Mass Violence and the Second Amendment: Analogizing Historical Prohibitions on Armed Groups to Modern Prohibitions on Assault Weapons and Large-Capacity Magazines

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MASS VIOLENCE AND THE SECOND AMENDMENT: ANALOGIZING HISTORICAL PROHIBITIONS ON ARMED GROUPS TO MODERN PROHIBITIONS ON ASSAULT WEAPONS AND LARGE-CAPACITY MAGAZINES

*Mark Anthony Frassetto**

In the two years since the Supreme Court decided New York State Rifle & Pistol Ass'n v. Bruen*, one of the most high-profile ongoing areas of Second Amendment litigation has been cases challenging the constitutionality of prohibitions on assault weapons and large-capacity magazines. Challenges to these laws are especially significant because assault weapons and large-capacity magazines are almost always used in the highest fatality mass shootings. Because* Bruen *mandated a history-focused analysis in Second Amendment cases, much of this litigation has focused on whether historical prohibitions on weapons like bowie knives or billy clubs and regulations on practices such as gunpowder storage and the concealed carry of firearms provide sufficient historical analogues to justify the modern prohibitions. This Article offers a new historical analogue for modern prohibitions on assault weapons and large-capacity magazines—prohibitions on armed groups.*

How mass killings have historically occurred differs from the present day. While today most killings of four or more people are committed by a single person with a firearm, before the twentieth century, that was often not the case. Instead, mass killings tended to be the result of violence perpetrated by armed groups. In response to group mass violence, both the common law and many state statutes prohibited armed groups, sometimes directly declaring them illegal and other times declaring armed groups unlawful assemblies or riots. Later, states would also prohibit private militia organizations, armed assemblies, and armed marches to limit the ability to assemble a force capable of causing mass violence. Today's prohibitions on large-capacity magazines and assault weapons are aimed at the same principle: prohibiting the means of committing mass violence.

In New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court commanded the lower courts to look at whether historical regulations "impose[d] a comparable burden on the right of armed self-defense and whether that burden is comparably justified," and in* United States v. Rahimi*, the Supreme Court said that courts should look to whether a "challenged regulation is consistent with the principles that underpin our regulatory tradition." Historical restrictions on armed groups imposed a similar burden on armed self-defense as modern prohibitions on large-capacity magazines and assault weapons in that they regulated the amount of force a person (or group of people) could assemble. Similarly, like modern regulations on large-capacity magazines, prohibitions on armed groups were intended to prevent the same kinds of mass casualty events. While prohibitions on semi-automatic firearms and magazine capacity, unsurprisingly, did not exist during the Founding Era or the Early Republic, given the gun technology at the time, similar concerns about mass violence did lead to regulations that imposed similar burdens on armed self-defense. These regulations provide important historical analogues justifying modern restrictions on weapon lethality.*

INTRODUCTION

Mass killings have always been viewed as uniquely horrific. Mass shootings grab headlines and national attention far more than the much larger number of

* Deputy Director, Second Amendment History and Scholarship, Everytown Law. I would like to thank Professor Brian Delay, Freya Jamison, and my wife for their helpful comments on this article. I would also like to thank the staff at the *Alabama Law Review* for their excellent work editing this article. The views expressed in this article do not necessarily represent the views of Everytown for Gun Safety.

Americans killed as part of the daily toll of gun violence.[1] While most interpersonal homicides are, and have historically been, a single person killing a single other person, fears about large numbers of people being killed or injured or large amounts of property being damaged have animated more aggressive legal responses than ordinary homicides.[2]

How mass killings have historically occurred differs from the present day. While today most killings of four or more people are committed by a single person with a firearm, before the twentieth century, an individual person killing a large number of people was quite rare.[3] Instead, mass killings tended to be the result of violence perpetrated by armed groups.[4] Violence perpetrated by armed rioters, lynch mobs, private and quasi-private militias, and private police forces, as well as the reciprocal violence from police, the militia, and soldiers, was the primary cause of mass killings during the eighteenth and nineteenth centuries.[5] In response to group mass violence, both the common law and many state statutes prohibited armed groups—sometimes directly declaring them illegal and other times declaring armed groups to be unlawful assemblies or riots subject to punishment or potentially lethal suppression by government forces.[6] Later, states—in an effort to limit the ability to assemble a force capable of causing mass violence—also prohibited private militia organizations, armed assemblies, and armed marches.[7]

These laws were intended to preempt mass violence by making the means—armed groups—illegal even absent any turn to violence.[8] Today's prohibitions on large-capacity magazines and assault weapons are aimed at the same principle: prohibiting the means of committing mass violence.[9]

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court commanded the lower courts to look at whether historical regulations "impose[d] a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[10] Historical restrictions on armed groups imposed a burden on armed self-defense similar to the burden imposed

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1. *See generally Study: Media's Reporting on Gun Violence Does Not Reflect Reality*, PENN MED. NEWS (Oct. 20, 2020), https://www.pennmedicine.org/news/news-releases/2020/october/study-medias-reporting-on-gun-violence-does-not-reflect-reality [https://perma.cc/4Z6E-9DCA].

2. *See, e.g.*, *New Zealand Tightens Gun Laws Further in Response to Mass Shooting,* REUTERS (June 18, 2020, 1:28 AM), https://www.reuters.com/article/us-newzealand-shooting/new-zealand-tightens-gun-laws-further-in-response-to-mass-shooting-idUSKBN23P0TE [https://perma.cc/MVR5-VB4G].

3. *See generally Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, https://everytownresearch.org/maps/mass-shootings-in-america/ [https://perma.cc/9T7V-62AW].

4. *See infra* Section II.D.

5. *See infra* Section II.D.

6. *See infra* Sections II.A–C.

7. *See infra* Sections II.A–C.

8. *See infra* Sections II.B–C.

9. *See infra* Part III.

10. 597 U.S. 1, 29 (2022); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) ("Why and how the regulation burdens the right are central to this inquiry.").

by modern prohibitions on large-capacity magazines and assault weapons in that they regulated the amount of force a person (or group of people) could assemble.[11] Like modern regulations on large-capacity magazines and assault weapons, prohibitions on armed groups were intended to prevent the same kinds of mass-casualty events.[12] While prohibitions on semi-automatic firearms and magazine capacity, unsurprisingly, did not exist during the Founding Era or the Early Republic, given the gun technology at the time, similar concerns about mass violence led to regulations that imposed similar burdens on armed self-defense.[13] These regulations provide important historical analogues justifying modern restrictions on weapon lethality.[14]

Part I of this Article will discuss the text-and-history test established in *Bruen* and its subsequent clarification in *United States v. Rahimi*. Part II will discuss laws regulating armed groups and the history of mass violence committed by them. Part III will conclude with a discussion of the analogy between restrictions on armed groups and modern regulations on large-capacity magazines.

I. THE *BRUEN* AND *RAHIMI* FRAMEWORK

In *Bruen*, the Supreme Court upended the Second Amendment framework that had uniformly been adopted by the lower federal courts over the fourteen years since *District of Columbia v. Heller*.[15] Under the pre-*Bruen* two-part framework, courts first looked to whether a challenged regulation fell within the scope of the Second Amendment as defined by an analysis of the right's text, history, and tradition.[16] If a regulation fell within the historical scope of the Second Amendment, a court would then apply one of the tiers of constitutional scrutiny—either intermediate or strict—depending on how significantly the regulation burdened the right.[17] Under this framework, the lower courts upheld a wide variety of gun regulations while striking down a few outlier laws.[18]

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11. *See infra* Part III.

12. *See infra* Part III.

13. *See infra* Part III.

14. *See infra* Part III.

15. *See Bruen*, 597 U.S. at 17.

16. *See* United States v. Marzzarella, 614 F.3d 85, 89–91 (3d Cir. 2010); *see also* NRA v. ATF, 700 F.3d 185, 194–95 (5th Cir. 2012), *abrogated by Bruen*, 597 U.S. at 1. For an excellent explanation of the two-step framework and why it makes sense, see generally Brief for Second Amendment Law Professors as Amicus Curiae in Support of Neither Party, N.Y. State Rifle & Pistol Ass'n v. City of New York, 590 U.S. 336 (2020) (No. 18-280).

17. *See Marzzarella*, 614 F.3d at 89; *see also* NRA v. ATF, 700 F.3d at 195.

18. *See generally Second Amendment Courtwatch*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/litigation/second-amendment-courtwatch/ [https://perma.cc/P2RF-HUDF].

The Supreme Court adopted a new framework in *Bruen* focused on the Second Amendment's text and history. Under this framework, courts first look at whether "the Second Amendment's plain text covers an individual's conduct."[19] This step generally tracks with Justice Scalia's textual analysis of the Second Amendment in *Heller*, but courts can consider other materials as well.[20] In *Heller*, the Court summarized the Second Amendment's text as protecting "the individual right to possess and carry weapons in case of confrontation."[21]

If a challenged regulation falls within the plain text of the Second Amendment, courts then consider whether the challenged regulation is "consistent with the Nation's historical tradition of firearm regulation."[22] At this step, a court analyzes whether a historical regulation is "relevantly similar" to the challenged modern gun regulation.[23] This analysis includes "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[24] In other words, the court considers "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[25] The modern regulation need not be "a dead ringer for historical precursors" but must be similar enough that courts do not "uphold every modern law that remotely resembles a historical analogue."[26] Courts may also use the provisions identified as presumptively lawful in *Heller* as analogues for modern regulations without independently showing a historical tradition of similar regulations during the relevant historical period.[27]

Two years after *Bruen*, the Court revisited its framework in *United States v. Rahimi*,[28] a case challenging the federal law that bars firearm possession by persons subject to certain domestic-violence restraining orders.[29] In an 8-1 decision, authored by Chief Justice John Roberts, the Court reversed a Fifth Circuit panel decision that struck down the law on the basis that similar restrictions did not exist during the eighteenth or nineteenth centuries.[30]

The Supreme Court rejected this approach, chiding the Fifth Circuit and other courts for having "misunderstood the methodology of our recent Second Amendment cases."[31] The Court clarified that "the Second Amendment permits more than just those regulations identical to ones that could be found

19. *Bruen*, 597 U.S. at 17.
20. *See* District of Columbia v. Heller, 554 U.S. 570, 579–95 (2008).
21. *Id.* at 592.
22. *Bruen*, 597 U.S. at 24.
23. *Id.* at 28–29.
24. *Id.* at 29.
25. *Id.*
26. *Id.* at 30.
27. *See id.* at 29–31.
28. 144 S. Ct. 1889 (2024).
29. *See id.* at 1896; *see also* 18 U.S.C. § 922(g)(8).
30. *Rahimi*, 144 S. Ct. at 1889, 1902–03.
31. *Id.* at 1897.

in 1791"[32] and declared that history should be analyzed at a higher level of generality, looking to "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[33] This approach asks whether the law applies "the balance struck by the founding generation" between gun rights and public safety "to modern circumstances."[34] The Court reaffirmed that "[w]hy and how the regulation burdens the right are central to this inquiry," stating that "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations."[35] The Court then explained that even "when a challenged regulation does not precisely match its historical precursors," it can still be constitutional as long as it "comport[s] with the principles underlying the Second Amendment."[36]

Applying this approach, the Court looked to historical laws requiring those who posed a threat to others to post bonds and looked to laws prohibiting carrying arms in a terrifying manner as analogous to the modern prohibition.[37] After conducting the clarified *Bruen* historical analysis, the Court said, "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[38] Under this tradition, the Court had little difficulty upholding the prohibition on firearms possession by those subject to domestic-violence restraining orders.[39] The Court also clarified that in facial Second Amendment challenges, a law should be found unconstitutional only when a challenger "establish[es] that no set of circumstances exists under which the Act would be valid."[40]

The historical regulations discussed in this Article "impose[d] a comparable burden on the right of armed self-defense" and are "comparably justified" to modern prohibitions on assault weapons and large-capacity magazines.[41] Laws prohibiting armed groups—in an effort to reduce or eliminate mass violence—effectively kept individuals from assembling the means to commit such violence.[42] Modern gun laws impose similar burdens on Second Amendment rights (prohibiting individuals from using large-capacity magazines and assault

32. *Id.* at 1897–98. The Court noted that "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *Id.* at 1898.

33. *Id.* at 1898.

34. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 n.7 (2022)).

35. *Id.*

36. *Id.*

37. *See id.* at 1899–1901. "Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901.

38. *Id.* at 1896.

39. *See id.* at 1896–97.

40. *Id.* at 1898 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

41. *Id.* at 29.

42. *See infra* Section II.D.

weapons capable of causing mass violence) and are aimed at addressing the same concerns about reducing or eliminating mass violence.[43] Under the *Bruen* framework, especially as clarified in *Rahimi*, these historical laws provide historical analogues that are relevant and in many cases will be decisive in deciding Second Amendment cases.[44]

II. Restrictions on Armed Groups and the History of Mass Violence

Mass violence is not a new phenomenon in English or American history. What has changed is how that violence occurs. While mass killings in the United States today are primarily the result of individuals with firearms killing multiple people, this was not the case historically.[45] Rather, large-scale violence was almost exclusively a group activity, and mass killings were almost always the result of armed groups.[46] In both England and the United States, these threats of mass violence were addressed by prohibitions on armed groups, which allowed for participants to be prosecuted for unlawful assembly, riot, or being part of an unauthorized militia.[47] Restrictions on armed groups date back to the early days of English common law, continued through the Founding Era, were endorsed by the Supreme Court in the late nineteenth century, and exist in some form in most states to the present day.[48] These laws, like modern prohibitions on assault weapons and large-capacity magazines, sought to prohibit the means of committing mass violence, and they provide a useful analogue when considering the constitutionality of modern assault-weapon and large-capacity-magazine laws.

A. Prohibitions on Armed Groups in England

Under English common law, public gatherings were generally lawful, but several classes of conduct could convert a lawful assembly into an unlawful assembly or riot.[49] Late sixteenth-century English treatise writer William Lambarde explained that, in order for a gathering to be unlawful, it must be shown "that their being together do[es] breed[] some apparent disturbance of

43. *See infra* Part III.

44. *See* United States v. Herriott, No. 23-CR-37-PPS-JEM, 2024 WL 3103275, at *2 n.1 (N.D. Ind. June 24, 2024) ("If anything, *Rahimi* can be seen as a softening of the approach to the Second Amendment taken in *Bruen*. How else does one explain that the author of *Bruen* is the sole dissenter in *Rahimi*?").

45. *See generally Mass Shootings in the United States*, *supra* note 3; *see also* Maria Esther Hammack, *A Brief History of Mass Shootings*, BEHIND THE TOWER, http://behindthetower.org/a-brief-history-of-mass-shootings [https://perma.cc/3KGK-QJF5].

46. *See infra* Section II.B.

47. *See infra* Section II.D.

48. *See infra* Section II.D.

49. *See* Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 253–54 & n.78 (2021).

the Peace."[50] This conduct included not only overt acts such as "significance of speech, . . . turbulent gesture, or actual and express violence" but also the passive "shewe of Armor."[51] Even before the conduct led to actual violence, it was regulated because it caused "the peaceable sort of men be unquieted and feared by the fact" and could cause the less peaceable to be "emboldened by the example."[52] Lambarde's definition of riot was apparently uncontroversial enough that it was adopted by seventeenth-century dictionary writers.[53] Similarly, early seventeenth-century treatise writer Fernando Pulton described a "rout" under the common law as "where three persons or above do[] assemble themselves, . . . and do[] shew [sic] by Armour, Gesture, or Speech, that they mean[] to do[] any violence, or to terrif[y] or fear[] any of the Kings people."[54]

These treatise writers' views were backed by the English courts. In the 1616 case of *Howard v. Bell*, the Court of King's Bench upheld substantial fines for a group of protesters for "assembling the tenants to the number of 200 in an open field, . . . weaponed with swords and daggers, abiding three hours together, and yet nothing was proved done there by any of the defendants, but conference concerning the defence of their title."[55] In *Semayne's Case*, which is most famous for the idea that "a man's house is his castle," Lord Chief Justice Edward Coke said that while it was perfectly legal for a man to "assemble his friends and neighbours to defend his house against violence," it was a crime to "assemble them to go with him to the market, or elsewhere for his safeguard against violence."[56]

William Shepard's 1652 treatise, following roughly the same line as Lord Chief Justice Coke's opinion in *Semayne's Case*, said: "And albeit one be threatened, and in danger of his life, and to defend himself[] he gathers a force, and they ride about armed; this is a Riot . . . ."[57] Similarly, early eighteenth-

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50. WILLIAM LAMBARDE, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF THE PEACE, IN FOURE BOOKES 181 (London, Thomas Wight & Bonham Norton, 4th ed. 1599) (1579). This section will draw heavily from Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61 (2018).

51. LAMBARDE, *supra* note 50, at 181. At the time, the term "armor" meant both offensive weapons and the more modern definition of the term. *See* Frassetto, *supra* note 50, at 79 n.121.

52. *Id.* at 77 (quoting LAMBARDE, *supra* note 50).

53. *See, e.g.*, JOHN COWELL, THE INTERPRETER: OR BOOKE CONTAINING THE SIGNIFICATION OF WORDS (Cambridge, Iohn Legate 1607); *see also* THOMAS BLOUNT, NOMO-LEXIKON: A LAW-DICTIONARY, INTERPRETING SUCH DIFFICULT AND OBSCURE WORDS AND TERMS, AS ARE FOUND EITHER IN OUR COMMON OR STATUTE, ANCIENT OR MODERN LAWES § 13 (London, Tho. Newcomb 1670) (stating that riot, rout, and unlawful assembly all require "that three persons at the least be gathered together; . . . [and] being together, do disturb the Peace, either by words, shew [sic] of arms, turbulent gesture, or actual violence").

54. FERDINANDO PULTON, A TREATISE DECLARING WHICH BE THE GREAT AND GENERAL OFFENCES OF THE REALME 25 (P.R. Glazebrook ed., Pro. Books Ltd. 1973) (1609).

55. Howard v. Bell (1616) 80 Eng. Rep. 241, 242; Hobart 91, 92.

56. Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91a, 91b (footnotes omitted).

57. WILLIAM SHEPHERD, THE WHOLE OFFICE OF THE COUNTRY JUSTICE OF THE PEACE 55 (London, W. Lee, D. Pakeman & G. Bedell 1652).

century treatise writer John Bond stated: "No person may go in Company to the Church, Fair or Market, [etc.] with any unusual Weapon to the Terror of the People, though he hath no intent to fight, . . . for this will be a Riot by the manner of going so."[58] Joseph Keble's 1683 treatise agreed with earlier treatise writers that "Shew [sic] of Armor" was sufficient to convert a lawful gathering to a riot and established that:

> [T]he manner of the doing of a lawful thing may make it unlawful, as if many in one Company Riding or going to the Sessions, Fair, Market, or Church itself, will ride or go Armed to the terror of the People; for although it be not only lawful, but meet and necessary also to go to the Church and Sessions, yet to go in such shew [sic], it is altogether needless, disordered, and against the Law.[59]

This same understanding remained in effect through the Glorious Revolution and the early eighteenth century. An example from Ireland illustrates the ongoing vitality of the standard. In the years preceding the Glorious Revolution, Irish Protestants in Borrisokane became concerned about attacks by the area's Catholic majority.[60] Area Protestants armed themselves and gathered in the town square to defend themselves against an attack.[61] No attack came.[62] The Protestants were then prosecuted for unlawful assembly for gathering armed in the town center.[63] Sixty of the Irish Protestants were indicted for the unlawful assembly, and ten were convicted.[64] Afterward, the government in London wrote a letter to the presiding judges concerned about reports that the judges had instructed the jury that "any number of people armed as they pleased might meet . . . provided they did no unlawful act."[65] One of the judges responded that both riot and unlawful assembly required an intent to do an unlawful act, but the other judge made clear that the judges had not extended this concept to armed groups, saying, "The very appearing with arms is an offense."[66]

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58. *See also* JOHN BOND, A COMPLEAT GUIDE FOR JUSTICES OF THE PEACE 223 (London, Richard & Edward Atkins, 3d ed. 1707) (1685) (citation omitted).

59. JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 645 (London, W. Rawlins, S. Roycroft, and H. Sawbridge 1683) (citation omitted); *see also* THOMAS ELLWOOD, A DISCOURSE CONCERNING RIOTS 9 (London, T. Howkins 1683) (compiling sources adopting the "Shew [sic] of Armour" view).

60. Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* THE RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 23, 31 (Jennifer Tucker et al. eds., 2019).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (quoting 7 CALENDAR OF THE MANUSCRIPTS OF THE MARQUESS OF ORMONDE, K.P. 371 (Hist. Manuscripts Comm'rs ed., 1912) [hereinafter ORMONDE MANUSCRIPTS]).

66. *Id.* (quoting ORMONDE MANUSCRIPTS, *supra* note 65, at 387).

After the Glorious Revolution, English courts continued to find armed groups presumptively illegal even absent actual bad conduct. For example, in *Queen v. Solely*, an indictment was brought against a mob that attacked a guildhall to disrupt an election.[67] In that case, Lord Chief Justice John Holt discussed the prohibition on armed groups, finding that "a number of men assemble[d] with arms" was "*in terrorem populi*, though no act is done."[68] Lord Chief Justice Holt made clear that any armed group was illegal, saying "[i]f *three* come out of an ale-house and go armed, it is a riot."[69] The Lord Chief Justice further distinguished between going armed singly, which was sometimes legal, and armed groups, which were always prohibited: "Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence."[70]

Influential treatise writer William Hawkins took a somewhat less punitive view in his *Pleas of the Crown*, stating that "riding together on the road with unusual weapons, . . . without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly."[71] Hawkins also said:

> [I]n every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew [sic] of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*.[72]

In 1714, the common law offense of riot was partially codified in the famous Riot Act.[73] Under the Riot Act, if a group of twelve or more people were "unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public[] peace," a public official could proclaim the gathering a riot and command the rioters to return to their homes within the hour.[74] Failure to comply with the Act was a felony punishable by death without the benefit of clergy.[75] A death sentence was not an idle threat. The Old Bailey Sessions Papers, a compendium of case reports from the London criminal

67. R v. Solely (1707) 88 Eng. Rep. 935, 935–36; 11 Mod. 115, 115–16.

68. *Id.* at 936–37; 11 Mod. at 116 (footnote omitted).

69. *Id.* at 937; 11 Mod. at 116 (footnote omitted).

70. *Id.*; 11 Mod. at 116–17 (footnote omitted).

71. 1 WILLIAM HAWKINS & JOHN CURWOOD, A TREATISE OF THE PLEAS OF THE CROWN 515 (8th ed. 1824) (1716); *see also* MICHAEL DALTON, THE COUNTRY JUSTICE 313 (London, Henry Lintot 1746) (identifying "threatning Speeches, turbulent Gesture, Shew [sic] of Armour, or actual Force or Violence" as conduct sufficient to convert a lawful gathering into an unlawful assembly or riot).

72. 1 HAWKINS & CURWOOD, *supra* note 71 (citations omitted).

73. Riot Act 1714, 1 Geo. c. 5 (Gr. Brit.).

74. *Id.* § I.

75. *Id.*

courts, list forty-four riot cases between 1715 and 1800 where a death sentence was given, including several examples where multiple rioters were executed.[76]

After 1723, some prosecutions of armed groups began to shift from the common law and statutory crimes of riot and unlawful assembly to the more punitive Black Acts, which prohibited armed and disguised groups.[77] Passage of the Black Acts initiated an extraordinarily punitive era of English law during which many very minor crimes carried the death penalty.[78] Under the Black Acts, participants in armed groups—especially if disguised or engaged in hunting—were subject to death sentences after cursory trials, even when not engaged in especially serious conduct.[79]

Armed groups remained unlawful assemblies or riots under British law into the nineteenth century.[80] This is exemplified by the disputes over prices at the Covent Garden Theater that broke out in 1809.[81] When the theater increased prices, patrons of the theater—known as the OPs for "old price"—rebelled, engaging in a months-long campaign of disrupting performances in an effort to force a return to the previous prices.[82] The legality of the OPs' conduct was

76. *See generally* THE PROCEEDINGS OF THE OLD BAILEY, https://www.oldbaileyonline.org/ [https://perma.cc/Y9YS-75UQ]; *see, e.g.*, *Trial of John Nash*, THE PROCEEDINGS OF THE OLD BAILEY, https://www.oldbaileyonline.org/record/t17161010-1 [https://perma.cc/JK2A-7ZDM] (convicting and sentencing Nash to death along with five of his fellow rioters).

77. Black Act 1723, § 9 Geo. c. 22, § I (Gr. Brit.) ("That if any person or persons, . . . being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed [sic] with any wall, pale, or other fence, wherein any deer have been or shall be usually kept, . . . or in any high road, open heath, common or down, or shall unlawfully and wilfully [sic] hunt, wound, kill, destroy, or steal any red or fallow deer, . . . every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.").

78. *See* Cal Winslow, *Sussex Smugglers*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 119, 134 (Douglas Hay et al. eds., 1975); *see also* Douglas Hay, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE, *supra*, at 17, 18 ("The most recent account suggests that the number of capital statutes grew from about 50 to over 200 between the years 1688 and 1820. Almost all of them concerned offences against property.").

79. *See, e.g.*, R v. Baylis & Reynolds (1736) 95 Eng. Rep. 188, 188; Cas. T. Hard 291, 292 (sentencing to death under the Black Act rioters disguised and armed with axes that attempted to pull down turnpikes).

80. RICHARD SARGENT, PRINCIPLES OF THE LAWS OF ENGLAND IN THE VARIOUS DEPARTMENTS 379 (London, William Crofts 1839) ("Is it necessary, to constitute the crime, that personal violence be committed? No; being armed, using threatening speeches, turbulent gestures, or the like, suffices." (emphasis omitted)); 1 JOSEPH GABBETT, A TREATISE ON THE CRIMINAL LAW 114 (Dublin, John Cumming 1835) (using the Hawkins language, "in every riot there must be some such circumstances either of actual force or violence, or at least some apparent tendency thereto, as are naturally apt to strike terror into the people, as the show of armour, threatening speeches, or turbulent gestures, (for every such offence must be laid to be done *in terrorem populi*)"); ARCHER RYLAND, THE CROWN CIRCUIT COMPANION; IN WHICH IS INCORPORATED THE CROWN CIRCUIT ASSISTANT 435 (London, S. Sweet et al., 10th ed. 1836) ("It is not necessary, to constitute this offence, that personal violence should have been committed; being armed, using threatening language, turbulent gestures, or the like, is sufficient . . . ." (footnotes omitted)); A REPORT OF THE CHARGE OF THE LORD CHIEF JUSTICE IN THE COURT OF KING'S BENCH UPON THE TRIAL OF JAMES FORBES AND OTHERS FOR A CONSPIRACY 10–11 (Dublin, Richard Milliken 1823).

81. Jacqueline Mulhallen, *The Old Price Riots of 1809: Theatre, Class and Popular Protest*, COUNTERFIRE (Nov. 12, 2012), https://www.counterfire.org/article/the-old-price-riots-of-1809-theatre-class-and-popular-protest/ [https://perma.cc/P77C-TQ2Z].

82. *Id.*

debated in the local press.[83] An anonymous lawyer, writing to the Morning Chronicle, stated, "[S]o long as the audience refrain from all acts of violence and threats, and confine themselves to hissing, and other peaceable demonstrations of disapprobation, . . . the magistrates and constables cannot interfere."[84] However, even advocates for a narrower reading of prohibitions on riots and unlawful assemblies understood that a "shew [sic] of armour" was sufficient to convert the otherwise lawful conduct into an unlawful assembly.[85] The anonymous lawyer advised protestors who were arrested to "bring an action for false imprisonment,"[86] and one protestor did, resulting in the case of *Clifford v. Brandon*.[87] The *Clifford* court noted that the protestors' conduct—"com[ing] to the theatre with a predetermined purpose of interrupting the performance [and] for this purpose mak[ing] a great noise and disturbance"—constituted a riot,[88] and the court made clear that such conduct constituted a riot even without the crowd "offering personal violence to any individual, or doing any injury to the house."[89] The jury ultimately found in favor of the plaintiff, Clifford, with some jurors reasoning that the riot was over by the time the defendant arrested him, and others saying that his wearing OP letters into the theatre did not equate to the instigation of a riot.[90]

B. *Prohibitions on Armed Groups in the American Colonies and United States*

The American Colonies and United States followed English common law by treating armed groups as riots or unlawful assemblies. One early American treatise, the first American edition of William Russell's *Treatise on Crimes and Misdemeanors*, stated: "If a number of men assemble with arms, in terrorem populi, though *no act is done*, it is a riot."[91] This was because armed groups had "an apparent tendency [to force and violence]" and were "naturally apt to strike a terror into the people."[92] The first American edition of John Frederick Archbold's *Summary of the Law Relative to Pleading and Evidence in Criminal Cases*

83. *Id.*

84. Letter from John Doe to the Editor of the Morning Chronicle (Sept. 21, 1809), *in* 2 THE COVENT GARDEN JOURNAL 408, 410 (London, John Joseph Stockdale 1810).

85. *Id.* at 409.

86. *Id.* at 411.

87. (1810) 170 Eng. Rep. 1183; 2 Camp. 358.

88. *Id.*

89. *Id.*

90. *Id.* at 1188; 2 Camp. at 372. A decade later, in a lawsuit following the Peterloo Massacre, which was an attack by British troops on workers rallying for expanded voting rights, Justice Holroyd instructed the jury that "if they come armed, or meet in such a way as to overawe and terrify other persons, that, of itself, may, perhaps, under such circumstances, be an unlawful assembly." Redford v. Birley (1821) 171 Eng. Rep. 773, 783; 3 Stark. 77, 102.

91. 1 WILLIAM RUSSELL & DANIEL DAVIS, A TREATISE ON CRIMES AND MISDEMEANORS 351 (Boston, Wells and Lily 1824).

92. *Id.* at 352.

stated that a riot required "circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; such as being armed, using threatening speeches, turbulent gestures, or the like."[93] Similarly, in 1836, in the first American edition of *The Law-Dictionary Explaining the Rise, Progress, and Present State of the British Law*, Thomas Tomlins and Thomas Granger explained that a riot occurred "if a number of men assemble with arms, *in terrorem populi*, though no act is done," and provided an example: "three come out of an alehouse and go armed."[94] Tomlins and Granger further clarified that only conduct with an "apparent tendency" towards violence was required, and it was "not necessary . . . that personal violence . . . be[] committed."[95]

J.A.G. Davis's *Treatise on Criminal Law* said that "in every riot there must be some such circumstances . . . as are naturally apt to strike a terror into the people," which was satisfied by a "show of arms."[96] Davis identified only fairly narrow exceptions where an armed group would not constitute a terror, such as "assemblies of the people for the exercise of common sports or diversions."[97] Such exceptions affirmed that the general rule was that armed groups were riots because they naturally created a threat of violence.[98]

Like in England, there was some dispute among American treatise writers about whether an armed group was necessarily a riot or only an unlawful assembly. In Francis Wharton's *Precedents of Indictments and Pleas*, he stated:

> [P]ersons riding together on the road with unusual weapons, . . . in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly.[99]

Similarly, in his *Treatise on the Criminal Law of the United States*, Wharton described unlawful assemblies as requiring "actual force or violence, or at least

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93. JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 333 (London, R. Pheney, S. Sweet & R. Milliken 1822).

94. 3 THOMAS EDLYNE TOMLINS & THOMAS COLPITTS GRANGER, THE LAW-DICTIONARY, EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE BRITISH LAW 397 (Philadelphia, R.H. Small 1836).

95. *Id.*

96. JOHN A.G. DAVIS, A TREATISE ON CRIMINAL LAW, WITH AN EXPOSITION OF THE OFFICE AND AUTHORITY OF JUSTICES OF THE PEACE IN VIRGINIA 252 (Philadelphia, C. Sherman & Co. 1838).

97. *Id.*

98. *See id.* The 1849 edition of *Blackstone's Commentaries*, produced by James Stewart, offers a similar analysis. JAMES STEWART, THE RIGHTS OF PERSONS, BEING THE FIRST BOOK OF BLACKSTONE'S COMMENTARIES 868, 869 (2d ed. 1849) (1839) (saying that in an indictment for riot, "[e]vidence must be given of some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto as are calculated to strike terror into the public; as a show of arms, threatening speeches or turbulent gestures" and that a prosecution for riot does not require "personal violence . . . to any individual" or "injury" to any property).

99. FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS, ADAPTED TO THE USE BOTH OF THE COURTS OF THE UNITED STATES AND THOSE OF ALL THE SEVERAL STATES 488 (Philadelphia, J. Kay, Jun. & Bro. 1849) (citation omitted).

an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like."[100] Oliver Barber's *Treatise on the Criminal Law of the State of New York* also acknowledged the dispute about whether an armed group was a riot or unlawful assembly but clarified that, in either case, the "show of arms" was "naturally apt to strike a terror into the people."[101]

Similarly, in John Bouvier's 1843 American legal dictionary, he defined the terror requirement of a riot as satisfied when the rioters' conduct was "to the terror of the people," which included "a show of arms, threatening speeches, or turbulent gestures" but did not require that "personal violence should be committed."[102] American treatise writers continued to consider armed groups riots after the ratification of the Fourteenth Amendment in 1868.[103]

Regulations on armed groups were not solely the province of common law; colonial legislatures and states also adopted statutory standards for riots, which took into account whether a group was armed with any weapon, specifically including improvised weapons. In 1750, faced with continuing outbreaks of violence, the Massachusetts state legislature adopted a new riot law, which prohibited assemblies of "Twelve or more, being Arm'd [sic] with Clubs or other Weapons," or fifty unarmed people when "unlawfully riotously or tumultuously assembled."[104]

In 1756, the Massachusetts colonial legislature, horrified by the violence of the November Pope Day Riot of 1755, passed a new law to prevent "Riotous, Tumultuous and Disorderly Assemblies."[105] The law prohibited the assembling of groups of "Persons being more than three in Number" who were "armed, . . . with Sticks, Clubs, or any Kind of Weapons, or disguised with Vizards [sic] . . . or painted or discolored Faces, or being in any other Manner disguised" and "having any Kind of Imagery or Pageantry with them as a

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100. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 524 (Philadelphia, Kay & Bro., 1846) (footnotes omitted); *see also* 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 739 (Philadelphia, Kay & Bro., 7th rev. ed. 1874) (1846) (describing unlawful assemblies as "[a]ny tumultuous disturbance of the public peace by three persons or more, having no ostensible legal or constitutional object, assembled under such circumstances, and deporting themselves in such a manner as to produce danger to the public peace and tranquility.").

101. OLIVER LORENZO BARBOUR, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF NEW-YORK 224 (Albany, Gold & Banks, 2d ed. 1852) (1841).

102. 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 559 (Philadelphia, T. & J. W. Johnson, 2d ed. 1843) (1839).

103. *See, e.g.*, THOMAS FREDERICK SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 436–37 (London, J. Murray, 7th ed. 1875) (1838) ("[T]o constitute a riot, there must be, not only the unlawful assembly of three or more, but some act of violence, or at least such an apparent tendency thereto, as may be naturally apt to strike terror into the people, as the show of arms, threatening speeches, or turbulent gestures.").

104. Act of Feb. 14, 1750, ch. 12, 1749–51 Mass. Acts 339, 339.

105. Act of Oct. 19, 1756, ch. 12, 1756–57 Mass. Acts 249, 249.

public[] Shew [sic] in any of the Streets or Lanes in . . . Boston."[106] These laws were not simply remnants of British tyranny, as they were readopted in Massachusetts in the years following the American Revolution.[107]

In 1791, New Hampshire adopted a law with language similar to Massachusetts's law;[108] New Jersey followed suit in 1797;[109] and Maine, Rhode Island, Michigan, and Wisconsin adopted laws reflecting similar standards during the earlier part of the nineteenth century.[110]

American courts also broadly adopted the view that armed groups were riots or unlawful assemblies, and the courts sometimes found that armed groups' conduct rose to the level of treason. One of these important early cases, *United States v. Mitchell*, arose out of the Whiskey Rebellion, a revolt by settlers in western Pennsylvania angered by the Washington Administration's imposition of an excise tax on whiskey.[111] In *Mitchell*, United States District Attorney William Rawle instructed the jury that "an assembly armed and arrayed in a warlike manner for a treasonable purpose is *Bellum levatum* [raised for war], though not *Bellum percussum* [engaged in war]."[112] Rawle said an armed group could "be treated as riot, or treason," depending on whether the conduct had a treasonable purpose.[113] The defense attorneys did not contest that a crime had been committed, saying that they "did not conceive it to be their duty to shew [sic], that the prisoner was guiltless of any description of crime against the United States, or the State of Pennsylvania."[114] They did, however, contest the treason charge, warning that the prosecution's view of treason was "calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic power a mob may easily be converted into a conspiracy; and a riot aggravated into High Treason."[115] Justice William Patterson, riding circuit in Pennsylvania, sided with District Attorney Rawle and advised the jury that "[the prisoner's] attendance, armed, at

106. *Id.* (emphasis omitted).

107. *See* Act of Oct. 28, 1786, ch. 8, 1786 Mass. Acts 502; *see also* Act of Mar. 10, 1797, ch. 50, 1797 Mass. Acts 99.

108. Act of Feb. 16, 1791, ch. 87, 1791 N.H. Laws 718, 721 (outlining the punishment for unlawful assembly).

109. Act of Feb. 24, 1797, ch. 637, 1797 N.J. Laws 179.

110. ME. STAT. tit. 12, ch. 159, § 5 (1840); 1857 R.I. Acts & Resolves 532, 533; 1846 Mich. Pub. Acts. 679, 679; 1838–39 Wis. Sess. Laws 368, 368. *See also* 1862–63 N.D. Laws 69, 69 (stating that "any persons, to the number of twelve or more, . . . being armed with any dangerous weapons; or . . . thirty or more [persons], whether armed or not, shall be unlawfully, riotously, or tumultuously assembled").

111. *See* 2 U.S. (2 Dall.) 348 (1795), 26 F. Cas. 1277 (C.C.D. Pa. 1795); *see also* Patrick Grubbs, *Whiskey Rebellion Trials*, THE ENCYC. OF GREATER PHILA. (2015), https://philadelphiaencyclopedia.org/essays/whiskey-rebellion-trials/ [https://perma.cc/RE4H-RK99].

112. *Mitchell*, 2 U.S. (2 Dall.) at 349, 26 F. Cas. at 1278. In a 2018 article, the author erroneously attributed this quote to Justice William Patterson; however, this language is from District Attorney Rawle's successful argument to the court and is not the words of Justice Patterson. *See* Frassetto, *supra* note 50, at 84.

113. *Mitchell*, 2 U.S. (2 Dall.) at 349, 26 F. Cas. at 1278.

114. *Id.* at 350, 26 F. Cas. at 1279 (emphasis omitted).

115. *Id.* at 350–51, 26 F. Cas. at 1279.

Bradock's field, would of itself amount to Treason, if his design was treasonable."[116]

The expanded view of treason as articulated in *Mitchell* was not unanimously accepted. In an essay included in his edition of *Blackstone's Commentaries*, Anti-Federalist judge and treatise author St. George Tucker criticized similar prosecutions for treason arising out of tax revolts.[117] Tucker acknowledged that in England "[t]he bare circumstances of having arms, . . . of itself, creates a *presumption* of warlike force . . . and may be given in evidence . . . to prove *quo animo* [with evil intent] the people are assembled."[118] But Tucker disagreed with this view in the frontier context, arguing that "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side."[119]

Tucker's view, however, was inconsistent with the federal judiciary's approach, and other influential jurists disagreed with him. Justice Joseph Story, for example, believed that carrying arms in public "'in a military form, for the express purpose of overawing or intimidating the public' was a form of treason" even when "no actual blow has been struck, or engagement has taken place."[120]

In the decades that followed, several American state courts found that armed groups constituted riots regardless of whether actual violence occurred. For example, in *Commonwealth v. Dupuy*, the Pennsylvania Court of Nisi Prius said that "a man may call in his friends completely armed to . . . protect himself against a threatened assault in his own house, but if he go abroad thus attended by two or more, . . . it would be considered a riot."[121] However, the court excepted an armed group protecting a man while traveling "to the magistrate to make his complaint."[122]

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116. *Id.* at 356, 26 F. Cas. at 1282 (emphasis omitted).

117. *See Note B Concerning Treason*, *in* 5 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND app. at 11–52 (St. George Tucker ed., 1803); *see also* Patrick Grubbs, *Fries Rebellion*, THE ENCYC. OF GREATER PHILA. (2015), https://philadelphiaencyclopedia.org/essays/fries-rebellion/ [https://perma.cc/2J6S-GG68].

118. *Note B Concerning Treason*, *supra* note 117, at 19.

119. *Id.*

120. Darrell A.G. Miller, *Guns as Smut: Defending the Home-bound Second Amendment*, 109 COLUM. L. REV. 1278, 1316 n.237 (2009) (quoting JOSEPH STORY, CHARGE OF MR. JUSTICE STORY, ON THE LAW OF TREASON DELIVERED TO THE GRAND JURY OF THE CIRCUIT COURT OF THE UNITED STATES 7 (Providence, H.H. Brown 1842)).

121. 1 Brightly 44, 46 (Pa. Ct. of Nisi Prius 1831).

122. *Id.*

C. Prohibitions on Private Militias in the United States

In the mid-nineteenth century, states began to adopt laws specifically prohibiting armed groups acting as private militias.[123] In 1865, Maine became the first state to enact such a law, which prohibited:

> [A]ny body of men whatsoever, other than the regularly organized corps of the militia, the troops of the United States, to associate themselves together as a military company or organization, or to parade in public with arms, in any city or town of this state, without the license of the governor . . . .[124]

Massachusetts enacted a law similar to Maine's in 1866.[125] In 1865, Florida enacted a law which provided:

> [I]f any person shall form any military organization in this State, not authorized by law, or shall participate or aid or abet in the formation of such organization, he shall be deemed to be guilty of a misdemeanor . . . .[126]

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123. These laws were consistent with a longstanding concern about the development of military forces outside of government control. During the Founding Era, most states adopted constitutional provisions requiring "the military" in the state to stay under the control of the civil government. VT. CONST. of 1777, ch. 1, § 15 ("[T]he military should be kept under strict subordination to, and governed by, the civil power."); N.H. CONST. of 1784, art. 26 ("In all cases, and at all times, the military ought to be under strict subordination to, and governed by, the civil power."); MASS. CONST. of 1780, art. XVII ("The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."); R.I. CONST. of 1842, art. I, § 18 ("The military shall be held in strict subordination to the civil authority. And the law martial shall be used and exercised in such cases only as occasion shall necessarily require."); CONN. CONST. of 1818, art. I, § 18 ("The military shall, in all cases and at all times, be in strict subordination to the civil power."); N.J. CONST. of 1844, art. I, § 12 ("The military shall be in strict subordination to the civil power."); PA. CONST. of 1776, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."); DEL. CONST. of 1776, A Declaration of Rights, art. I, § 20 ("That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power."); MD. CONST. of 1776, A Declaration of Rights, art. XXVII ("That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."); VA. CONST. of 1776, art. I, § 13 ("That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."); N.C. CONST. of 1776, A Declaration of Rights, art. XVII ("That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."); S.C. CONST. of 1778, art. XLII ("That the military be subordinate to the civil power of the State."). At the time, "military" was primarily used as an adjective. *See* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE § M (Dublin, Thomas Ewing, 4th ed. 1773) (1755) ("1. Engaged in the life of a soldier; soldierly. . . . 2. Suiting a soldier; pertaining to a soldier; warlike. . . . 3. Effected by soldiers."). Noah Webster's dictionary contains a definition of military as a noun. *See* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (E.H. Barker reprt. 1832) (1828) ("MILITARY, *n.* The whole body of soldiers; soldiery; militia; an army.").

124. Act of Feb. 23, 1865, ch. 307, § 171, 1865 Me. Laws 235, 280.

125. Act of May 8, 1866, ch. 219, § 184, 1866 Mass. Acts 170, 219.

126. Act of Jan. 15, 1866, ch. 1466, § 15, 1865 Fla. Laws 23, 25–26.

Florida's law raises the question of what motivated these kinds of laws. The Florida state legislature enacted its law shortly after the conclusion of the Civil War alongside plainly racist provisions that made up the state's "Black Code."[127] As such, the legislature may very well have passed the law in an effort to prohibit Black militias from forming. However, because other sections of Florida's laws were explicit in their racist purposes,[128] the lack of express racism in the section prohibiting private militia activity may suggest broader motives on the legislature's part. In any event, many other states, including many northern states, passed similar laws with no clear racial motivation.[129]

In 1871, North Carolina passed a law prohibiting "secret political organizations," seemingly aimed at groups like the Ku Klux Klan.[130] The law prohibited joining "any oath-bound secret political or military organization, society or association" for the purpose of "furthering any political object, or aiding the success of any political party or organization, or for resisting the laws."[131] The law also prohibited using any "signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever" to advance the group's objectives.[132] Finally, like other prohibitions on private militias, the law forbade "persons [from] . . . band[ing] together and assembl[ing] to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law."[133] Kentucky adopted a similar law in 1873.[134]

127. *See id.* § 14, 1865 Fla. Laws at 25 ("[I]f any negro, mulatto, or other person of color, shall intrude himself into any religious or other public assembly of white persons, or into any railroad car or other public vehicle set apart for the exclusive accommodation of white people, he shall be deemed to be guilty of a misdemeanor, and upon conviction, shall be sentenced to stand in the pillory for one hour, or be whipped, not exceeding thirty-nine stripes, or both . . . .").

128. *See id.*

129. *See, e.g.*, Act of Feb. 23, 1865, ch. 307, § 171, 1865 Me. Laws 235, 280; *see also* Act of May 8, 1866, ch. 219, § 184, 1866 Mass. Acts 170, 219. In 1867, Congress took steps to break White-supremacist control of state militias by dissolving state militia units in southern states, including Florida. *See* Act of Mar. 2, 1867, Pub. L. No. 39-170, § 6, 14 Stat. 485, 487.

130. *See* Act of Mar. 17, 1871, ch. 133, 1870–71 N.C. Sess. Laws 200; *see also* S. POVERTY L. CTR., KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 15 (6th ed. 2011), https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf [https://perma.cc/RT3G-3XY9] ("In 1871, Congress held hearings on the Klan and passed a harsh anti-Klan law modeled after a North Carolina statute.").

131. Act of Mar. 17, 1871, ch. 133, 1870–71 N.C. Sess. Laws 200–01.

132. *Id.* at 201.

133. *Id.*

134. Act of Apr. 11, 1873, ch. 767, § 3, 1873 Ky. Acts 35, 35 ("If two or more persons shall unlawfully confederate or band together, and go forth armed or disguised, they shall each, on conviction thereof, be imprisoned in the penitentiary not less than six nor more than twelve months, or fined . . . .").

Another two states, Illinois and Colorado, enacted laws prohibiting private militia activity in 1879.[135] Iowa adopted a similar law the next year, and New York and Georgia followed suit in 1883 and 1885 respectively.[136]

In *Dunne v. People of Illinois*, the Illinois Military Code provisions prohibiting private militia organization were challenged in the Illinois Supreme Court for infringing on the federal power of organizing the militia.[137] The dispute arose after a member of the Illinois State Guard, created by the Military Code, refused to serve on a jury, claiming an exemption based on militia service.[138] The guardsman was fined fifty dollars, and he appealed the decision to the Illinois Supreme Court, arguing that Illinois's law violated the federal power to control state militias and was preempted by federal militia law.[139] This challenge primarily focused on whether the creation of a state guard was inconsistent with federal control over the militia.[140] The court rejected the guardsman's challenge, finding that militias were "a matter upon which there may be concurrent legislation by the States and Congress."[141] After dealing with the actual scope of the appeal, the court also opined on other sections of the law. When addressing the prohibition on private militias, the court stated:

> We have been referred to no source whence comes the right contended for, to bodies of men organized into military companies, under no discipline by the United States or State authorities, "to parade with arms" in any city or public place as their inclination or caprice may prompt them. No such right is conferred by any act of Congress, nor is it insisted this provision of our statute is in conflict with any paramount law of the United States. It is a matter that

135. Military Code of Illinois, art. XI, § 5, 1879 Ill. Laws 149, 156 ("It shall not be lawful for any body of men whatever, other-than [sic] the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof . . . ."); Act of Feb. 8, 1879, art. VIII, § 23, 1879 Colo. Sess. Laws 111, 138–39 ("It shall not be lawful for any body of men whatsoever, other than the regularly organized national guard or militia, or the troops of the United States, to associate themselves together as a military company or organization, or to parade in public with arms, in any city or town in the state, without the license of the governor therefor . . . .").

136. Act of Mar. 30, 1880, tit. VIII, ch. 1, § 36, 1880 Iowa Acts 259, 265 ("It shall not be lawful for any body of men whatever, other than the regularly organized volunteer militia of this state and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade within the limits of this state without the license of the governor thereof, which license may at any time be revoked . . . ."); Act of Apr. 23, 1883, ch. 299, § 75, 1883 N.Y. Sess. Laws 417, 439 ("It shall not be lawful, but it shall be a misdemeanor, for any body of men whatsoever, other than the regular organized corps of the National Guard and Militia and the troops of the United States, except such independent military organizations as are now in existence, to associate themselves together as a military company or organization, or to parade in public with fire-arms in any city or town of this State . . . ."); Act of Oct. 13, 1885, No. 355, tit. VII, § 17, 1884–85 Ga. Laws 74, 85 ("[I]t shall not be lawful for any body of men whatever, other than the said volunteer forces of this State, and the troops of the United States and bodies of police, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town in this State, without the license of the Governor thereof . . . .").

137. *See* 94 Ill. 120, 124 (1879).

138. *Id.* at 123.

139. *Id.* at 123–24.

140. *See id.* at 123–28.

141. *Id.* at 125.

> pertains alone to our domestic polity. The right of the citizen to "bear arms" for the defence of his person and property is not involved, even remotely, in this discussion. This section has no bearing whatever on that right, whatever it may be, and we will enter upon no discussion of that question. Whether bodies of men, with military organizations or otherwise, under no discipline or command by the United States or the State, shall be permitted to "parade with arms" in populous communities, is a matter within the regulation and subject to the police power of the State.[142]

After the Illinois Supreme Court's rejection of the *Dunne* challenge, a new case was brought directly addressing the prohibition on private militias in Illinois law. The case, *Presser v. Illinois*, ultimately made its way to the Supreme Court of the United States, where Illinois's law was upheld in one of the Court's few nineteenth-century Second Amendment cases.[143]

The case began when Herman Presser led an armed group of four hundred men, who were part of the Lehr und Wehr Verein, a primarily German civic association, on a parade through the streets of Chicago.[144] The group was not licensed by the governor to parade and practice as a military company, so Presser was arrested and fined for the display.[145]

Presser argued, among other things, that Illinois's law prohibiting private militias was preempted by federal law and that the law violated the Second Amendment's protection of the right to keep and bear arms.[146] The Court explained at length that federal law did not preempt Illinois's law before the Court disposed of Presser's other arguments.[147] While Presser's Second Amendment claim could not prevail because the Bill of Rights did not extend to state governments at that time, the Court noted:

> We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms.[148]

The Court also rejected a Fourteenth Amendment privileges-and-immunities claim, saying:[149]

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are

142. *Id.* at 140–41 (quoting Military Code of Illinois, art. XI, § 5, 1879 Ill. Laws 149, 156).

143. *See* 116 U.S. 252, 254–55 (1886); *see also* PATRICK CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 162 n.239 (2018) (compiling sources discussing the Illinois law and the *Presser* case).

144. Presser v. Illinois, 116 U.S. 252, 254–55 (1886).

145. *Id.* at 255.

146. *See id.* at 260–61.

147. *See id.* at 261–69.

148. *Id.* at 264–65.

149. *Id.* at 266–68.

> subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.[150]

Federal preemption was also the focus of briefing by Presser's attorneys, including Lyman Trumbull, who had co-authored the Thirteenth Amendment while serving as a United States Senator.[151] Trumbull did not address the Second Amendment until the third section of his brief and described its protections in a way that maximally supported his preemption case, arguing that states were only limited by the Second and Fourteenth Amendments when "the keeping and bearing of arms is connected with some national purpose."[152] This was intended to stop states from preventing federal organization of the militia by prohibiting any person from keeping and bearing arms.[153] Trumbull took a strictly militia-focused view of the Second Amendment, stating that "[t]he citizen of the United States has secured to him the right to keep and bear arms as part of the militia."[154] Because he understood the core of the right to be facilitating participation in the militia, Trumbull put aside the question of whether other regulations might violate the Second Amendment.[155]

After the *Presser* decision, there was a burst of new prohibitions on private militia activity, although it is unclear whether these events were connected. Nebraska, Alabama, Kentucky, California, West Virginia, North Carolina, Texas, Utah, and Minnesota all prohibited private militia activity in the years after *Presser*.[156] Several of these states had exceptions for military schools or

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150. *Id.* at 267.

151. *Lyman Trumbull*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Lyman-Trum bu ll [https://perma.cc/6JSG-BM97].

152. Supplemental Brief for Plaintiff in Error at 257, *Presser*, 116 U.S. 252.

153. *See id.* at 257–58.

154. *Id.*

155. *Id.*

156. Act of Feb. 28, 1881, ch. 50, § 54, 1881 Neb. Laws 479, 502 ("It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States to associate themselves together as a military company or organization, or to drill or to parade with arms in any city or town in this state without the license of the governor."); Act of 1888–89, no. 94, § 1, 1888–89 Ala. Laws 82, 82 ("[I]t shall not be lawful for any person, persons or body of men, whether uniformed or not uniformed, to be associated, assembled or congregated together by or under any name whatsoever, in a military capacity for the purpose of drilling, parading or marching, at any time or place in the State of Alabama, or otherwise taking up or bearing arms in any such capacity, unless authorized by law and granted by the governor."); Act of 1888, ch. 1525, § 1, 1888 Ky. Acts 139, 139 ("It shall be unlawful for any body of men whatever, other than the regular organized militia of this Commonwealth, and the troops of the United States, to associate themselves together as a military company or other armed organization, or to drill or parole with arms anywhere in this Commonwealth, without the license of the Governor thereof."); CAL. POLITICAL CODE § 1942 (Bancroft-Whitney Co. 1895) ("It shall not be lawful for [any body] of men whatever, other than the regular organized National Guard of this state, and the troops of the United States, to associate themselves together as a military company or organization, to drill or parade with arms in this state, without the license of the governor thereof."); Act of Jan. 9, 1889, ch. 24, § 13, 1889 W. Va. Acts 81, 86 ("[I]t shall not be lawful for anybody [sic] of men whatsoever, other than the regularly organized National

allowed members of benevolent associations to carry ceremonial swords, but they still generally prohibited organized armed groups.[157] In 1889, Washington enshrined in its state constitution authority for the state to prohibit armed groups.[158] Arizona adopted an identical constitutional provision upon achieving statehood.[159] During the same period, Massachusetts, Georgia, and New York adopted updated versions of their prohibitions.[160]

Several states adopted related provisions aimed at prohibiting the use of private police forces like the Pinkerton Detective Agency, which were often used to break strikes.[161] At least seven states adopted constitutional provisions targeted at strikebreakers, which prohibited bringing armed groups into the

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Guard or militia or the troops of the United States, to associate themselves together as a military company or organization, or to parade in public with arms, in any city or town in the state, without the license of the governor therefor, which may at any time be revoked, nor shall it be lawful for any city or town to raise or appropriate any money towards arming, equipping, uniforming, or in any way supporting or sustaining or providing drill rooms or armories, for any such bodies of men."); Act of 1893, ch. 374, § 38, N.C. Sess. Laws 350, 356–57 ("It shall be unlawful for any persons to organize a military company, or drill or parade under arms as a military body, except under the militia laws and regulations of this state; and no person shall exercise or attempt to exercise the power or authority of a military officer in this state unless he holds a commission from the governor, and any person offending against this act shall be guilty of a misdemeanor."); Act of Jan. 8, 1889, ch. 16, sec. 7, § 3294, 1889 Tex. Gen. Laws 12, 12–13 ("Any number of persons not less than forty nor more than one hundred, of good moral character, desiring to form a company of volunteer guards, may meet and declare such purpose, and after obtaining consent from the governor may perfect their organization by electing their company officers in accordance with the provisions of this chapter. And it shall not be lawful for any body of men whatsoever, other than the regularly organized volunteer guard, to associate themselves together as a military company or organization, or to parade in public with arms in any part of the state, without the license of the governor therefor."); Act of 1894, ch. 53, § 53, 1894 Utah Laws 64, 76 ("It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this Territory, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this Territory."); Act of Jan. 5, 1897, ch. 118, § 107, 1987 Minn. Laws 204, 229 ("It shall not be lawful for any body of men whatever, other than the regularly organized national guard of this state, and the troops of the United States, to associate themselves together as a military company or organization, to drill or parade with arms in any city or town of this state, except the regular organization known as the Sons of Veterans.").

157. *See, e.g.*, Act of 1888, ch. 1525, § 1, 1888 Ky. Acts 139, 139 ("[N]othing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords, or students in educational institutions chartered by the Legislature, wherein military science is part of the course of instruction, from drilling and parading with arms in public, under the superintendence of their instructors, or honorably discharged soldiers of the United States Army from parading or doing escort duty with arms. This section shall not apply to the Louisville Light Infantry."); Act of 1888–89, no. 94, § 1, 1888–89 Ala. Laws 82, 82 ("[T]he provisions of this act shall not apply to any school or college where military tactics are taught, to the Order of Knights Templar, Order of Knights of Pythias, or Patriarchs Militant.").

158. WASH. CONST. of 1889, art. 1, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.").

159. ARIZ. CONST. of 1910, art. II, § 26 ("The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.").

160. Act of 1893, ch. 360, § 124, 1893 Mass. Acts 994, 1049; GA. CODE tit. 11, ch. 11, § 1205 (The Foote & Davies Co. 1895); Act of 1808, ch. 212, § 177, 1808 N.Y. Laws 508, 582–83.

161. *See* Elizabeth Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLO. LEGAL STUD. 357, 364 (2006) ("Of the private police services, the Pinkerton National Detective Agency played a leading role in providing these companies with employees to act as strike guards, 'scabs' (substitute workers), undercover agents, and 'strike missionaries.'").

state.[162] Many other states adopted similar state laws, prohibiting organizing or importing armed groups in laws aimed at strikebreaking activities.[163] While first adopted in the late 1880s, these laws became common after the Homestead Strike of 1892 during which a gun battle between striking steelworkers and

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162. *See generally* SEN. COMM. ON EDUC. AND LAB., 76TH CONG., REPORT ON A RESOLUTION TO INVESTIGATE VIOLATIONS OF THE RIGHT OF FREE SPEECH AND ASSEMBLY AND INTERFERENCE WITH THE RIGHT OF LABOR TO ORGANIZE AND BARGAIN COLLECTIVELY: STRIKEBREAKING SERVICES, at 14–17 (1939) (discussing connection between state constitutional provisions and strikebreaking activities); MONT. CONST. of 1889, art. III, § 31 (original constitution of Montana, approved by Congress) ("No armed person or persons or armed body of men shall be brought into this State for the preservation of the peace or the suppression of domestic violence, except upon the application of the legislative assembly or of the governor when the legislative assembly cannot be convened."); WYO. CONST. of 1889, art. 19, § 6 (present day version) ("No armed police force, or detective agency, or armed body, or unarmed body of men, shall ever be brought into this state, for the suppression of domestic violence, except upon the application of the legislature, or executive, when the legislature cannot be convened."); IDAHO CONST. of 1889, art. XIV ("No armed police force, or detective agency or armed body of men, shall ever be brought into this state for the suppression of domestic violence, except upon the application of the legislature, or the executive when the legislature cannot be convened.").

163. Act of June 10, 1889, §§ 1–2, 1889 Mo. Laws 95, 95 (preventing the importation of armed men or associations of men into this state for the purpose of police duty) ("It shall be unlawful for any person or persons, company, association or corporation to bring or import into this state any person or persons, or association of persons, for the purpose of discharging the duties devolving upon the police officers, sheriffs or constables in the protection or preservation of public or private property. . . . Hereafter no sheriff of this state shall appoint any under sheriff or deputy sheriff except the person so appointed shall be at the time of his appointment a bona fide resident of the state."); Act of Dec. 30, 1890, § I, 1890–91 Ga. Laws 220, 220 (regulating appointment of peace officers and detectives) ("[N]o . . . person authorized by law to appoint . . . peace officers, or detectives in this State, to preserve the public peace and prevent or detect crime, shall hereafter appoint as such . . . peace officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of . . . peace officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of the State."); Act of Apr. 22, 1891, ch. 16, §§ 1, 3, 1891 Minn. Laws 93, 93–94 (regulating the employment of persons serving in the capacity of peace officers) ("[I]t shall be unlawful for any state or municipal officers to swear in, appoint or allow any person to act . . . as a peace officer for the purpose of bearing arms or maintaining the peace, who is not a legal voter or militiaman of the state, and has been a continual resident of the state for the four (4) months next preceding such swearing in or appointing. . . . That it shall also be unlawful to institute or keep any private detective office for the purpose of keeping or letting out any armed force for hire. And it shall be unlawful for any person or persons, company or corporation, to keep or let any armed force for hire; but all armed forces shall be subject to the police authorities created by law, and under the control of the state or municipality. No person shall be appointed as a detective, spy or secret agent by any municipal authority until he has become a legal voter of the state of Minnesota and been a continuous resident of the state for four (4) months next preceding such appointment. But nothing herein contained shall prevent the employment of any detective resident or non-resident, by any person or corporation, municipal or otherwise, to obtain information as to the commission of any crime, and to report upon the same, but without any authority to make arrests or bear arms."); Act of Apr. 9, 1891, §§ 1, 4, 1891 Ark. Acts 245, 245–46 (regulating the appointment of peace officers and providing for the punishment of unlawful acts of non-residents) ("[T]hat the Governor, the Sheriff of any County, United States Marshal, Mayor of any city or incorporated town or other person authorized by law to appoint special deputy sheriffs, . . . shall not hereafter appoint as such special deputies sheriffs, special constables, marshals, policemen, or other peace officer any person who is not a citizen of the State of Arkansas and a resident of the County in which a disturbance may occur . . . . Any person, officer, company, association or organization who shall knowingly bring or cause to be brought or aid in bringing into this State any armed or unarmed police, or detective force or other armed or unarmed body of men for the suppression or pretended suppression of any domestic violence, riot or disturbance except called upon by the lawful authority of this State as provided in section three (3) of this act, shall be liable in a civil action to any person or their legal representatives for any injury for any and all damages to such person . . . .").

Pinkerton agents killed ten people.[164] Even the federal government adopted a law prohibiting the federal government or D.C. from hiring any "employee of the Pinkerton Detective Agency, or similar agency."[165]

164. Joh, *supra* note 161, at 365; Act of Feb. 28, 1893, ch. 191, § 1, 1893 N.C. Sess. Laws 148, 148 (prohibiting bodies of men known and designated as detectives from going armed in this state) ("[N]o body of men composed of more than three persons calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives shall go armed in this state."); Act of Feb. 12, 1891, ch. 135, § 1, 1893 Wash. Sess. Laws 449, 450 (declaring it unlawful to organize, maintain or employ an armed body of men in this state, and providing punishment therefor) ("[I]t shall be unlawful for any person, corporation or association of persons, . . . to organize, maintain or employ an armed body of men in this state for any purpose whatever . . . ."); Act of Mar. 4, 1893, ch. 17, § 1, 1893 S.D. Sess. Laws 27, 27 (prohibiting the importation of armed forces into the state) ("[N]o armed police force or detective agency or armed body of men other than United States troops shall ever be brought into the state for the suppression of violence, except upon the application of the legislature when in session, or the executive, when the legislature is not in session."); Act of Apr. 10, 1893, ch. 51, §§ 1–2, 1893 Neb. Laws 403, 403 (prohibiting the importation of armed men into this state for police duty, and to prevent the appointment of any but residents for such service) ("That it shall be unlawful for any person or persons or association, company or corporation to bring or import into this state any person or persons or association of persons for the purpose of discharging the duties devolving upon the police officers, sheriffs or constables in the protection or preservation of public or private property. . . . That no sheriff, mayor or chief of police or members of the Board of Police Commissioners shall appoint any under sheriff or deputy for the protection of public or private property except the person so appointed shall be a resident of this state."); Act of Apr. 13, 1893, ch. 163, § 1, 1893 Wis. Sess. Laws 197, 197 (prohibiting and punishing the employment of bodies of armed men to act as militiamen, policemen, or peace officers, who are not authorized by law to act in that capacity) ("The use or employment of bodies of armed men to act as militiamen, policemen or peace officers, who are not duly authorized or empowered to act in such capacity under the laws of this state, is hereby prohibited and declared to be unlawful; and no person, firm, company or corporation, shall hereafter use or employ any such body of armed men, to act in the capacity aforesaid, for the protection of person or property, or for the suppression of strikes within this state, whether such armed men be employe[e]s of detective agencies (so called) or otherwise. Any person who, as officer or agent of any firm, incorporated company or corporation, aids or assists in the employment of such armed men, shall be deemed to have employed the same within the meaning of this act."); PENAL CODE OF MONT. part I, tit. XI, § 759 (Standard Publishing Co. 1895) ("Every person who brings into this state an armed person or armed body of men for the preservation of the peace or the suppression of domestic violence, except at the solicitation and by the permission of the legislative assembly or of the governor, is punishable by imprisonment in the state prison not exceeding ten years and by a fine not exceeding ten thousand dollars."); Act of Mar. 13, 1897, ch. 124, §§ 1–2, 1897 Kan. Sess. Laws 230, 230 (relating to the appointment or employment of detectives) ("That no . . . persons authorized by law to appoint special deputies . . . in this state, to preserve the public peace and prevent and quell public disturbances, shall hereafter appoint as such special deputies . . . any person who is not resident of this state. . . . That it shall be unlawful for any person, company or association or corporation to bring or import into this state any person or persons or association of persons for the purpose of discharging the duties devolving upon sheriffs, deputy sheriffs, policemen, constables or peace officers in the protection or preservation of public or private property, or in the punishment of any person violating the criminal laws of this state."); Act of Mar. 17, 1899, §§ 1–2, 1899 Or. Laws 96, 96–97 (preventing the maintenance of armed bodies of men, and declaring it unlawful to organize, maintain or employ an armed body of men in the state of Oregon other than those provided for by law, and providing punishment therefor) ("That it shall be unlawful for any person, corporation or association of persons, or agents of any person, . . . to organize, maintain or employ an armed body of men in this state for the purpose of assuming, discharging or attempting to discharge in any city in the state of Oregon any of the duties or occupations properly belonging to the duly organized police patrol of such city. . . . That it shall be unlawful for any person, corporation or association of persons, or agent of any person, or member, agent or officer of any corporation or association of persons, to establish or maintain in any city in the state of Oregon any armed or uniformed patrol system not under the direct control and appointed by the proper municipal departments, as provided for in the charter of such city.").

165. Anti-Pinkerton Act of 1893, ch. 208, 27 Stat. 572, 591 (making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894 and for other purposes).

In 1896, a defendant prosecuted under Massachusetts's revised prohibition on armed groups appealed his conviction to the Massachusetts Supreme Judicial Court, asserting that the prohibition violated the state's version of the Second Amendment.[166] The defendant, James Murphy, had led a group of ten to twelve men in a parade armed with Springfield rifles (although he claimed they had been rendered inert by filing down the firing pin).[167] The justices of the Supreme Judicial Court had little trouble upholding the conviction, stating: "The right to keep and bear arms for the common defence does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law."[168] The court stated that the prohibition was a "matter affecting the public security, quiet, and good order" and "it is within the police powers of the Legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades."[169] The court cited both *Presser* and the Illinois Supreme Court decision for this point.[170] The court also relied on the fact that it was "almost universally held that the Legislature may regulate and limit the mode of carrying arms," citing a variety of state supreme court decisions upholding public-carry regulations of various kinds.[171] The court made clear that the prohibition was not aimed solely at actual mass violence but also the fear created by the potential for mass violence.[172] It rejected claims that the carried arms being inoperable put the marchers outside of the statute, stating: "So far as appearance went, it was a parade with firearms which were efficient for use," and thus, "[w]ith the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still existed in the parade in which the defendant took part."[173]

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166. Commonwealth v. Murphy, 66 Mass. 171 (1896); MASS CONST. pt. I, art. 17 ("The People have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."); Act of Mar. 8, 1894, § 53, 1894 Utah Sess. Laws 76, 76–77 ("Provided, that students in educational institutions where military science is a part of the course of instruction, may, with the consent of the Governor, drill and parade with arms in public under the superintendence of their instructors, and may take part in any regimental or brigade encampment under command of their military instructor; and, while so encamped shall be governed by the provisions of this act. They shall report and be subject to the commandant of such encampment; Provided, further, that nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords.").

167. *Murphy*, 66 Mass. at 173–74.

168. *Id.* at 172.

169. *Id.*

170. *Id.*

171. *Id.* at 172–73 (citing Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); Wilson v. State, 33 Ark. 557 (1878); Haile v. State, 38 Ark. 564 (1882); English v. State, 35 Tex. 473 (1871); State v. Reid, 1 Ala. 612 (1840); State v. Wilforth, 74 Mo. 528 (1881); State v. Mitchell, 3 Blackf. 229 (Ind. 1833)).

172. *Id.* at 174.

173. *Id.*

Several additional states prohibited private militia activity in the very early twentieth century, including Kansas, Arizona, Mississippi, Montana, Nevada, North Dakota, Idaho, Oklahoma, Rhode Island, Tennessee, Washington, Wyoming, and a bit later, in 1941, New Hampshire.[174] A variety of other militia restrictions exist to the present day.[175]

D. *A History of Group Mass Violence*

The laws against armed groups and private militias described above were not enacted in a vacuum. Whether in England, the pre-Revolution American colonies, the Antebellum Period, or Reconstruction America, group mass violence was an unfortunate reality. Before the mid-twentieth century, mass violence generally took the shape of riots, often driven by economic, religious, and racial strife. These riots sometimes resulted in dozens or even hundreds of deaths and massive property destruction. The examples of riots discussed below underscore the government's longstanding concern about mass violence and interest in curbing it with prohibitions on armed groups.

In Founding Era England, working people often rioted against privatization of previously public lands[176] and increases in food prices.[177] Major religious riots also occurred during the eighteenth century.[178] By far the deadliest were the anti-Catholic Gordon Riots in 1780, which were the most destructive in British history and resulted in almost three hundred deaths and substantial destruction in the City of London.[179]

174. Act of Mar. 9, 1903, ch. 359, § 3, 1903 Kan. Sess. Laws 548, 548; ARIZ. REV. STAT. part 5, tit. 46, ch. 1, art. 9, § 6 (Press of E. W. Stephens 1901); Act of Apr. 7, 1916, ch. 245, § 14, 1916 Miss. Acts 383, 388–89; Act of Mar. 13, 1911, ch. 145, § 101, 1911 Mont. Laws 432, 475; Act of Mar. 27, 1929, ch. 153, § 62, 1928 Nev. Stat. 201, 219–20; Act of Mar. 6, 1909, ch. 165, § 88, 1909 N.D. Laws 203, 235–36; Act of Mar. 15, 1927, ch. 262, § 79, 1927 Idaho Sess. Laws 510, 541; Act of May 22, 1908, ch. 59, § 3, 1907-1908 Okla. Sess. Laws 562, 562–63; Act of May 1, 1909, ch. 394, § 89-90, 1909 R.I. Acts & Resolves 64, 113–14; Act of Apr. 29, 1909, ch. 400, § 91, 1909 Tenn. Pub. Acts 1410, 1438–39; Act of Mar. 22, 1909, ch. 249 § 294, 1909 Wash. Sess. Laws 980, 980; Act of Feb. 28, 1925, ch. 163, § 44, 1925 Wyo. Sess. Laws 251, 259; Act of Apr. 4, 1941, ch. 46, § 15, 1941 N.H. Laws 45, 48–49.

175. Inst. for Const. Advoc. & Prot., *Addressing Political Violence, Unlawful Paramilitaries, Threats to Democracy, and Gun Violence: State Fact Sheets*, GEORGETOWN L., https://www.law.georgetown.edu/icap/our-work/addressing-political-violence-unlawful-paramilitaries-and-threats-to-democracy/state-fact-sheets/ [https://perma.cc/3X5D-KMFP].

176. *See* Christian D. Liddy, *Urban Enclosure Riots: Risings of the Commons in English Towns, 1480-1525*, 226 PAST & PRESENT 41 (2014).

177. PAUL A. GILJE, RIOTING IN AMERICA 16 (Ind. Univ. Press 1996).

178. *Id.* at 15–16; *see also* Donald McAdams, *Riots as a Measure of the Religious Conflict in Seventeenth and Eighteenth Century England*, 14 ANDREWS UNIV. SEMINARY STUD. 289 (1976).

179. George F. E. Rudé, *The Gordon Riots: A Study of the Rioters and Their Victims: The Alexander Prize Essay*, 6 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 93, 99 (1956); *see also* Mark Anthony Frassetto, Catholic Emancipation: 1760–1829, at 19–20 (Jan. 9, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198549.

Riots were also common in the American colonies.[180] In 1682, Virginia planters, upset about a glut in tobacco production resulting in low prices, went on a rampage, destroying tobacco crops on more than two hundred plantations before they could be suppressed by the local militias.[181] In 1683, Boston rioters attacked royal officials, assaulting a customs collector, a marshal, and a member of the governor's council, before one rioter barged into the governor's mansion and threw two of the governor's men into a fireplace.[182] Opposition to taxation resulted in mobs attacking tax collectors and shutting down courts on multiple occasions in New York and Virginia in the late seventeenth century.[183]

Rioting was especially prevalent in the leadup to the American Revolution. Between 1765 and 1769, there were at least 150 riots in American cities.[184] The largest outbreak came in opposition to the Stamp Act of 1765; mobs made several cities nearly ungovernable for weeks at a time before the riots were successful and the Act was repealed.[185] Colonial leaders were generally able to prevent the disorder from spiraling into deadly interpersonal violence, but the attacks did often result in property damage against imperial officials.[186] In the 1770s, rioting began to focus more on conflicts between garrisoned British soldiers and the local populace.[187] These conflicts culminated in the Boston Massacre when a crowd attacked British soldiers with snowballs and rocks and the soldiers fired their weapons, killing five and injuring seven.[188] Other less violent riots involved the destruction of property, like British tea and the harassment of imperial customs agents.[189]

While this disorder was generally accepted by American revolutionary leaders as integral to the revolutionary process,[190] after the Revolution, American officials sought to end riots as a valid form of political participation. Officials suppressed several uprisings, sometimes by opening fire on the riotous crowds.[191] One prominent example came in the Fort Wilson Riot when armed Philadelphians protesting high prices and war profiteering besieged a group of thirty conservatives, including Robert Morris and James Wilson, inside Wilson's

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180. RANDOLPH ROTH, AMERICAN HOMICIDE 28 (Harvard Univ. Press 2009) (noting that the American colonies had homicide rates that were three to five times higher than the present day and that "[governments] relied heavily on force and on prosecutions for sedition, heresy, and treason" to suppress frequent "riots and rebellions").

181. *Id.* at 52–53; *see also* GILJE, *supra* note 177, at 19.

182. ROTH, *supra* note 180, at 53.

183. GILJE, *supra* note 177, at 19–20.

184. *Id.* at 35.

185. *Id.* at 38–41.

186. *Id.* at 39–40.

187. *Id.* at 45–46.

188. *Id.* at 47.

189. *Id.* at 48.

190. *Id.* at 38.

191. *Id.* at 52–53 ("In all three cases magistrates did not hesitate to take action to quell disturbances they believed were unnecessary and violations of the public order.").

home.[192] The riot resulted in one death in Wilson's home and several among the crowd before it was broken up by a conservative militia unit.[193]

After the American Revolution, a depressed economy and high taxes to pay war debts—which were mostly owned by wealthy merchants in port towns—led to an explosion in defaults on personal debts by farmers in rural areas.[194] To combat skyrocketing foreclosures, armed groups in rural areas blocked court sessions and foreclosure sales.[195] The most prominent of these efforts came in western Massachusetts in 1786 when hundreds of armed men blocked the function of courts to prevent foreclosures on farms and livestock.[196] The farmers, led by Revolutionary War captain Daniel Shay, were met aggressively by the state government, which raised a 4,400-man army to suppress the uprising.[197] While Shay's forces were initially successful in stopping courts from functioning, they immediately panicked and fled when faced with the state army.[198] Their effort to take the federal armory in Springfield, Massachusetts, ended in a bloody defeat; when government forces attacked Shay's retreating forces, they immediately routed, with most of the rebel leaders fleeing the state.[199] Eighteen rebels were convicted of crimes and sentenced to death; ultimately, two who were convicted for theft crimes as part of the rebellion were executed.[200] While the actual threat from Shay's forces was not great, many elites viewed it as a crisis at the time, and their concerns helped to stir the creation of the national Constitution.[201]

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192. ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY 1750–1804 363 (W. W. Norton & Co. 2016).

193. Kevin Diestelow, *The Fort Wilson Riot and Pennsylvania's Republican Formation*, J. OF THE AM. REVOLUTION (Feb. 28, 2019), https://allthingsliberty.com/2019/02/the-fort-wilson-riot-and-pennsylvanias-republican-formation/ [https://perma.cc/52V2-GVEN].

194. TAYLOR, *supra* note 192, at 364–65 ("[T]axes in Massachusetts were at least four times higher than before the war. The taxes were regressive, with the poor land of common farmers paying at a higher rate than the vast tracts held by land speculators.").

195. *Id.* at 368 ("Conservatives also felt alarmed by smaller-scale regulations in rural pockets from New Hampshire to South Carolina as farmers blocked courthouse sessions and foreclosure sales.").

196. *Id.* at 367.

197. *Id.* at 368.

198. *Id.* at 367–68.

199. *Id.* at 368.

200. Michael DiCamillo, *"They Crucified Two Thieves": The Executions of John Bly and Charles Rose, Shays's Rebels*, 5 THE HISTORIES, no. 2, 2019, at 5–6.

201. *Id.* at 8; TAYLOR, *supra* note 192, at 368–70; Rachel Parker, *Shays' Rebellion: An Episode in American State-Making*, 34 SOCIO. PERSP. 95, 96–97 (1991) ("Newspaper statements indicated a change over the nine-month revolt in what were politically acceptable solutions to the rebellion in particular and to the Confederation's impotence in general. Convention delegates would have been aware of these statements. The difference between the Annapolis and Philadelphia meetings was that the historical context had been altered; one key to this change is located in the structural processes of state-making, of which Shays' Rebellion was a part."); JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 117–18 (W. W. Norton & Co. 2018) ("Still, when the resolution [to have a constitutional convention] reached Congress, which met, then, in New York, Congress failed for weeks to consider it. Arguably, it was only the course of events in Massachusetts that spurred Congress to act.").

After the ratification of the Constitution, Congress passed an excise tax on whiskey, which was resisted by farmers in rural areas throughout the country.[202] Many farmers converted excess grain into whiskey, which was easier to transport than grain and provided much of the farmers' cash income.[203] The largest effort to resist the tax broke out in western Pennsylvania.[204] Armed farmers attacked and burned the home of a tax collector, forcing him to flee.[205] The rebellion, known as the "Whiskey Rebellion," was met with overwhelming force by the federal government. President Washington himself led an army of 15,000 to suppress the unrest, which melted away against the overwhelming numbers.[206] The suppression of the Whiskey Rebellion further established that armed mobs were not a valid form of political engagement.[207]

During the Antebellum period, riots in the North oftentimes targeted abolitionists and free Blacks.[208] One scholar documented 1,218 riots that occurred between 1828 and the outbreak of the Civil War in 1861.[209] Mobs attacked, assaulted, and ran out of town abolitionists attempting to organize rallies or petitions.[210] Black communities were often the target of White attacks. For example, Whites in Providence, Rhode Island, attacked the city's Black neighborhood in 1824 and 1831,[211] and mobs attacked the Black neighborhoods of Cincinnati in 1829, 1836, and 1841, forcing many of the city's Black residents to flee to Canada.[212]

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202. TAYLOR, *supra* note 192, at 413; David Whitten, *An Economic Inquiry into the Whiskey Rebellion of 1794*, 49 AGRIC. HIST. 491, 493 (1975) ("Of considerable importance, however, is the fact that taxation of spirits distilled from domestic ingredients had been at the retail level rather than at the still.").

203. WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 67–68 (Simon & Schuster 2006) ("There was no tax on grain, but westerners who raised grain were forced, in part by federal policies that kept the Mississippi closed, to convert grain to whiskey in order to transport it eastward."); TAYLOR, *supra* note 192, at 413.

204. TAYLOR, *supra* note 192, at 413.

205. *Id.*

206. *Id.* at 414.

207. GILJE, *supra* note 177, at 53–54 ("Men who once encouraged anti-British mobs, now reversed themselves. Old radicals in Boston, such as Samuel Adams, became frightened by the specter of these backcountry farmers dictating the course of government through extra-legal violence.").

208. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 432 (David M. Kennedy ed., 2007).

209. DAVID GRIMSTED, AMERICAN MOBBING 1828–1861: TOWARD CIVIL WAR, at viii (1998).

210. KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 99–100 (2021).

211. *The Hardscrabble Riot of 1824 Makes Providence a City*, NEW ENGL. HIST. SOC'Y (2024), https://newenglandhistoricalsociety.com/the-hardscrabble-riot-of-1824-makes-providence-a-city/ [https://perma.cc/6URU-6Z8Z]; Stephen Chambers, *Our Hidden History: Race Riots Gave Birth to Providence Police*, PROVIDENCE J. (Mar. 5, 2021, 1:46 PM), https://www.providencejournal.com/story/opinion/2020/07/18/our-hidden-history-race-riots-gave-birth-to-providence-police/42593079 [https://perma.cc/XP4B-6WUX].

212. *See* Avery Ozimek, *Exploring Northern Identity Through Historical Analysis of Cincinnati's Antebellum Period*, 2019 FREEDOM CTR. J. 28, 38–45 (2020); *see generally* Silas Niobeh Tsaba Crowfoot, Community Development for a White City: Race Making, Improvementism, and the Cincinnati Race Riots and Anti-Abolition Riots of 1829, 1836, and 1841 (2010) (Ph.D. dissertation, Portland State University) (ProQuest).

These riots peaked in the mid-1830s when the Abolitionist Movement first began to seriously assert itself.[213] In 1834, mobs attacked abolitionists and the Black community in New York.[214] The mobs destroyed more than sixty buildings, including six churches.[215] That same year, an armed White mob in Philadelphia killed at least one Black man, horribly disfigured another, and attacked, damaged, or destroyed two churches and many homes in a predominantly Black neighborhood, in a purported response to a dispute occurring over a carousel.[216] In 1835, workers in Washington, D.C., rampaged through the city attacking Blacks and abolitionists and destroying Black-owned businesses.[217] In 1835, a mob attacked abolitionist newspaper publisher William Lloyd Garrison, who had to flee into protective custody in the city jail.[218] In 1837, a White mob in Alton, Illinois, attacked the printing press of abolitionist Elijah Lovejoy and shot Lovejoy to death.[219]

Like in every other aspect of American life, mob violence in the southern states was substantially more deadly than in northern states.[220] One study found that in 1835, the seventy-nine recorded southern mobs killed a total of sixty-three people, while the sixty-eight northern mobs killed eight.[221] Vigilante mob violence existed in both the North and the South, but northerners were more likely to destroy a brothel and leave its occupants physically unharmed, while southerners would summarily execute gamblers and other strangers in town.[222]

A young Abraham Lincoln criticized this violence in an 1838 speech, in which he warned that "[w]henever the vicious portion of the population shall be permitted to gather bands of hundreds and thousands, and burn churches, ravage and rob provision-stores, throw printing-presses into the river, shoot editors, and hang and burn obnoxious persons at pleasure and with impunity, depend on it, this government cannot last."[223]

An odd target of violence that led to one of the deadliest Antebellum Era riots was theaters hosting British actors. Several New York performances by British actor Joshua Anderson had to be called off in 1831 and 1832.[224] In 1849,

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213. HOWE, *supra* note 208, at 431–32.

214. Linda K. Kerber, *Abolitionists and Amalgamators: The New York City Race Riots of 1834*, 48 N.Y. HIST. 28, 30–33 (1967); *see also* HOWE, *supra* note 208, at 433.

215. HOWE, *supra* note 208, at 433.

216. ROTH, *supra* note 180, at 195; John Runcie, *"Hunting the Nigs" in Philadelphia, the Race Riot of 1834*, 39 PA. HIST.: J. MID-ATL. STUD. 187, 190 (1972).

217. Jefferson Morley, *The 'Snow Riot'*, THE WASH. POST (Feb. 5, 2005, 7:00 PM), https://www.washingtonpost.com/archive/lifestyle/magazine/2005/02/06/the-snow-riot/0514ba84-54dd-46ac-851c-ff74856fcef4/.

218. GRIMSTED, *supra* note 209, at 26–27.

219. MASUR, *supra* note 210, at 208; HOWE, *supra* note 208, at 433.

220. *See generally* ROTH, *supra* note 180, at 180–82.

221. HOWE, *supra* note 208, at 435.

222. *Id.*

223. *Id.* at 438.

224. *Id.* at 431–32.

working-class and immigrant New Yorkers who believed American actor Edwin Forrest was superior to English actor William MacReady disrupted a performance of *MacBeth* and fought state militia, resulting in the deaths of at least eighteen individuals and injuries to dozens more people.[225]

In the 1840s and 1850s, riots tended to focus on immigration and religion.[226] In 1844, clashes between Catholics and Protestants in Philadelphia left approximately twenty people dead and the destruction of Catholic churches and homes throughout the city.[227] In 1855, clashes between Protestant mobs and Catholic and immigrant communities in Louisville, Kentucky, resulted in twenty-two deaths and many more injuries.[228] Attacks between Know Nothing nativists and Baltimore Democrats in 1856 resulted in fourteen deaths and the successful suppression of the Democratic vote, swinging Maryland to support Millard Filmore in that year's presidential election.[229] In 1857, Know Nothings from Baltimore traveled to Washington, D.C., to attempt to block immigrant voters from the polls.[230] President Buchanan called in the Marines, and at least ten people were killed.[231]

Mass violence increased dramatically in the years after the Civil War. Horrific mob attacks perpetrated by armed Whites against Blacks became commonplace in the South.[232] Whites in Memphis attacked the city's Black neighborhoods, killing forty-six Black people, injuring others, and destroying Black churches, homes, and schools in the community.[233] In New Orleans in 1866, White mobs led by the city's ex-Confederate mayor attacked the state's interracial constitutional convention.[234] The mob attacked Black delegates marching to the convention and then stormed the convention building, indiscriminately firing upon delegates before spilling out into the streets and

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225. Betsy Golden Kellem, *When New York City Rioted Over Hamlet Being Too British*, SMITHSONIAN MAG., (July 19, 2017), https://www.smithsonianmag.com/history/when-new-york-rivalry-over-shakespeare-boiled-over-deadly-melee-180964102/ [https://perma.cc/DX3L-EYWA]; ROTH, *supra* note 180, at 325.

226. ROTH, *supra* note 180, at 305.

227. *See id.* at 188, 305.

228. GRIMSTED, *supra* note 209, at 232–34.

229. *Id.* at 236–38.

230. *Id.* at 241.

231. *Id.*

232. *See* WILLIAM BLAIR, THE RECORD OF MURDERS AND OUTRAGES: RACIAL VIOLENCE AND THE FIGHT OVER TRUTH AT THE DAWN OF RECONSTRUCTION 56, 59–65 (2021); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 262 (Henry Steele Commager & Richard B. Morris eds., 1988).

233. FONER, *supra* note 232, at 261–62; Christopher Blank, *Do the Words 'Race Riot' Belong on a Historic Marker in Memphis?*, NPR (May 2, 2016, 5:29 PM), https://www.npr.org/sections/codeswitch/2016/05/02/476450908/in-memphis-a-divide-over-how-to-remember-a-massacre-150-years-later [https://perma.cc/6J5N-P7DM].

234. BLAIR, *supra* note 232, at 56; FONER *supra* note 232, at 263.

indiscriminately shooting Black people.[235] Between forty and fifty were killed, and at least one hundred more were wounded in the attack.[236]

Horrific mass violence inspired Radical Republicans to seize control of Reconstruction from President Johnson.[237] However, violence against freedmen continued. In 1868, a White mob fired on freedmen who were parading to a political rally in Camilla, Georgia.[238] More than twenty of the ralliers were killed and wounded.[239] Mass violence was the worst in Louisiana, which saw more than two hundred Blacks killed by an armed White mob in the Opelousas Massacre.[240] Between seventy and 165 Black men were shot and killed in the Colfax Massacre,[241] over two dozen were killed in an attempted coup by White Democrats in New Orleans,[242] and as many as six Republican office holders were killed in an attack by the White League in Red River Parish, Louisiana.[243] Horrific mass violence against freedmen also occurred in Mississippi,[244] Alabama,[245] and South Carolina.[246]

Other interethnic disputes also led to mass violence. In 1871, Catholics and Irish Protestants fought in New York, resulting in a major riot.[247] New York militia responded aggressively and assaulted the Catholics, killing seventy

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235. BLAIR, *supra* note 232, at 56; FONER, *supra* note 232, at 262–63.

236. BLAIR, *supra* note 232, at 56; FONER, *supra* note 232, at 263.

237. *See* FONER, *supra* note 232, at 271 (reporting that Senator James Grimes of Iowa once stated that "[t]he President has no power to control or influence anybody and legislation will be carried on entirely regardless of his opinions"); BLAIR, *supra* note 232, at 64–65.

238. FONER, *supra* note 232, at 342.

239. *Id.*

240. Lorraine Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago*, SMITHSONIAN MAG. (Sept. 28, 2018), https://www.smithsonianmag.com/history/story-deadliest-massacre-reconstruction-era-louisiana-180970420/ [https://perma.cc/SE3H-GLGF].

241. RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS 279–80 (2017).

242. FONER, supra note 232, at 262–63.

243. *Id.* at 551.

244. *Id.* at 428 ("[T]hree black leaders were arrested in March 1871 on charges of delivering 'incendiary' speeches. Firing broke out at their court hearing, the Republican judge and two defendants were killed, and a day of rioting followed, which saw perhaps thirty blacks murdered in cold blood, including 'all the leading colored men of the town with one or two exceptions.'" (footnote omitted)); *id.* at 560 ("Democrats assaulted a Republican barbecue at Clinton, only fifteen miles from the state capital. A few individuals on each side were killed, and armed whites went on to scour the countryside, shooting down blacks 'just the same as birds.' They claimed perhaps thirty victims, among them schoolteachers, church leaders, and local Republican organizers.").

245. *Id.* at 427 ("In October 1870, a group of armed whites broke up a Republican campaign rally at Eutaw, the county seat of Greene County, Alabama, killing four blacks and wounding fifty-four.").

246. *Id.* at 571 ("That day, the black militia gathered in Hamburg, as did a large number of armed whites. After Adams [the black militia leader] refused a demand by Gen. Matthew C. Butler, the area's most prominent Democratic politician, to disarm his company, fighting broke out, about forty militiamen retreated to their armory, and Butler made for Augusta, returning with a cannon and hundreds of white reinforcements. As darkness fell, the outgunned and outnumbered militiamen attempted to flee the scene. Hamburg's black marshal was mortally wounded and twenty-five men captured; of these, five more were murdered in cold blood around two in the morning. After the killings, the mob ransacked the homes and shops of the town's blacks.").

247. ROTH, *supra* note 180, at 305.

people.[248] In the American West, anti-Chinese sentiments among White workers often led to riots and mass killings. An anti-Chinese riot in Los Angeles resulted in eighteen Chinese men—more than ten percent of Los Angeles's Chinese population—being shot or hanged.[249] A riot by armed, White mine workers in Rock Springs, Wyoming, resulted in the killing of twenty-eight Chinese people with guns and fire and the destruction of virtually all Chinese-owned properties.[250]

Attacks by Whites on Blacks also continued throughout the country and included riots leading to lynchings, as well as mass violence destroying entire Black communities and killing dozens of people.[251] The most notable of these atrocities is the Tulsa Massacre, in which an armed White mob killed at least thirty-six, but possibly as many as three hundred, Black Tulsans and displaced 6,000 people, as thirty-five city blocks in the community's prosperous Black neighborhood were destroyed.[252]

III. LARGE-CAPACITY MAGAZINES, ASSAULT WEAPONS, AND HISTORICAL ANALOGY

Like modern laws, which aim to prevent and mitigate mass violence by prohibiting the sale or possession of assault weapons and large-capacity magazines, historical prohibitions on armed groups aimed to prevent and mitigate mass violence by prohibiting assembling the means to commit that violence. In *Bruen*, the Court directed the analysis of historical analogy to two considerations, namely "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[253] The Court elaborated: "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[254] The Court made

248. *Id.*

249. *See* Kelly Wallace, *Forgotten Los Angeles History: The Chinese Massacre of 1871*, L.A. PUB. LIBR. BLOG (May 19, 2017), https://www.lapl.org/collections-resources/blogs/lapl/chinese-massacre-1871 [https://perma.cc/G36X-UCWB].

250. Tom Rea, *The Rock Springs Massacre*, WYOHISTORY.ORG (Nov. 8, 2014), https://www.wyohistory.org/encyclopedia/rock-springs-massacre [https://perma.cc/9D98-JXC2].

251. Daniel Levinson Wilk, *The Phoenix Riot and the Memories of Greenwood County*, S. CULTURES, Winter 2002, at 29, 29–30; Adrienne LaFrance & Vann R. Newkirk II, *The Lost History of an American Coup D'État*, THE ATL. (Aug. 12, 2017), https://www.theatlantic.com/politics/archive/2017/08/wilmington-massacre/536457/ [https://perma.cc/882Q-RV2D].

252. *1921 Tulsa Race Massacre*, TULSA HIST. SOC'Y & MUSEUM, https://www.tulsahistory.org/exhibit/1921-tulsa-race-massacre/ [https://perma.cc/LF3P-C2VC]. The nation's history of violence against Black people is far too extensive to address in this Article. The cited examples are merely illustrative.

253. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) ("[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.").

254. *Bruen*, 597 U.S. at 29 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

clear that modern gun laws need not be "a historical twin" or "dead ringer" to historical regulations but warned against accepting too-farfetched analogies.[255]

Here, a stretch is not required. Like modern assault-weapon and large-capacity-magazine laws, historical prohibitions on armed groups sought to prevent mass violence by taking away the means by which mass violence could be committed. Laws prohibiting armed groups and laws prohibiting the sale or possession of especially dangerous weapons or weapon accessories are obviously not identical. Semi-automatic firearms and detachable magazines did not enter the civilian market until the early twentieth century, and large-capacity magazines were rare in the first half of the century.[256] Unsurprisingly, the Founding Era and nineteenth-century historical record lack examples of laws regulating these weapons. Governments tend not to regulate speculatively in an attempt to address problems that may occur in the future.[257] Instead, governments regulated the mass violence threat of the day—armed groups.[258]

This is exactly the kind of analogy the Court said should be considered when "unprecedented societal concerns or dramatic technological changes" have occurred.[259] Analogizing assault weapons and large-capacity magazines to armed groups is the type of "nuanced approach" the Court called for when a problem the Founders did not face was addressed.[260] The Court required only a "representative historical *analogue*, not a historical *twin*."[261] Historical prohibitions on armed groups are such analogues. Laws prohibiting the purchase, sale, and possession of assault weapons and large-capacity magazines are constitutional because they are consistent with a long American tradition of firearms regulation.[262]

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255. *Id.* (emphasis omitted). The full paragraph is a master class on two-handed lawyering (or more specifically two-handed judging): "To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.' On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (citations omitted) (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3d. Cir. 2021)).

256. Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. (forthcoming 2024).

257. *See Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) ("[I]mposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us 'a law trapped in amber.' And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority. Such assumptions are flawed, and originalism does not require them." (citation omitted)).

258. *See supra* Part II.

259. *Bruen*, 597 U.S. at 27. After *Rahimi* it is unclear whether the government needs to show "unprecedented societal concerns or dramatic technological changes" before availing itself of analogical reasoning. *See Rahimi*, 144 S. Ct. at 1896–98 (moving to analogical reasoning without analyzing whether domestic violence was an unprecedented societal concern).

260. *See Bruen*, 597 U.S. at 27.

261. *Id.* at 30.

262. Recently, at least two articles have argued that assault-weapon and large-capacity-magazine restrictions are unconstitutional because assault weapons and large-capacity magazines are the modern

This argument was further strengthened by the Court's decision in *United States v. Rahimi*.[263] *Rahimi* makes clear that, as evidenced by the long history of regulating armed groups, modern regulations of assault weapons and large-

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equivalent of the militia musket that was foremost in the mind of the founding generation. *See* C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 WYO. L. REV. 89, 93 (2024) ("[T]he commonly owned civilian firearms of the era that are also optimal in warfare are the *most protected of all* when it comes to firearm regulation."); William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) ("*Every* nineteenth-century court and legal treatise writer to consider the question understood that arms particularly useful to militia service fell within the very core of the right."). These arguments seem to rely on what is known as the "hybrid" or "civic-Republican" understanding of the Second Amendment. Under this view, the Second Amendment primarily protects an individual right to have guns in furtherance of the civic need for a militia to protect public safety and deter tyranny rather than an individual right to have guns primarily for purposes of self-defense. *See* Michael O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597, 606 (2014) ("[U]nder the hybrid interpretation, the right to arms protects a personal right of individual citizens to 'keep arms'—that is, to acquire, possess, practice with, and engage in other types of legitimate activity with those types of common firearms that are useful for militia purposes. But the right to bear arms is structured mainly by the civic purposes mentioned in the Second Amendment's preface—military readiness and protecting the public liberty by deterring government tyranny—not by the purpose of individual self-defense."); *see also* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1587–88 (2014).

Several nineteenth-century cases adopted this view of the Second Amendment and state-level analogues. *See* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) ("As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment."); English v. State, 35 Tex. 473, 475 (1871) ("the provision protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such only are properly known by the name of 'arms,' and such only are adapted to promote 'the security of a free state.'"); Haile v. State, 38 Ark. 564 (1882). The high point for the hybrid model came in 1939, when the Supreme Court decided *United States v. Miller*. 307 U.S. 174 (1939). In *Miller*, the National Firearm Act's prohibition on short-barreled shotguns was challenged as a violation of the Second Amendment. *Id.* at 176. The Court rejected this challenge, stating "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well[-]regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178.

While technically *Miller* remains good law, the hybrid model of the Second Amendment carries little weight today because it was rejected by the Court in *District of Columbia v. Heller*. 554 U.S. 570 (2008). In *Heller*, the Court found that the Second Amendment protects "an individual right unconnected with militia service." *Id.* at 582; *see also id.* at 605 (same language); *id.* at 608 ("Story's Commentaries also cite as support Tucker and Rawle, both of whom clearly viewed the right as unconnected to militia service."); *id.* at 610 ("an individual right unconnected to militia service"); *id.* at 611 (same); *id.* at 612 (same); *id.* at 616 ("an individual right unconnected with militia service."). The Court went on to specifically reject the argument that the Second Amendment provides special protection for weapons necessary for military service. *See id.* at 627–28 ("It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. . . . It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."). Earlier in *Heller*, the Court read *Miller* "to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Heller*, 554 U.S. at 625. Given the Court's rejection of the hybrid approach in *Heller*, this Article does not address it in depth.

263. United States v. Herriott, No. 2:23-CR-37-PPS-JEM, 2024 WL 3103275, at *4 n.1 (N.D. Ind. June 24, 2024) ("If anything, *Rahimi* can be seen as a softening of the approach to the Second Amendment taken in *Bruen*. How else does one explain that the author of *Bruen* is the sole dissenter in *Rahimi*?").

capacity magazines are "consistent with the principles that underpin our regulatory tradition."[264] The prohibitions "faithfully [apply] the balance struck by the founding generation" and the generation that adopted the Fourteenth Amendment "to modern circumstances."[265] *Rahimi* also maintains the "[w]hy and how" analysis from *Bruen* but makes clear that it was not intended to "suggest a law trapped in amber."[266] As discussed above, historical restrictions on armed groups and modern restrictions on assault weapons and large-capacity magazines are adopted for the same "why"—to prevent acts of mass violence—and the same "how"—limiting the availability of the means to commit that violence.

Whether the courts apply a principle-based approach or analyze the historical record with a higher degree of specificity, the long tradition of prohibiting armed groups provides a close historical analogy justifying modern prohibitions on assault weapons and large-capacity magazines under the *Bruen-Rahimi* standard.

264. *See Rahimi*, 144 S. Ct. at 1897–98. Some high-profile originalist scholars have also recently advocated for this approach. *See, e.g.*, William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024).

265. *Rahimi*, 144 S. Ct. at 1898.

266. *Id.* at 1897.