VIOLENCE AND NONDELEGATION

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INTRODUCTION

Debates over delegation are experiencing a renaissance.[1] These debates presuppose an initial distribution of constitutional authority between actors that cannot be redistributed, or that can be redistributed only according to some clear ex ante set of rules.[2] Nondelegation in this sense often arises in debates about separation of powers and intergovernmental delegation, although scholars have begun applying the concept to delegations to private corporations and other private actors.[3] The public delegation doctrine restricts one branch of government from transferring its constitutional authority to another branch, while the private delegation doctrine limits transfer of government power to private entities.[4] In this Essay, we apply intuitions about power transfer to the

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[1] *See generally, e.g.*, F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

[2] *See* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1080–81 (2021).

[3] Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. 1431, 1470 (2021) (articulating a "corporate nondelegation doctrine" limiting government delegation to private corporations). *See generally* CATHERINE M. DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES: A COMPARATIVE PERSPECTIVE (2007); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007).

[4] *See, e.g.*, Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 50 (2021); James M. Rice, Note, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 545 (2017) ("The public nondelegation doctrine limits Congress's ability to delegate regulatory authority to the executive branch, while the private nondelegation doctrine limits Congress's ability to delegate regulatory authority to nongovernmental actors."); Robert Craig & andré douglas pond cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. BALT. L. REV. 261, 282–83 (2020) ("Although courts have not explicitly delineated the structural underpinnings of the private nondelegation doctrine, two main themes drive their decisions: first, core governmental functions cannot be delegated to private parties; and second, executive branches cannot grant legal enforcement power to entities outside the government over whom the executive does not exercise

delegation of violence to private parties.[5] In other words, we ask whether there are or should be constitutional limits on the types of force the government can permit private individuals to use against other private parties — in short, a violence nondelegation doctrine.[6]

I. PUBLIC AND PRIVATE VIOLENCE

According to Anglo-American legal tradition and early modern political theory, the state holds the monopoly on legitimate violence.[7] In

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control." (footnotes omitted)); *see also* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) (referring to the private delegation doctrine as the "constitutional prohibition" that "is the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch," that is, the public delegation doctrine), *vacated and remanded by* 575 U.S. 43 (2015); Carter v. Carter Coal Co., 298 U.S. 238, 310–11, 316 (1936) (striking down a form of private delegation).

[5] We use *violence* roughly synonymously with *the threat or application of unconsented-to physical force*. Although one can certainly argue that violence can occur without physical force, most agree that at least unconsented-to force is violence. *See* Robert Paul Wolff, *On Violence*, 66 J. PHIL. 601, 606 (1969) ("Strictly speaking, violence is the illegitimate or unauthorized use of force to effect decisions against the will or desire of others." (emphases omitted)). We do not, however, incorporate Professor Robert Wolff's illegitimacy condition into our understanding of violence. *See id.*; *cf.* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 888 (2004) ("Force is any legitimized threat or act of physical coercion.").

[6] There have been some recent attempts to discuss this topic through the lens of political theory and state action doctrine. *See, e.g.*, F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 623–24 (2014); John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1242 (2014) (arguing that "the use of deadly force to seize non-violent criminals is a nondelegable governmental function subject to constitutional limits even when private actors exercise that force"). *See generally* Rosky, *supra* note 5. Recent proposals like those in Missouri and Florida (discussed *infra* notes 32–34 and accompanying text) warrant a fresh look at this topic. *Cf.* Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971, 1008 (2018) (noting that "little contemporary work has been done examining when governments may permissibly authorize deadly force apart from self-defense").

[7] As Professor Clifford Rosky observes: "It is hard to exaggerate the pedigree and influence of this idea. For four centuries, it has been widely accepted and articulated, in one form or another, by philosophers, political scientists, sociologists, historians, and economists — both liberal and nonliberal alike." Rosky, *supra* note 5, at 886. This monopoly means that the state is the entity with authority to determine which uses of force are authorized and which are not. Jennifer Carlson, *Revisiting the Weberian Presumption: Gun Militarism, Gun Populism, and the Racial Politics of Legitimate Violence in Policing*, 125 AM. J. SOCIO. 633, 633 (2019) ("The state has the prerogative to distinguish between legitimate and illegitimate violence."). It does not mean only the state uses violence. As Professor Robert Nozick explains:

> A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly.

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 23 (1974). This conception is consistent with the Anglo-American tradition undergirding the law of self-defense, which has sometimes been described as an *exception* to the state's monopoly, but in reality has always been "heavily conditioned and constructed by the state." Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 86 (2017). Even those who ground self-defense in natural law

exchange, the state's agents are supposed to conform to principles of equity and proportionality, articulated in a web of constitutional and subconstitutional rules and norms.[8] Whatever else these legal or social norms allow, they limit the permissible scope of public violence. The limits on legally sanctioned private violence, however, are not so clear.

A. Limits on Public Violence

Take the constitutional rules governing certain kinds of preventive and defensive violence. Under the Fourth Amendment, official restraint on a person's freedom of movement constitutes a seizure that must be reasonable to be constitutional.[9] And the Supreme Court has constrained the degree of force that can be used. In *Tennessee v. Garner*,[10] the Court held that where a fleeing felon "poses no immediate threat to the officer and no threat to others," capture through deadly force is unreasonable.[11] A state actor's use of defensive force in his official capacity is subject to the same constraints.[12]

Or consider the Eighth Amendment, which constrains punitive violence by expressly forbidding "cruel and unusual *punishments*."[13] The Supreme Court has long recognized that some modes of punitive vio-

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recognize a narrowly circumscribed natural right: "[O]ur right of self-defense has not typically been understood to license any violence beyond what is strictly necessary to preserve our physical well-being." James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 913 (2004). Some scholars reject — or consider the American project to reject — the conventional monopoly-on-force account, and we engage these arguments in our longer work. *E.g.*, Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 41 (2021); Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989).

[8] SETH W. STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE 4 (2020) (detailing "four evaluative standards" for judging police uses of force: constitutional standards, state laws, administrative and agency regulations, and community expectations); Hubbard, *supra* note 6, at 623–24 (discussing the limits on the use of deadly force as a result of the state's monopoly).

[9] Tennessee v. Garner, 471 U.S. 1, 7 (1985).

[10] 471 U.S. 1.

[11] *Id.* at 11. As a corollary, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*

[12] Reed v. Hoy, 909 F.2d 324, 329 (9th Cir. 1989) (Fourth Amendment implicated in police officer's use of force for self-defense); *see also* Wardlaw v. Pickett, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (same).

[13] U.S. CONST. amend. VIII (emphasis added); Ingraham v. Wright, 430 U.S. 651, 667 (1977) (stating that "the Cruel and Unusual Punishments Clause circumscribes the criminal process" in multiple ways, including by "limit[ing] the kinds of punishment that can be imposed on those convicted of crimes"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008) (remarking that in early America "criminal offenders were subjected to public flogging, pillorying, or even mutilation"). Some advocates argue that, in the midst of the mass-incarceration crisis, it may even be wise to bring such punishment back, or at least to give offenders the option to choose between imprisonment and a whipping. *See generally* PETER MOSKOS, IN DEFENSE OF FLOGGING (2011).

lence are "manifestly cruel and unusual," like "burning at the stake, crucifixion, breaking on the wheel, or the like."[14] Some modern courts and commentators consider all or most types of judicially imposed corporal punishment to violate the Eighth Amendment.[15]

B. Limits on Private Violence?

The state has authorized private parties to engage in some, but not all, of these types of violence. When it does, the delegation has traditionally been narrow. Take the shopkeeper's privilege, for instance. Retailers can hold suspected shoplifters only so long as is "necessary for a reasonable investigation of the facts,"[16] after which they become liable for false imprisonment.[17] Citizens' arrest laws similarly authorize private individuals to use violence to apprehend someone they reasonably believe has committed a felony or sometimes a misdemeanor offense.[18] Until recently, these arrests were assumed to be "like their official counterparts, . . . protected only so long as they are made without unreasonable and excessive force."[19] And even though we've passed into a period

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[14] *In re* Kemmler, 136 U.S. 436, 446 (1890).

[15] Hope v. Pelzer, 536 U.S. 730, 738 (2002) (holding that handcuffing an inmate to a hitching post for seven hours in the heat was an unconstitutional "punitive treatment [that] amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits"); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.) ("Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals."); Michael P. Matthews, *Caning and the Constitution: Why the Backlash Against Crime Won't Result in the Back-Lashing of Criminals*, 14 N.Y. L. SCH. J. HUM. RTS. 571, 583–609 (1998); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

[16] RESTATEMENT (SECOND) OF TORTS § 120A (AM. L. INST. 1965).

[17] *Id.* § 120A cmt. f.

[18] Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557, 576–77 (2016) ("In general, an arrestor may use as much force as is reasonably required to detain the arrestee and effectuate the arrest."). These laws are at the center of the killing of Ahmaud Arbery in February 2020 and were a significant part of the defense's case. Ashish Valentine, *What Is the Citizen's Arrest Law at the Heart of the Trial over Ahmaud Arbery's Death?*, NPR (Oct. 26, 2021, 10:39 AM), https://www.npr.org/2021/10/26/1048398618/what-is-the-citizens-arrest-law-in-the-trial-over-ahmaud-arberys-death [https://perma.cc/4T7T-TFHK].

[19] DAN B. DOBBS ET AL., THE LAW OF TORTS § 94 (2d ed. 2011); *see also* Whitten v. Cox, 799 So. 2d 1, 8 (Miss. 2000) ("[U]se of firearms by a police officer is not justified except to protect himself from reasonably apparent bodily harm or death at the hands of the suspect. Citizens are held to the same standard." (citation omitted)); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 42 cmt. f (AM. L. INST., Tentative Draft No. 6, 2021) ("This Section's prohibition of the use of deadly force beyond that authorized under § 23 and § 24 (governing self-defense and defense of others) is justified by the policies of limiting the use of extreme violence to trained law enforcement officers and restricting the use of such force by citizen vigilantes.").

of "private prison" experimentation, where private parties can detain individuals as part of their business models, no jurisdiction that we're aware of authorizes private prisons to impose corporal or capital punishment.[20]

In contrast to their governmental counterparts, when private parties deploy this kind of violence, it's unsettled what — or even whether — constitutional restrictions apply.[21] If subconstitutional law like torts or criminal law supplied effective constraints, this might not be an issue.[22] But there's good reason for skepticism about the effectiveness of these constraints and — even more concerning — a growing attempt by some jurisdictions to relax legal rules in order to sanction violence otherwise constitutionally forbidden to the state.[23] The goal appears to be to enlist private actors to engage in crime control and order maintenance in ways the state itself cannot[24] and to obscure the lines of accountability for any violence that may result.[25]

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[20] *Cf.* Furman v. Georgia, 408 U.S. 238, 333 (1972) (Marshall, J., concurring) ("Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function."). There is an enormous literature criticizing private prisons. *See, e.g.*, Craig & cummings, *supra* note 4, at 289 ("Restricting liberty in the process of enforcing the law fits squarely in the executive branch powers, and . . . the nature of incarceration means that delegation of that function necessarily entails private parties exercising coercive authority that is reviewable only after the fact, when monetary remuneration may be a poor substitute for the vindication of constitutional rights." (footnotes omitted)); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 546 (2005) ("[T]here is arguably something to the view that punishment, if it is to be legitimate, should be a wholly public function, untainted by private motives and interests."); Laura Suzanne Farris, Comment, *Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority*, 33 TULSA L.J. 959, 961 (1998); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 651 (1987); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010). There are also some defenders of at least some forms of private prisons. *E.g.*, Rosky, *supra* note 5, at 883.

[21] The conventional answer, of course, is that as a matter of formal doctrine no constitutional rules apply to purely private actors. *See* United States v. Cruikshank, 92 U.S. 542, 554 (1875); Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 106–07 (2013) (detailing the ways that private parties are empowered to perform public law–enforcing functions but are not restricted from abuses in the same way as their public counterparts). But, as Rosky notes, privatizing forms of violence represents "challenges to one of our most fundamental, venerated axioms of liberal thought — the idea that 'the state' has, must have, or should have a 'monopoly of force.'" Rosky, *supra* note 5, at 881.

[22] *See* Larkin, *supra* note 4, at 92–93 (identifying alternative mechanisms of accountability); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1501–02 (2003) (same).

[23] *See, e.g.*, Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076257 [https://perma.cc/9TZQ-C6QS].

[24] Metzger, *supra* note 22, at 1462 ("A central characteristic of much government privatization is that private delegates are granted powers not simply for their own advantage, but rather to enable them to act — and more specifically, to interact with third parties — on the government's behalf.").

[25] Andrea Nishi, Note, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1699–700 (2019) (arguing that "[a]t the heart" of the concerns over the private delegation doctrine "is the need to maintain the role of the Constitution, and therefore the public, in directing the exercise of government power").

II. LEGAL ACCOUNTABILITY FOR PRIVATE VIOLENCE

A facile answer to this concern is that none of this delegation is of constitutional moment because private violence is not state action. Such an objection misunderstands the problem. There are at least two doctrinal avenues by which state-sanctioned private violence could violate the Constitution: the private delegation doctrine and the state action doctrine.[26] The former focuses on the legal sanction itself, on whether the statutory permission to engage in violence in a given situation is permissible. The latter focuses on the exercise of violence itself, on whether a private actor has been transformed into a state actor for constitutional purposes. In a private-delegation dispute, the focus is on the delegator — Congress or the states.[27] In a state-action dispute, the focus is on the delegate — the force wielder.[28]

Both might serve as mechanisms to inhibit government sanction of constitutionally impermissible violence. Consider private delegation first. When a law *authorizes or legally immunizes* overbroad private violence, constitutional rules would seem to be implicated in that decision.[29] Assume, for example, that a state repeals its prohibitions against murder, essentially declaring everyone subject to the executive judgment of everyone else.[30] Even in the absence of a public official's use of force,

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[26] Metzger, *supra* note 22, at 1396 (arguing that "the powers exercised by private entities as a result of privatization often represent forms of government authority, and that a core dynamic of privatization is the way that it can delegate government power to private hands"); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1229–75 (1999) (analyzing possible limits on private police as a matter of state action doctrine).

[27] Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1757 (2002).

[28] Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 504 (2011) ("The state action doctrine asks whether private parties should be treated as government actors susceptible to liability for violations of individual constitutional rights. . . . [I]t does not enable constitutional challenges to the delegation of government power to private parties or the exercise of that power beyond constitutional limits."); *see also* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1789 (2010) (proposing agency principles to distinguish state action from private action).

[29] *See, e.g.*, Autry v. Mitchell, 420 F. Supp. 967, 970–71 (E.D.N.C. 1976); State v. Goodseal, 183 N.W.2d 258, 263–64 (Neb. 1971) (striking down an overly broad self-defense statute on delegation grounds and stating that "[w]ithout fixing the amount of force that may properly be exercised in resorting to justifiable self-defense, over and above which is criminal, the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do," *id.* at 263); Leider, *supra* note 6, at 1017 ("[T]he state's monopoly on force is the state's, and the state therefore has a duty to control how force of that type is exercised by the people whom it authorizes to exercise it."); Hubbard, *supra* note 6, at 623–24 ("Because a state has a 'monopoly of the legitimate use' of deadly force, the use of such force is only legitimate if the state has authorized that use." (footnote omitted)).

[30] Criminal law is in fact meant to deal with precisely these problems of individualized executive judgments. *See* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1705 (2003) ("If we allow any defendant to exempt himself from the rules and challenge the state's monopoly on violence, we fear that he will enforce the law in ways that are excessive or partial.").

a legal regime that fails to punish the infliction of private violence would appear to implicate the state for constitutional purposes.[31] A state could accomplish something similar by vastly expanding the legal defenses available to violence doers, like creating an irrebuttable presumption of reasonable fear whenever a defendant testifies he was afraid or privileging deadly force on a mere subjective apprehension of bodily harm, no matter how slight the threat or unreasonable the apprehension. These exceptions to the prohibition against murder could swallow the rule. The private delegation doctrine is directly concerned with the government skirting its constitutional obligations by fobbing off its functions, like crime control and law enforcement, to private actors.

What about more realistic laws that fall short of these examples, but allow a kind of violence that government agents could not engage in? Many self-defense statutes now authorize the use of deadly force in a broader array of settings than is permitted to police officers.[32] And more proposals keep coming.[33] In the aftermath of the racial justice protests

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A state's repeal of its murder laws is in many ways the inverse of a state forbidding the use of self-defense at all. *See* Leider, *supra* note 6, at 1012 ("A state that made self-defense unlawful — that punished victims for resisting unjust attacks — would be complicit in the violence of unjust aggressors.").

[31] Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 566 n.287 (1989) ("That equal protection . . . in a constitutional sense could be denied through the inaction of individual states actors was understood not only in Congress, but also in the case law at that time."); *see also* United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) ("Denying [equal protection of the laws] includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."). The district court judge in *Hall* took this language directly from an 1871 letter from Justice Joseph Bradley. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 48 (2011). As Professor Pamela Brandwein notes, for some nineteenth-century legal thinkers, "[i]t was not a stretch to interpret the failure to equally administer laws against murder as subjecting one class to special burdens while granting another special exemptions." *Id.* at 53.

[32] Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIA. L. REV. 1099, 1106 (2014) (arguing that Florida's stand-your-ground law's authorization of deadly force to prevent forcible felonies like robbery and burglary "is a significant departure from the long-held belief that the use of deadly force should not be used to protect mere property"); *see also* Note, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1212–13 (1959) (commenting on the draft Model Penal Code's injunction against using deadly force to protect property).

[33] A Missouri legislator recently introduced legislation that appears to eliminate the defendant's burden to raise self-defense and instead creates a presumption that a person who used force in self-defense reasonably "believed such force was necessary to defend himself or herself or a third person from what he or she believed to be the use or imminent use of unlawful force by another person." S. 666, 101st Gen. Assemb. (Mo. 2022). The bill faced backlash from law enforcement, who dubbed it the "Make Murder Legal Act." Andrew Sullender & Galen Bacharier, *Springfield Police Chief Pans Burlison's Self-Defense Bill, Labels It "Make Murder Legal Act*,*"* YAHOO! NEWS (Feb. 8, 2022), https://news.yahoo.com/springfield-chief-pans-burlisons-self-160805554.html [https://perma.cc/FT2A-WG7G]. One version of the bill died in committee, but another is still under consideration at the time of this writing. Zach Cunning, *Missouri Bill Labeled "A License to Murder" Dies in Committee*, HEARTLAND SIGNAL (Feb. 11, 2022), https://heartlandsignal.com/2022/02/11/missouri-bill-labeled-a-license-to-murder-dies-in-committee [https://perma.cc/6FDU-ALQL].

of 2020, Florida Governor Ron DeSantis proposed expanding the lawfulness of private deadly force to include circumstances of looting, criminal mischief, or arson that disrupt a business operation.[34] It is well settled that a state cannot constitutionally impose the death penalty for property crimes like looting or burglary,[35] but some self-defense statutes and proposed legislation authorize private parties to do just that. Nor can state officials, under *Tennessee v. Garner*, use deadly force to arrest a nonviolent fleeing felon,[36] but some state courts have upheld just this sort of conduct when private actors are trying to make a citizen's arrest.[37]

Not only might a statutory regime broadly delegating rights to violence be constitutionally problematic on its own terms, it might also transform the private actors enacting violence under its authority into state actors for constitutional purposes.[38] In *Shelley v. Kraemer*,[39] the Supreme Court confronted private action — there, restrictive racial covenants — that all parties agreed could "not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance."[40] And although the racially discriminatory private agreement itself was beyond the Constitution's reach, its enforcement by a state judicial officer was sufficient to trigger state action.[41] Indeed, an

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[34] Erik Ortiz, *"Stand Your Ground" in Florida Could Be Expanded Under DeSantis' "Anti-mob" Proposal*, NBC NEWS (Nov. 12, 2020, 6:31 PM), https://www.nbcnews.com/news/us-news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555 [https://perma.cc/594F-HW3L].

[35] In fact, the Supreme Court has held that a state cannot even impose the death penalty for rape. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

[36] Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[37] *E.g.*, State v. Cooney, 463 S.E.2d 597, 599 (S.C. 1995) ("[T]he holding in *Garner* does not apply to seizures by private persons and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon."); *see also* Watts, *supra* note 6, at 1238–39 ("In [some] states, a private person may shoot and kill a common thief to prevent his escape even though a police officer is constitutionally prohibited from using deadly force under the same circumstances."). *See generally* Kimberly Kessler Ferzan, Response, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller,* Pointing Guns*, 99 Texas L. Rev. 1173 (2021)*, 100 TEX. L. REV. ONLINE 1 (2021).

[38] *See* Hubbard, *supra* note 6, at 635 (arguing that a private actor exercising the authority under a citizen's arrest law "is acting as an agent of the state"); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1126 (2008) (observing that authority for individuals in self-defense or citizen's arrest situations operates "only insofar as [individuals] stand in the shoes of public officials to whom this authority belongs"). *But see* 5 AM. JUR. 2D *Arrest* § 86 (2022) ("An arrest by a private citizen is not a government action, for Fourth Amendment purposes, where the citizen is not acting pursuant to instructions from the police.").

[39] 334 U.S. 1 (1948).

[40] *Id.* at 11.

[41] *Id.* at 19; *see also id.* at 20 ("State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.").

entire category of state action doctrine presupposes a set of "public function[s]" that are "traditionally associated with sovereignty."[42] Parties that engage in these functions become public agents, no matter their ostensible "private" attributes.[43] Most legally authorized "violence work" appears to fit that bill,[44] even if not all of it would qualify under a narrow reading of the Court's current state action doctrine.[45]

Finally, a state of anarchy unleashed by a state's repeal of its murder laws or radically overbroad permission for violence could also violate the Republican Form of Government Clause[46] or even the Thirteenth Amendment.[47] Immunization of private violence dredges up infamous cases like *State v. Mann*,[48] which held that no legal process could protect an enslaved person from physical violence imposed by her owner.[49] Certainly a state could not single out a particular individual as outside the protection of the law and subject to the violence of any private person — that's outlawry,[50] and it's a due process and equal protection violation.[51]

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42 Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974).

43 *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) ("[C]onfinement of wrongdoers — though sometimes delegated to private entities — is a fundamentally governmental function."); *see also* Watts, *supra* note 6, at 1259.

44 *See* MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 12 (2018); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 172 n. 8 (1978) (Stevens, J., dissenting) ("[I]t is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action.").

45 *See* Sklansky, *supra* note 26, at 1273 ("The public function doctrine has been hemmed in so tightly that almost nothing qualifies as a public function. As we have seen, the doctrine is almost certainly inapplicable to crime fighting and peacekeeping, notwithstanding the common view of the police officer as the paradigmatic state actor."); Watts, *supra* note 6, at 1261 (recognizing this narrowness).

46 U.S. CONST. art. IV, § 4; *cf.* Hoxie Sch. Dist. No. 46 v. Brewer, 137 F. Supp. 364, 366–67 (E.D. Ark. 1956), *aff'd*, 238 F.2d 91 (8th Cir. 1956) (Republican Form of Government Clause implicated where defendants sought to "compel a rescission of the order of desegregation by intimidation and force"); Nourse, *supra* note 30, at 1696 (arguing that major criminal law defenses implicate theories of the state and governance, "incorporat[ing] elements that demand deference to majoritarian norms and aim to prevent private punishment").

47 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

48 13 N.C. (2 Dev.) 263 (1829).

49 *Id.* at 267 ("The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped . . . .").

50 Deborah A. Rosen, *Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric*, 58 AM. J. LEGAL HIST. 126, 127 (2018) (explaining that "[o]utlawry was an old practice by which an accused felon who refused to submit to legal process was declared to be outside the protection of law" and could be killed by any private party); 4 WILLIAM BLACKSTONE, COMMENTARIES *315 ("[The outlaw] was to be dealt with as in a state of nature, when every one that should find him might slay him . . . .").

51 Autry v. Mitchell, 420 F. Supp. 967, 970–71 (E.D.N.C. 1976).

CONCLUSION

Are there any limits to a government's ability to authorize or immunize the violence of private citizens? If so, what are they and from what source do they come? The increase in recent scholarly and judicial debate over government delegations and the rapidly expanding state statutes immunizing private violence make these questions newly urgent.[52] Our strong intuition is that there are limits to delegated violence, sourced in constitutional law, but this Essay cannot do more than lay out the issues for the substance of a longer paper. As well as the questions identified throughout this Essay, the issues include whether delegation, privatization, state action, or another doctrine is the best frame within which to assess the concern; how the analysis changes based on whether the violence authorization emanates from the state or federal government;[53] what precise kind of power is transferred in these statutes and the impact (if any) that transfer has;[54] and what legal or political accountability is optimal for these authorizations.[55] In that longer project, we take on these questions and build on our intuition that some forms of legitimate violence are inherently nondelegable, so their exercise is, at best, an act of public agency and, at worst, a form of "new outlawry" — alien to principles of equal protection and due process.[56]

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[52] Newly urgent, but by no means new. *See* Carl Schurz, *Report on the Condition of the South*, *reprinted in* 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 326 (Frederic Bancroft ed. 1913) (remarking on some laws in the South that "invest[] every white man with the power and authority of a police officer as against every black man"); *see also* LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 416 (1979) (reporting on regions where "patrols of white men meted out summary justice to blacks who were not under contract to an employer or who were found to be in violation of a contract").

[53] *See* Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701, 707 (5th Cir. 2017) (noting that the public delegation doctrine "is rooted in federal separation-of-powers concerns that cannot dictate how state governments allocate their powers" while the private delegation doctrine is rooted in the Fourteenth Amendment's Due Process Clause and thus does apply to states); DONNELLY, *supra* note 3, at 117–18 (noting the two constitutional sources for limits on private delegation).

[54] *See* Dina Mishra, *An Executive-Power Non-delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1516 (2015) (developing a theory of nondelegation for Article II's executive power); Craig & cummings, *supra* note 4, at 289 (arguing that distinguishing between powers is unnecessary when considering a case of private delegation because "a private party simply cannot exercise either legislative *or* executive power").

[55] *Compare* Metzger, *supra* note 22, at 1456 (arguing that the "key issue" is "whether grants of government power to private entities are adequately structured to preserve constitutional accountability"), *with* Brown, *supra* note 28, at 535 (focusing on whether "sufficient mechanisms for ensuring democratic accountability exist"). *See also* DONNELLY, *supra* note 3, at 98 (discussing private delegation in connection with various forms of accountability: political, legal, financial, and other).

[56] *See generally* Jacob D. Charles & Darrell A.H. Miller, The New Outlawry (working paper) (on file with the Harvard Law School Library).