com/donald-trump-transfer-power-democrat-criticism-1534016> [<https://perma.cc/8J33-KR9J>].

²²⁸ Jie Jenny Zou & Erin B. Logan, *Key Facts to Know About the Jan. 6 Insurrection*, L.A. TIMES (Jan. 5, 2022, 4:00 AM), <https://www.latimes.com/politics/story/2022-01-05/by-the-numbers-jan-6-anniversary> [<https://perma.cc/NVW9-VXAX>].

²²⁹ Andrew Beaujon, *Here's What We Know About the Pro-Trump Rallies That Have Permits*, WASHINGTONIAN (Jan. 5, 2021), <https://www.washingtonian.com/2021/01/05/heres-what-we-know-about-the-pro-trump-rallies-that-have-permits/> [<https://perma.cc/XPX5-MNQQ>].

²³⁰ Walking Directions from The Ellipse to The Capitol Building, GOOGLE MAPS, <https://www.google.com/maps/dir/The+Ellipse,+Washington,+DC+20502/The+Capitol,+First+Street+Southeast,+Washington,+DC/@38.8913734,-77.0315927,15z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x89b7b7a303eb5371:0x9acbbad2bbc35466!2m2!1d-77.0365825!2d38.8939876!1m5!1m1!1s0x89b7b82921a2cf17:0x482a3f7c10cf8c4!2m2!1d-77.0090505!2d38.8899389> (follow "Directions" hyperlink; then search starting point field for "The Ellipse, Washington DC" and search destination field for "The Capitol").

²³¹ Laura Clawson, *January 6 Trump Rally Was a Who's Who of Trump Dead-Enders*, DAILY KOS (Feb. 10, 2021, 8:58 AM), <https://www.dailykos.com/stories/2021/2/10/2015097/-12-people-besides-Donald-Trump-spoke-at-January-6-rally-Remember-their-names-but-know-who-to-blame> [<https://perma.cc/4XY2-RFEC>].

²³² Aaron Blake, *'Let's Have Trial by Combat': How Trump and Allies Egged on the Violent Scenes Wednesday*, WASH. POST (Jan. 6, 2021, 8:09 PM), <https://www.washingtonpost.com/politics/2021/01/06/lets-have-trial-by-combat-how-trump-allies-egged-violent-scenes-Wednesday/> [<https://perma.cc/E76P-2GYT>].

²³³ Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> [<https://perma.cc/27JZ-5B2Z>].

²³⁴ *Read: Former President Donald Trump's January 6 Speech*, CNN (Feb. 8, 2021, 6:16 PM), <https://www.cnn.com/2021/02/08/politics/trump-january-6-speech-transcript/index.html> [<https://perma.cc/DM7C-JZEV>].

the crowd to “fight like hell.”²³⁵ He suggested that the crowd had the power to prevent Biden from taking office.²³⁶ He then encouraged the protestors, which he had now transformed into a mob, to descend on the Capitol as a joint session of Congress prepared to certify President-elect Joe Biden’s victory.²³⁷

The riled crowd, goaded to action by Trump and a few congressional representatives, closed in on the Capitol.²³⁸ They openly called for violence against Congress members.²³⁹ They moved through the Capitol grounds with force, breaching the police perimeter, forcing entry, and storming the building.²⁴⁰ In full riot mode, the mob swept through the Capitol Building, vandalizing, looting, and forcing elected officials and their staff to seek cover and, eventually, abandon the building.²⁴¹ Some of the insurgents attacked police officers and reporters, and others searched for congresspeople to assail, take hostage, and possibly murder.²⁴² Although he had been one of the President’s chief supporters, many of the insurgents turned on Vice President Mike Pence, yelling “Hang Mike Pence.”²⁴³ They blamed Pence for deciding not to reject the Electoral College votes certifying Biden’s victory.²⁴⁴

The rioters looted and vandalized the office of several members of Congress, including Speaker of the House Nancy Pelosi, and ransacked the Senate chambers.²⁴⁵

²³⁵ *Id.*

²³⁶ Aaron Blake, *What Trump Said Before His Supporters Stormed the Capitol, Annotated*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/annotated-trump-speech-jan-6-capitol/> [<https://perma.cc/KD7U-TNMQ>].

²³⁷ *Id.*

²³⁸ Larry Buchanan et al., *How a Pro-Trump Mob Stormed the U.S. Capitol*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/06/us/trump-mob-capitol-building.html> [<https://perma.cc/C8LF-5VKZ>]; Clawson, *supra* note 231.

²³⁹ Dalton Bennett et al., *41 Minutes of Fear: A Video Timeline from Inside the Capitol Siege*, WASH. POST (Jan. 17, 2021), <https://www.washingtonpost.com/investigations/2021/01/16/video-timeline-capitol-siege/?arc404=true> [<https://perma.cc/YDU4-72S4>].

²⁴⁰ Washington Post Staff, *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, WASH. POST (Jan. 7, 2021, 12:52 AM), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/> [<https://perma.cc/5GLN-97ZZ>].

²⁴¹ Bennett et al., *supra* note 239.

²⁴² Katelyn Polantz, *US Takes Back Its Assertion That Capitol Rioters Wanted to ‘Capture and Assassinate’ Officials*, CNN (Jan. 15, 2021, 7:18 PM), <https://www.cnn.com/2021/01/15/politics/capitol-capture-assassinate-elected-officials/index.html> [<https://perma.cc/L74F-WXHX>].

²⁴³ Dan Evon, *Was ‘Hang Mike Pence’ Chanted at Capitol Riot?*, SNOPE (Jan. 9, 2021), <https://www.snopes.com/fact-check/hang-mike-pence-chant-capitol-riot> [<https://perma.cc/9RQ7-46KW>].

²⁴⁴ *Id.*

²⁴⁵ Harmeet Kaur, *This Is the Damage Rioters Caused to the Capitol Building*, CNN (Jan. 7, 2021, 12:24 PM), <https://www.cnn.com/2021/01/07/us/rioters-capitol-building-damage-photos-trnd/index.html> [<https://perma.cc/JL5W-QYZQ>].

One man marked his victory by ascending the seat of the President of the Senate²⁴⁶ and another by kicking his feet up on Speaker Pelosi's desk.²⁴⁷ This was no ordinary riot. In addition to invading the sanctum of American democracy, over 140 police officers were injured, and some of the insurgents planted explosive devices near the Capitol at the headquarters of both the Democratic and Republican National Committees.²⁴⁸ This was a planned insurrection.

Trump was initially pleased with the insurrection.²⁴⁹ He refused to intervene.²⁵⁰ After constant pressure from top-ranking congressional Republicans and Republican officials around the country, he reluctantly released a Twitter video at 4:17 PM asking the rioters to go home.²⁵¹ However, most of the tweet praised the rioters and excused their actions:

This was a fraudulent election, but we can't play into the hands of these people We have to have peace. So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel.²⁵²

At 6:01 PM, Trump continued to support the insurgents and their revolutionary performances: "These are the things and events that happen when a sacred landslide

²⁴⁶ Madeline Holcombe & Andy Rose, *Man Seen Hanging Off Senate Balcony and Sitting in Vice President's Chair During Capitol Riot Is in Custody*, CNN (Jan. 13, 2021, 3:13 AM), <https://www.cnn.com/2021/01/13/us/man-vice-president-chair-capitol-riot-trnd/index.html> [<https://perma.cc/86YE-H4UK>].

²⁴⁷ Laura Wainman, *'I Bled on Her Envelope', Rioter Photographed with Feet on Nancy Pelosi's Desk Arrested*, WUSA9 (Jan. 11, 2021, 5:16 PM), <https://www.wusa9.com/article/news/local/dc/trump-supporter-breaks-into-pelosi-office-feet-on-desk/65-dec7c0fa-acfa-4253-a06e-4f495730a8c5> [<https://perma.cc/TL64-3ERE>].

²⁴⁸ Olivia Rubin et al., *By the Numbers: How the Jan. 6 Investigation Is Shaping Up 1 Year Later*, ABCNEWS (Jan. 4, 2022, 2:23 PM), <https://abcnews.go.com/US/numbers-jan-investigation-shaping-year/story?id=82057743> [<https://perma.cc/Z3H5-D4YB>].

²⁴⁹ Bess Levin, *Ex-White House Press Secretary: Trump "Gleefully" Watched Insurrection on TV, Hit "Rewind" to Watch People Fighting Again*, VANITY FAIR (Jan. 6, 2022), <https://www.vanityfair.com/news/2022/01/donald-trump-stephanie-grisham-january-6> [<https://perma.cc/3CXV-YFE5>].

²⁵⁰ *Id.*

²⁵¹ Jenni Fink, *Jan. 6 Capitol Riot Timeline: From Trump's First Tweet, Speech to Biden's Certification*, NEWSWEEK (Jan. 6, 2022, 1:00 AM), <https://www.newsweek.com/jan-6-capitol-riot-timeline-trumps-first-tweet-speech-bidens-certification-1665436> [<https://perma.cc/HNE7-JE8P>].

²⁵² Brett Samuels, *Trump Tells Rioters "Go Home," While Stoking Election Fury*, HILL (Jan. 6, 2021, 4:27 PM), <https://thehill.com/homenews/administration/532976-trump-tells-rioters-go-home-we-love-you/> [<https://perma.cc/BTD5-3K6E>].

election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long.”²⁵³

The statement roundly contradicted Trump’s view of the Black Lives Matter protestors who gathered at the Capitol to protest unlawful police violence some months prior.²⁵⁴ His statements during the Black Lives Matter movement belied his newfound revolutionary spirit, which he expressed on January 6th, 2021. During the Black Lives Matter protests, he was itching to unleash the might of the U.S. military, the greatest military in history, on Black Americans and their supporters who, for the most part, were demonstrating peacefully.²⁵⁵

A congressional committee investigating the events on January 6, 2020 revealed several other key pieces of evidence. First, prior to the rally, Trump dismissed concerns that some of his supporters were carrying semi-automatic assault rifles, requesting security to refrain from screening his supporters with metal detectors.²⁵⁶ He argued, “they’re not here to hurt me” Trump also attempted to forcibly participate in the uprising on January 6.²⁵⁷ When his security detail refused to drive him to the capital, he reportedly grabbed the steering wheel of the presidential limousine in an effort to reroute it towards the capital.²⁵⁸ He then lunged at a secret service official.²⁵⁹ Apparently, White House officials were afraid that Trump’s presence at the riot would open members of the administration to charges on “every crime imaginable.”²⁶⁰ There was also some evidence that Trump affiliates tried to intimidate witnesses slated to testify at the January 6th Committee hearings.²⁶¹

The January 6th Committee made several key findings including:

1. On the night of the 2020 election and in the weeks after, the committee says Trump “purposely disseminated false allegations of fraud related to the 2020 presidential election in order to aid his effort to overturn the election and for purposes of soliciting contributions.” The committee says those false claims “provoked his supporters to violence on January 6th.”

²⁵³ Fink, *supra* note 251.

²⁵⁴ Nicole Chavez, *Rioters Breached U.S. Capitol Security on Wednesday. This Was the Police Response When It Was Black Protestors on DC Streets Last Year*, CNN (Jan. 10, 2021, 11:30 PM), <https://www.cnn.com/2021/01/07/us/police-response-black-lives-matter-protest-us-capitol/index.html> [<https://perma.cc/DWN6-CEP6>].

²⁵⁵ *Id.*

²⁵⁶ Richard Cowan & Moira Warburton, *Trump Wanted to Join Capitol Riot, Tried to Grab Limo Steering Wheel, Aide Says*, REUTERS (July 5, 2022, 5:25 AM), <https://www.reuters.com/world/us/us-capitol-riot-panel-promises-new-evidence-surprise-tuesday-hearing-2022-06-28/> [<https://perma.cc/LY57-EAB9>].

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

2. Despite “knowing” that he and his supporters lost dozens of election-related lawsuits and encouragement from his own advisers to concede, Trump refused to accept the results of the 2020 election, the committee notes. “Rather than honor his constitutional obligation to ‘take Care that the Laws be faithfully executed,’ President Trump instead plotted to overturn the election outcome,”
3. The committee says Trump “corruptly pressured Vice President Mike Pence to refuse to count electoral votes during Congress’ joint session on January 6th,” despite “knowing that such an action would be illegal.”
4. Trump “sought to corrupt the U.S. Department of Justice” by trying to enlist DOJ officials to “make purposely false statements and thereby aid his effort to overturn the election effort.” Trump then “offered the position of Acting Attorney General to Jeff Clark knowing Clark intended to disseminate false information.”
5. Trump “unlawfully pressured state officials and legislators to change the results of the election in their states,”
6. Trump also “oversaw an effort to obtain and transmit false electoral certificates to Congress and the National Archives,”
7. Trump “pressured members of Congress to object to valid slates of electors from several states,”
8. Trump “purposely verified false information filed in federal court.”
9. Based on false allegations of a stolen election, Trump “summoned” his supporters to Washington for Jan. 6, instructing them to “take back” their country, even though some of his supporters were armed.
10. Knowing that a violent attack on the Capitol was underway and knowing that his words would incite further violence, Donald Trump purposely sent a social media message publicly condemning Vice President Pence at 2:24 p.m. on January 6th.”
11. Trump knew violence was underway at the Capitol and “refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead watched the violent attack unfold on television,” which “perpetuated violence at the Capitol and obstructed Congress’s proceeding to count electoral votes.”
12. Trump took all of these actions “in support of a multi-part conspiracy to overturn the lawful results of the 2020 presidential election.”
13. The intelligence community and law enforcement agencies did “successfully detect the planning for potential violence on January 6th,” and shared the information within the executive branch.
14. Intelligence gathered did not suggest that Antifa or other left-wing groups would have violent counter-demonstrations, and they were not involved to “any material extent” in the attack.
15. The intelligence community and law enforcement did not know the full extent of the “ongoing planning by President Trump, John Eastman,

Rudolph Giuliani and their associates to overturn the certified election results.” The intelligence community and law enforcement did not “anticipate the provocation President Trump would offer in the crowd in his Ellipse speech.”

16. Jan. 6 would have been “far worse” without the bravery of hundreds of U.S. Capitol Police and D.C. Metropolitan police officers, and says Capitol Police leadership “did not anticipate the scale of the violence that would ensure.”
17. Trump “had the authority and responsibility to direct deployment of the National Guard in the District of Columbia, but never gave any order to deploy the National Guard on January 6th or on any other day.” The committee “found no evidence that the Pentagon delayed the timing of deployment of the National Guard.”²⁶²

The FBI has arrested and charged nearly a thousand rioters—many on serious charges of sedition and conspiracy²⁶³—including several members of alt-right extremist groups the Proud Boys and the Oath Keepers.²⁶⁴ As of March 2023, over 200 rioters were sentenced to jail time and more than 500 have pleaded guilty to an assortment of charges.²⁶⁵ Most defendants have been charged with misdemeanors, including demonstrating in the capital, disorderly conduct, being in a restricted building, and disruptive activity.²⁶⁶ Four arrestees argued in court that they marched to the Capitol at Trump’s directions.²⁶⁷

²⁶² Kathryn Watson, *The 17 Key Findings from the Executive Summary of the Jan. 6 Committee’s Report*, CBS NEWS (Dec. 19, 2022, 2:42 PM), <https://www.cbsnews.com/news/january-6-committee-report-executive-summary-key-findings-trump/> [<https://perma.cc/B87B-H2NA>]; see also H.R. REP. NO. 117-663, at 4–7 (2022) (Final Report of the Select Committee to Investigate the January 6th Attack on the U.S. Capitol).

²⁶³ Scott Pelley, *Inside the Prosecution of the Capitol Rioters*, CBS NEWS (Mar. 22, 2021, 6:55 AM), <https://www.cbsnews.com/news/capitol-riot-investigation-sedition-charges-60-minutes-2021-03-21/> [<https://perma.cc/832Y-AJQU>].

²⁶⁴ Pelley, *supra* note 263; David Shortell, *Five People Associated with Proud Boys Arrested for Capitol Riot on Conspiracy Charges*, CNN (Feb. 11, 2021, 2:02 PM), <https://www.cnn.com/2021/02/11/politics/proud-boys-capitol-riot-arrest/index.html> [<https://perma.cc/3UA6-5SM2>].

²⁶⁵ See Meg Anderson & Nick McMillan, *1,000 People Have Been Charged for the Capitol Riot. Here’s Where Their Cases Stand*, NPR (Mar. 25, 2023, 5:00 AM), <https://www.npr.org/2023/03/25/1165022885/1000-defendants-january-6-capitol-riot> [<https://perma.cc/5DBT-T5UZ>]; *Capital Breach Cases*, U.S. DEP’T JUST., <https://www.justice.gov/usao-dc/capitol-breach-cases> [<https://perma.cc/CDZ6-5PH3>] (last visited May 8, 2023); *Sentences Handed Down in Capital Breach Cases*, U.S. DEP’T JUST., <https://www.justice.gov/file/1567746/download> [<https://perma.cc/9PL5-F5DV>] (last updated Mar. 10, 2023).

²⁶⁶ Clare Hymes et al., *What We Know About the “Unprecedented” Capitol Riot Arrests*, CBS NEWS (Aug. 11, 2021, 6:36 PM), <https://www.cbsnews.com/news/us-capitol-riot-arrests-latest/> [<https://perma.cc/2DUB-9CQJ>]; *Capitol Breach Cases*, U.S. ATT’Y OFF. D.C., <https://www.justice.gov/usao-dc/capitol-breach-cases> [<https://perma.cc/BEL4-Q2RB>].

²⁶⁷ Katelyn Polantz, *Justice Department Says an Oath Keepers Leader Waited for Trump’s*

One of the most interesting arrests was of Jessica Watkins, a leader of the Oath Keepers, another alt-right extremist group, on conspiracy charges.²⁶⁸ Prosecutors revealed, “[a]s the inauguration grew nearer, Watkins indicated she was awaiting direction from President Trump.”²⁶⁹ Initially, she was concerned about the insurrection, stating in a text, “[u]nless the POTUS himself activates us, it’s not legit If Trump asks me to come, I will.”²⁷⁰ According to Watkins, she got the implicit go-ahead from Trump at December’s end.²⁷¹ Prosecutors claim that she had a “single-minded devotion to obstruct through violence.”²⁷² They also allege that other Trump supporters discussed transporting weapons to D.C. via the Potomac River.²⁷³ The Oath Keepers founder, Steward Rhodes, was convicted in November 2022 of seditious conspiracy, one of the most, if not the most, serious charges and convictions stemming from the riot.²⁷⁴ Self-proclaimed “western chauvinists,” the Proud Boys’ leader, Enrique Tarrío, currently faces seditious conspiracy charges.²⁷⁵ Additionally, Jacob Chansely, the self-proclaimed “Qanon Shaman” and “one of the most recognizable symbols of the insurrection” was sentenced to 41 months in prison.²⁷⁶ Trump himself was impeached for “incitement of insurrection.”²⁷⁷

The entire revolt prompts the question of whether the Second Amendment’s political necessity defense applies to the rioters’ actions. The analysis is more complicated than one might think. An analysis of the traditional political necessity defense, however, is straightforward.

Direction Before Capitol Attack, CNN (Feb. 12, 2021, 8:22 AM), <https://www.cnn.com/2021/02/11/politics/oath-keeper-justice-trump-capitol/index.html> [<https://perma.cc/9CX2-EFWP>].

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Press Release, U.S. Dep’t of Just., Leader of Oath Keepers and Oath Keepers Member Found Guilty of Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach (Nov. 29, 2022), <https://www.justice.gov/opa/pr/leader-oath-keepers-and-oath-keepers-member-found-guilty-seditious-conspiracy-and-other> [<https://perma.cc/R64U-49ED>].

²⁷⁵ Press Release, U.S. Dep’t of Just., Leader of Proud Boys and Four Other Members Indicted in Federal Court For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), <https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and> [<https://perma.cc/8FPX-2M2U>].

²⁷⁶ Sabrina Willmer, ‘QAnon Shaman’ Drops Appeal of His Plea and Sentence for Jan. 6 Capitol Riot, BLOOMBERG (July 5, 2022, 3:32 PM), <https://www.bloomberg.com/news/articles/2022-07-05/-qanon-shaman-drops-appeal-of-his-plea-and-sentence-for-jan-6?leadSource=verify%20wall> [<https://perma.cc/U6FM-T8A7>].

²⁷⁷ Lisa Mascaro et al., *Trump Impeached After Capitol Riot in Historic Second Charge*, APNEWS (Jan. 31, 2021), <https://apnews.com/article/trump-impeachment-vote-capitol-siege-0a6f2a348a6e43f27d5e1dc486027860> [<https://perma.cc/NJJ5-Y5LA>]; H.R. Res. 24, 117th Cong. (2021).

The traditional political necessity defense will not be available to the insurgents. The storming of the Capitol is a classic case of indirect political protest. The insurgents were not attacking the laws of assault, conspiracy, or sedition. They were attacking the outcome of a political event. The *Schoon* precedent clearly applies.

The insurgents' actions do not fit at least three of the elements under *Schoon*. First, they did not choose the lesser of two evils. The Ninth Circuit held in *Schoon* that the political process, constitutionally executed, is incapable of causing harm.²⁷⁸ Voting and the conduct of elections are part of the political process. Thus, the only harm caused was the harm created by the insurgents. As a result, the balance of harms favors the government.

Furthermore, there is no evidence that the conduct of the election, including the balloting, violated the Constitution.²⁷⁹ Trump, many congressional Republicans, and other Republican officials around the country alleged widespread voter fraud but offered no real evidence to support their claims.²⁸⁰ Indeed, the opposite is true. Voter fraud is mostly a phantom crime.²⁸¹ On the other hand, the Republican party has been re-enacting Jim Crow–style voter suppression laws under the guise of preventing voter fraud since the Supreme Court unleashed the former confederate states from the necessary shackles of the Voting Rights Act of 1965.²⁸² The Supreme Court struck down Section 5 of the Voting Rights Act in 2012 in *Shelby County v. Holder*, which permitted race-conservatives and anti-democratic libertarians to revert to historical form.²⁸³ Section 5 required states with a long history of voter suppression to seek approval from the federal government before enacting red-flag changes in voting laws.²⁸⁴ If any voter-related practice is unconstitutional, voter suppression laws enacted historically by the thought-class now crying wolf top the list. In the end, voter fraud is a fraud about fraud and thus cannot serve the basis of a constitutional violation.

Second, the insurgents had a reasonable alternative to storming the Capitol as a matter of law. *Schoon* held that the political process is always a reasonable alternative to violating the law.²⁸⁵ Here, the political process ran its course and made a considered determination. Trump and his affiliates filed over sixty lawsuits contesting the election.²⁸⁶ Each court has rejected the claims of voter fraud, including the

²⁷⁸ *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1991) (opinion amended on Aug. 4, 1992).

²⁷⁹ Alison Durkee, *FBI Director Says No Evidence of 'National Voter Fraud Effort,' Undercutting Trump*, FORBES (Sept. 29, 2020, 8:32 PM), <https://www.forbes.com/sites/alison-durkee/2020/09/24/fbi-director-says-no-evidence-of-national-voter-fraud-effort-undercutting-trump/?sh=25ae75914974> [https://perma.cc/32MV-HV3J].

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² ALL IN: THE FIGHT FOR DEMOCRACY (Amazon Studios 2020).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *United States v. Schoon*, 971 F.2d 193, 199 (9th Cir. 1991) (opinion amended on Aug. 4, 1992).

²⁸⁶ Cummings et al., *supra* note 220.

law-and-order Supreme Court.²⁸⁷ The political process, in this instance, worked overtime, establishing it as a reasonable alternative to insurgency, at least under *Schoon*.

Lastly, the direct causation element is missing. The *Schoon* court found that acts of protest that require a middle man to act are unlikely to change the targeted law or policy as an immediate result of the criminal act.²⁸⁸ The court reasoned that “it takes another *volitional* actor not controlled by the protestor to take a further step; Congress must change its mind” and that “[i]f the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct.”²⁸⁹

The insurgents will be unable to establish the direct causation elements simply because overturning an election would require more than the dissidents’ criminal act of storming the Capitol. A third party or body would have to act to achieve the desired results. For instance, a body would have to authorize the revote, and then a series of parties would have to administer the revote, and finally citizens would have to act by going to the polls and voting. Ultimately, the insurgents’ actions do not satisfy the *Schoon* test.

The Second Amendment political necessity defense, however, is a different matter. The most intriguing questions involve the reasonableness, both objective and subjective, of the rioters’ actions, considering the right under threat.

As discussed in Part II, the Second Amendment political necessity defense requires the following: (1) a threat to the Constitution or a violation of an individual or group’s fundamental rights; (2) the failure of the political process regarding the rights offended; (3) an act reasonably calculated to set the events in motion that would abate the harm; (4) a showing that the type and degree of force used or threatened was proportionate to the violation justifying it; and (5) that the government’s acts or omissions were intentional, malicious, arbitrary, grossly negligent and/or conspiratorial.²⁹⁰

Without question, the nature of the right at issue, the right to vote, which lies at the heart of representative democracy, is a fundamental right, although it is not enumerated in the Constitution.²⁹¹ An attack on the franchise represents, in a real sense, a threat to democracy itself. If the election had been stolen, the rioters would have easily met the first element.

However, the Second Amendment seems to demand proof of an actual constitutional violation or threat.²⁹² As the Declaration of Independence remarks, “Prudence,

²⁸⁷ *Id.*

²⁸⁸ *Schoon*, 971 F.2d at 198.

²⁸⁹ *Id.* at 197–98.

²⁹⁰ *Supra* Section II.E.

²⁹¹ See generally Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457 (2007); LEE J. STRANG ET AL., 5 CASES AND MATERIALS ON FEDERAL CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT (2017).

²⁹² The right to rebel, by all indications, is a moral right pitched in black and white. This suggests that it is applicable only to situations where the government actors are in fact morally blameworthy. See discussion *supra* Part II.

indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”²⁹³ On the other hand, courts may require only a reasonable belief rather than a correct belief that the rioter’s constitutional rights were at risk. Reasonableness is the hallmark of every other common law justification defense, including self-defense.²⁹⁴ If courts administer a lax standard of reasonableness, the insurgents conceivably meet this element due to a chorus of governmental support and societal amens.

The facts establish that the election was fair.²⁹⁵ However, both the President of the United States and at least 147 members of Congress who voted not to certify the election suggested to their constituencies that the Democrats had hijacked the election.²⁹⁶ That is, the highest-ranking official in the land, the most powerful man in the world, along with other Republican lawmakers around the country, whose government positions bespeak credibility and authority, claimed that the election was rigged and suggested to the rioters that democracy itself was under threat. In addition, seventy-six percent of Republican voters still believe that Democrats rigged the election.²⁹⁷

The rioters would likely be able to meet the second element requiring the failure of the political process. After all, a new President now occupies the White House. In addition, the Trump administration filed over sixty lawsuits; two even reached the Supreme Court.²⁹⁸ Moreover, the Republican Party over the past ten years passed a series of election laws and ostensible voter fraud laws, stifling votes that would have, otherwise, gone to the Democratic party.²⁹⁹ That is, the Republican party not only exhausted the political process but abused it.

On the other hand, the political process was thorough and established that no constitutional violation existed. That is, the political process duly evaluated the gamut of measures taken by Trump and the Republican Party to overturn the election, including most prominently, the sixty lawsuits filed. All wings of government concluded the election was not stolen.³⁰⁰ Furthermore, presidential power and a

²⁹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁹⁴ DRESSLER, *supra* note 10, at 212–13.

²⁹⁵ Durkee, *supra* note 279.

²⁹⁶ Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [<https://perma.cc/BA8Q-XCX7>].

²⁹⁷ Chris Cillizza, *Three-Quarters of Republicans Believe a Lie About the 2020 Election*, CNN (Feb. 4, 2021, 2:48 PM), <https://www.cnn.com/2021/02/04/politics/2020-election-donald-trump-voter-fraud/index.html> [<https://perma.cc/Y4TU-94Q5>] (according to a Quinnipiac University poll).

²⁹⁸ Cummings et al., *supra* note 220.

²⁹⁹ Brandon Tensley, *America’s Long History of Black Voter Suppression*, CNN, <https://www.cnn.com/interactive/2021/05/politics/black-voting-rights-suppression-timeline/> [<https://perma.cc/2ZLE-VKD2>] (last visited May 8, 2023).

³⁰⁰ Durkee, *supra* note 279; Cummings et al., *supra* note 220.

Republican-dominated Congress buttressed the political process's accuracy in this instance. In other words, the insurrectionists were not without political power. They actually possessed it to an inordinate degree. They were not underdogs, as Trump suggested; they were big dogs upset that their reign was reaching its twilight years.

In the end, however, if one suspends disbelief and presumes that the election was stolen, storming the Capitol was the last resort. The political process would have yielded a result contrary to the Constitution, despite all efforts to safeguard the peoples' constitutional rights.

Furthermore, storming the Capitol seemed reasonably calculated to set events in motion that would abate the harm of a stolen election. It seems far-fetched that eight hundred insurrectionists could force a country with the greatest military in the world to meet even trivial demands, much less recycle an election.³⁰¹ But such a belief is no more far-fetched than the colonials' belief that they could route the British military, which was, at the time, the greatest military force in the history of humankind.

More importantly, many power players supported the idea of overturning the election. It was thus not completely unrealistic that the rioters would accomplish their goal. The President of the United States, the commander in chief of the U.S. military, not only claimed the election was stolen but instigated the run on the Capitol. Robert A. Pape writes, "[t]he overwhelming reason for action, cited again and again in court documents, was the arrestees were following Trump's order to keep Congress from certifying Joe Biden as the presidential-election winner."³⁰² Furthermore, over thirty percent of the country believed that the election was hijacked, providing an enormous support base for government intervention.³⁰³ Republican state officials around the country provided another justifying force. Also, 147 congresspersons voted not to certify the election, presumably, or at least ostensibly, on the grounds of election fraud. It is difficult to say that the insurgents were unreasonable in believing that their plot would work, particularly considering the amount of perceived government support.

Next, it is arguable whether the amount of force the insurgents used or threatened was proportionate to the perceived violation. The insurgents used various types and degrees of force and compulsion, including trespass, interference with government operations, physical assaults on police officers, destruction of government property, the threat of deadly force to congresspeople and law enforcement officials, bombing threats to the Democratic and Republican National Committee buildings, the force used to gain entry into the Capitol building, the attack on the international standing of the country, and the psychological attack on the public's feeling of safety and faith in the unassailability of American democracy.³⁰⁴ It must be determined

³⁰¹ See Robert A. Pape & Keven Ruby, *The Capitol Rioters Aren't Like Other Extremists*, ATLANTIC (Feb. 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/> [<https://perma.cc/U9E3-8GLK>].

³⁰² *Id.*

³⁰³ Cillizza, *supra* note 297.

³⁰⁴ See *supra* notes 241–43 and accompanying text.

whether each insurgent's criminal acts, considering the type, extent, and grade of force used, were proportionate to the constitutional violation.

The violation (if true) at issue was substantial: the theft of a presidential election and the damage done to democracy because of it. First, administration without representation, like taxation without representation, is a distinct harm within itself. That is, even if the Biden Administration's orders and policies do not harm the insurgents in fact, any policies and orders coming from an unelected government would violate the metaphysical principle of freedom, undermine the right to vote, and constitute an assault on American democracy. Second, the Biden administration's policies might adversely affect the rioters' legitimate interests. These are weighty threats.

On the other hand, the insurrectionist suffered no "long train of abuses" like the ones Thomas Jefferson described in the Declaration of Independence. The insurgents were reacting to a single, one-off violation comprising a relatively short episode in U.S. history. The Second Amendment political necessity defense, because it arises from the Founders' fears embossed in the Constitution, requires more than an isolated abuse to justify the real and metaphysical force many of the insurgents employed in conspiring to overturn the government, attempting to bomb Republican and Democratic office buildings, and attempting to murder governmental officials and police professionals.

Historically, the thought-class and demographic the insurgents represent has perpetrated "a train of abuses" on American others almost as long as the country is old. Many of these abuses, discussed in detail in Part I of this Article series, have existed in one form or another for the better part of four hundred years.³⁰⁵ Some examples include the slavery system (where many members of this demographic worked as overseers and slave patrollers), white massacres, post-Reconstruction domestic terrorism, and unlawful police violence.³⁰⁶

The insurgents' thought-class and demographic has not experienced a "long train abuses" in the area of voting rights. This thought-class and demographic have again perpetrated voting rights abuses from the end of slavery to the present. Some examples include Black voter prevention through violence from 1880 until the end of the 1960s and the 1898 Wilmington massacre and coup d'état where race-conservatives massacred as many as 300 African American men, women, and children en route to violently usurping the city and county governments by assassinating democratically elected Black Republican government officials.³⁰⁷

The insurgents' thought-class and demographic are also responsible for Jim Crow voter laws that effectively eliminated democracy in the South for eight decades.³⁰⁸ This thought-class is also behind the recent rash of voter suppression laws.³⁰⁹

³⁰⁵ See Tensley, *supra* note 299.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

So, for this thought-class to decry an assault on voting rights is puzzling at best, hyper-hypocritical and claim-defeating otherwise.

Furthermore, many commentators have plausibly argued that what ultimately motivated Trump supporters to storm the Capitol was not a stolen election but a perceived assault on white status.³¹⁰ That is, a threat to democracy was not the real threat. The claim was a proxy for something else, something more malignant. The real threat, some argue, is the encroachment of equality, the threat of democracy realized.³¹¹ If so, then any force, even the simple violence caused by breaking the law, is disproportionate.

There is also other evidence to support this theory. The Trump base, less educated, middle-aged white men, are “the least well off, most precariously situated members of the dominant caste in America.”³¹² This lower wrung of white America has experienced rising mortality rates since 2000, due to what economist Anne Case and Nobel laureate Angus Deaton call “deaths of despair.”³¹³ Other American ethnic groups and middle to upper-income whites have experienced declining mortality rates along with the rest of the Western world.³¹⁴ Isabel Wilkerson writes in her critically acclaimed work, *Caste: The Origin of Our Discontents*:

In a psychic way, the people dying of despair could be said to be dying of the end of an illusion, an awakening to the holes in an article of faith that an inherited, unspoken superiority, a natural deservedness over subordinated casts, would assure their place in the hierarchy. They had relied on this illusion, perhaps beyond the realm of consciousness, and perhaps needed it more than any other group in a forbiddingly competitive society “in which downward social mobility was a constant fear . . .” When a hierarchy is built around the needs of the group to which one happens to have been born, it can distort the perceptions of one’s place in the world. It can create an illusion that one is innately superior to others if only because it has been reinforced so often that it becomes accepted as subconscious truth.³¹⁵

Social and political scientists refer to this phenomenon as dominant group status threat.³¹⁶ Political scientist Diana Mutz explains that dominant group status threat

³¹⁰ Sandhya Dirks, *The Unspoken Role of Race in the Jan. 6 Riot*, NPR (Aug. 16, 2022, 4:50 PM), <https://www.npr.org/2022/08/16/1117762232/the-unspoken-role-of-race-in-the-jan-6-riot> [<https://perma.cc/B6JB-NYKS>].

³¹¹ ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 325–26, 328, 331–32 (2020).

³¹² *Id.* at 180.

³¹³ *Id.* at 178.

³¹⁴ *Id.*

³¹⁵ *Id.* at 181–82.

³¹⁶ *Id.* at 180.

“is born of a sense that the outgroup is doing too well and, thus, is a viable threat to one’s own dominant group status.”³¹⁷ Wilkerson puts it another way:

To stand on the same rung as those perceived to be of a lower caste is seen as lowering one’s status. In the zero-sum stakes of a caste system upheld by perceived scarcity, if a lower-caste person goes up a rung, an upper-caste person comes down. The elevation of others amounts to a demotion of oneself, thus equality feels like a demotion.³¹⁸

Wilkerson concludes that the class of white Americans experiencing dominant groups status threat, the Trump base, “might have been more susceptible to the calls to ‘take our country back’ after 2008 and to ‘make America great again’ in 2016” and 2020.³¹⁹

It seems clear that the insurrectionists were responding to a more serious threat than an election that they may or may not have believed was stolen. Still, it is equally clear that if the election had been stolen and historical context is omitted, some of the insurgents (at least the ones accused of less serious crimes) acted proportionately to the violation, particularly since subjective intent is hard to prove on an individual basis.

Lastly, suppose the rioters were correct in their belief that the election was stolen. In that case, it is a given that the government’s acts or omissions were intentional, malicious, and conspiratorial. That is, the very act of stealing anything connotes intentionality and, since so many states and actors were involved, conspiracy also. However, that “if” is a large “IF,” considering the complete lack of evidence supporting the claim. The rioters would likely not meet this element.

The upshot is that the political necessity defense is probably not a viable defense for the insurgents who attacked the Capitol. They could not provide enough credible evidence to establish a *prima facie* case of a constitutional violation, particularly regarding intentionality. Nonetheless, the Second Amendment political necessity defense is a much more viable option for forcible resisters in these types of situations than the traditional political necessity defense.

CONCLUSION

This country was forged by purposeful lawlessness and then molded by subsequent rebellions, demonstrations, and riots that invoked the same design. Due to the role purposeful lawlessness, particularly forcible dissent, played in establishing, developing, and sustaining American democracy, criminal law should not discourage

³¹⁷ *Id.*

³¹⁸ *Id.* at 183.

³¹⁹ *Id.* at 180.

similar acts that lead to net social good. The way to ensure this is to enable citizens charged with politically motivated crimes to present their cases to a jury of their peers to determine whether their unlawful activities resonate with principles underlying the country's founding and the Second Amendment.

This form of empowerment is most comparable to the traditional political necessity defense. However, most courts would not allow activists to advance a necessity defense under circumstances like the ones leading to this country's founding or the ones that facilitated its transformation during the 1960s.

The Second Amendment political necessity defense is the constitutional version of the traditional political necessity defense. The Second Amendment hamstring state and federal courts when the constitutional version of the defense is raised, overriding many previous objections to the defense. The Second Amendment political necessity defense vindicates the right to rebel and, by extension, the violent veto power. The right to rebel empowers citizens to resist acts of government tyranny like unlawful police violence forcibly. The violent veto power authorizes forcible resistance to duly passed but unconstitutional governmental laws and policies.

The Second Amendment provides a complementary framework for a constitutionally based political necessity defense that would exceed the jurisdiction of state laws and lower federal courts. The fit derives from the close relationship between the Second Amendment's history and the rationale undergirding the common law necessity defense. Both demonstrate doctrines meant to check government usurpations of rights belonging to the people. Both the Second Amendment and the common law necessity defense were designed to promote public good over the law's letters. In this way, the necessity defense is inherently political even when applied to criminal acts that do not have political implications, such as trespassing to avoid a storm or shooting a deer out of season to stave off hunger.

The Second Amendment encompasses several related doctrines that implicate a Second Amendment-style political necessity defense, including the right to bear arms, the right to rebel, and the right to self-defense. The right to rebel, the most relevant here, is an independent manifestation of the Framers' fear of government tyranny. Alternatively, the right to rebel could be viewed as a category of self-defense, as the Constitutional Congress understood the doctrine at the time. Self-defense, at the time, was understood to be a broad, all-encompassing doctrine best described as spectral self-defense. The concept of self-defense included protection from private and public violence perpetrated by a lone criminal or a standing army.

Irrespective of how one frames the right to rebel and self-defense as either a single doctrine or two, the modern means of vindicating the rights are distinctive. The means depend on the oppressing party's status. The modern doctrine of self-defense provides the framework for self-defense against a private party. The right to rebel supplies the foundation for thwarting a government agent or government body out of political necessity.

While the circumstantial evidence of a Second Amendment political necessity doctrine is strong, courts have yet to provide the parameters of such a doctrine. This

Article has sought to forecast the Second Amendment political necessity defense's likely parameters by preserving aspects of the traditional political necessity defense compatible with the Second Amendment. Additionally, the Article has attempted to discern the parameters by discarding aspects of the conventional political necessity defense incompatible with the history of the Second Amendment. The Article has also endeavored to develop a fuller picture of the parameters by assessing the characteristics of the Second Amendment that impose limitations on the traditional political necessity defense.

The aspects of the traditional political necessity defense that are incompatible with the Second Amendment include the traditional political necessity defense's demand for a rigorous balancing of the harm created by a given criminal act against the social utility of the criminal act. Other incompatible aspects include the Ninth Circuit's proclamation that the political process is always a reasonable alternative to criminal action, the unavailability of the defense when successful harm abatement requires third party action, and the exclusion of systematic wrongs and future harms from coverage. However, the Second Amendment imposes its own limitations on the political necessity defense, including a requirement of proportionate force, proof of intentional, malicious or grossly negligent government conduct, and the failure of the political process to disperse the harm.