The Watchman's Time To Kill: The Right To Vigilante Justice in the Jim Crow South

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I. INTRODUCTION

The HBO series *Watchmen* raises compelling questions about the potential constitutionality of certain forms of extrajudicial justice. The series is set in an altered history of modern-day Tulsa, Oklahoma.[1] The story picks up after the Seventh Kalvary, a secret white supremacist society, murders all the police officers in Tulsa except two, the chief of police and the black

[1] *Watchmen: It's Summer and We're Running Out of Ice* (HBO Oct. 20, 2019).

female lead, Angela Abar, played by actress Regina King.[2] The new crop of police officers wears masks to protect their identities from the Kalvary.[3]

Late in the series, Abar discovers that she is the granddaughter of the first black police officer in Tulsa.[4] Her grandfather, Will, had witnessed the Tulsa Massacre of 1921 as a child.[5] Crazed white Tulsans killed Will's parents because they were jealous of the prosperous African American community dubbed the Black Wall Street. He barely escaped with his young life.[6]

Will later returned to Tulsa in 1938 and became a police officer, but the department was rife with racism.[7] After discovering a plot called "Cyclops," his white counterparts pulled a hood over his head, beat, and hung him.[8] The officers cut him down before died, warning him that investigating "Cyclops" would be a fatal error. While walking home, he places the hood back on and takes on the persona of Hooded Justice. He later discovers that "Cyclops" is a plan by white supremacists to use a hypnotic film to cause violent, self-destructive eruptions among the black population. As a result, his alter ego, Hooded Justice, terminates all the white supremacists involved.[9]

Abar first meets Will after he phones her, demanding that she meet him at a particular location.[10] When she arrives, she finds her friend and mentor, the white chief of police, hanging by the neck.[11] An elderly gentleman in a wheelchair is sitting beneath him. The elderly gentleman claims responsibility, but Abar is incredulous.[12] It turns out the chief of police had been a closeted, high-ranking member of the Kalvary.[13] Will had used an adapted form of the hypnotic video to compel the police chief to hang himself.[14]

Watchmen presents some of the same questions about race and justice that the movie *A Time to Kill* did almost 25 years earlier.[15] *A Time to Kill* portrays

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[2] *Id.*

[3] *Id.*

[4] *Watchmen: This Extraordinary Being* (HBO Nov. 24, 2019).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Watchmen: The Extraordinary Being* (HBO Nov. 24, 2019).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] A TIME TO KILL (Warner Brothers 1996).

a white southern attorney, Jake Brigance, defending a black father of a 10-year-old daughter charged with murder.[16] The father, Carl Lee Hailey, visits Jack early in the film and confirms that four boys raped a black girl a year earlier with impunity.[17] The implication is that Carl Lee will have to get justice himself.[18] The next day, Carl Lee mows down the rapists as they enter the courthouse.[19]

A Time to Kill is set in a majority white city in Mississippi in the 1980s, where aspects of the Jim Crow South remained.[20] Both films evoke the true history of extrajudicial white violence against blacks in the Jim Crow South. A case in point is the case of Emmett Till.

J.W. Milam and Roy Bryant brutally murdered Till for allegedly whistling at a white woman in the Mississippi delta in 1955.[21] Mamie Till, the mother of Emmett Till, recalled a moment during the trial of her son's murderers that illustrates the ubiquity of criminal injustice in the Jim Crow South; when the defendants were white and the victims were black.[22] The black supporters automatically and in mass began to walk out of the courtroom when the jury retired for deliberations.[23] The implication was clear. Their job was done. They had seen this movie too many times to wait for the credits to roll.

When Till's mother saw the black audience leave the courtroom, she leaned over and said to her companion, "It's time for us to go. Congressman Diggs said to me, 'and miss the verdict?' I said, 'this is one you don't want to hear. The verdict is not guilty.'"[24]

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See generally* THE UNTOLD STORY OF EMMETT LOUIS TILL (ThinkFilm 2005) (explaining the life and murder of Emmett Till).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 48:57.

Of course, what followed was almost as predictable as the effects of gravity. About 45 minutes after the jury went in, they came out.[25] The verdict was not guilty.[26]

Till's mother remarked to a news reporter that "the whole trial was just a farce . . . but the verdict was the one I expected."[27] When news officials interviewed the foreman of the jury, he remarked, "it wouldn't have taken us that long, but they told us to make it look good. So we had some soda pop and beer and . . . waited a little while, and then we came back with our verdict."[28]

Subsequently, the state prosecuted the defendants on kidnapping charges.[29] Their evidence was iron-clad. The defendants had been caught red-handed. They had forcibly taken Emmett from his grandmother's home in front of several witnesses.[30] Convictions would have been inevitable had this not been the Jim Crow South.

Not only were the men not convicted, but the grand jury refused even to indict them.[31] In another bold display of Southern self-righteousness, Sydney Carlton, the lawyer for the defendants, basically admitted in a press conference in front of news cameras that his clients were guilty, stating: "Frankly, I think that this is a result primarily of the interference in Mississippi, in Mississippi affairs by outside interests, and a result of the NAACP and their activities in trying to make something big out of just an ordinary and criminal affair in Mississippi."[32] A year later, the defendants, J.W. Milam and Roy Bryant confessed to the kidnapping and murder to reporter William Bradford Hui.[33]

Emmett Till's cousin, who was present during the whistling incident, remarked years later, "you never expect anything but for them to be acquitted because that was Mississippi during that time."[34]

Before the murder trial, the Sheriff of Tallahatchie County, H.C. Strider, made the following comment; not in private, not off the record, but intentionally in front of a news camera:

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[25] *Id.*

[26] *Id.*

[27] THE UNTOLD STORY OF EMMETT LOUIS TILL, *supra* note 21, at 50:03.

[28] *Id.* at 51:22.

[29] *Id.* at 54:00.

[30] *Id.* at 11:48.

[31] *Id.* at 54:53.

[32] *Id.* at 55:17.

[33] THE UNTOLD STORY OF EMMETT LOUIS TILL, *supra* note 21, at 56:30.

[34] *Id.* at 51:46.

> I'd like for the NAACP, or any colored organization anywhere, to know that we are here, giving all parties a free trial, and intend to give a fair and impartial trial. And we don't need the help of the NAACP, and we don't intend for them to help. We never have any trouble until some of our southern niggers go up north, and the NAACP talks to them and they come back home.[35]

This same sheriff, immediately after Till's body was found, had unilaterally arranged a quick funeral in an apparent effort to prevent an autopsy from being performed on the body. Sheriff Strider wanted an immediate burial because he knew if people saw Emmett's body, it would make the State of Mississippi look bad. Mamie Till recalls, "the only way you could stop people from seeing was to bury it. I mean to get it out of sight. I don't know what authority he had to bury my son, but he took that authority."[36]

Both *A Time to Kill* and the HBO series *Watchmen* add interesting texture to the discussion about criminal justice and race by highlighting inequities in the justice system. However, the films ask the viewer to assess the justness of Hooded Justice and Carl Lee Hailey's actions within the confines of the traditional legal structure, using unlawful extrajudicial justice and self-defense as rubrics. But both characters' efforts go beyond current notions of self-defense and even beyond the Second Amendment right to community defense championed by individuals such as Robert Williams in Monroe, North Carolina in the late fifties[37]; groups like the Deacons of Defense in Louisiana in the mid-sixties[38]; and the Black Panther Party in Oakland, California in the mid-to-late sixties and early seventies.[39]

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[35] *Id.* at 38:32.

[36] *Id.* at 23:14.

[37] *Robert Williams: American civil rights leader*, BRITANNICA (Feb. 22, 2022), https://www.britannica.com/biography/Robert-Williams [https://perma.cc/WR35-PPSH]; *see also* Truman NELSON, PEOPLE WITH STRENGTH: THE STORY OF MONROE, NORTH CAROLINA 20–22 (1962). Truman Nelson, 'People With Strength: The Story of Monroe, North Carolina', 1962, within 'Robert and Mabel Williams Resource Guide' (San Francisco: Freedom Archives, 2005), p. 55, 59.

[38] *Id.* at 49, 60, 65. *See also Donnan's Barber Shop: 1960s command post for Deacons for Defense and Justice in Natchez,* NATCHEZ DEMOCRAT (Feb. 20, 2022), https://www.natchezdemocrat.com/2022/02/20/donnans-barber-shop-1960s-command-post-for-deacons-of-defense-and-justice-in-natchez [https://perma.cc/UXC6-YTD7].

[39] Giovanni Russonello, *Fascination and Fear: Covering the Black Panthers,* N.Y. TIMES (Oct. 15, 2016), https://www.nytimes.com/2016/10/16/us/black-panthers-50-years.html [https://perma.cc/4KW7-3J85].

These community defense groups protected the black community from the immediate use of deadly force by white supremacist organizations and the police. However, Hooded Justice's actions in *Watchmen* and Carl Lee Hailey's response in *A Time to Kill* are different matters altogether. The films do not premise the two characters' actions on protection from impending force but rather on general notions of justice that fall outside established laws. There is no common law doctrine that provides a defense for vigilantism, no matter how just. However, other potential sources support a narrowly tailored defense in both situations.

In 2016, Colin Kaepernick, then starting quarterback for the San Francisco 49ers took a knee during the pre-game singing of the national anthem in protest of uninterrupted history of police officers killing unarmed black men. The protest caused a national media explosion leading to far-flung accusations against Kapernick for disloyalty and treason. The issue was even hijacked by then-President Donald Trump as a political football to hand off to his base. However, Kaepernick's explanation of why he was protesting suggests that he was perhaps more American than his critics. He explained:

> I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. . . . To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder.[40]

He added that he would continue to protest until "[the American flag] represents what it's supposed to represent."[41] In other words, Kaepernick argued he owed no allegiance to the flag because the government had failed to protect African Americans from being routinely beaten, harassed, and killed by police officers. He would continue to withhold allegiance until the government stepped in to stop the abuse.

One of the themes behind the Fourteenth Amendment is the theme of allegiance for protection.[42] Under this maxim, "citizens owe allegiance to their government in exchange for the government's" protection from

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[40] Steve Wyche, *Colin Kaepernick explains why he sat during national anthem*, NFL (Aug. 27, 2016, 3:04 AM), https://www.nfl.com/news/colin-kaepernick-explains-why-he-sat-during-national-anthem-0ap3000000691077 [https://perma.cc/RKJ9-NLV8].

[41] Michael Frost, *Colin Kaepernick vs. Tim Tebow: A tale of two Christians on their knees*, WASH. POST (Sep. 24, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/09/24/colin-kaepernick-vs-tim-tebow-a-tale-of-two-christianities-on-its-knees [https://perma.cc/NT6J-YYNQ].

[42] Wilson R. Huhn, *Congress has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 546 n.50 (2007).

criminal and civil harm.[43] Said differently, there is no social contract to abide by the law when the law doesn't uphold its end of the bargain. The case for self-help, at least as far as African Americans in the Jim Crow South were concerned, was that state and local governments were not protecting African Americans from mob violence, lynch law, and Ku Klux Klan terrorism, so African Americans had no obligation to obey state laws, including criminal prohibitions. In other words, African American acts of vigilante justice or self-help would have been necessary because the states failed to protect African Americans from domestic terrorism.

The potential sources establishing viable defenses in both Carl Lee Hailey and Hooded Justice's cases derive from the Bill of Rights and the Fourteenth Amendment. All of the sources share one element in common: the right to use redistributive force. Redistributive force, as coined here, is the force used when the prerogative to use force is not distributed evenly by government bodies or actors. It is a constitutional remedy premised on the failure of government. It derives primarily from the Fourteenth Amendment right to Equal Protection and the Equal Protection Clause's promise of protection in exchange for allegiance.[44] The Second Amendment right to rebel and the Second Amendment political necessity defense provides additional support.[45] The Ninth Amendment, which protects unenumerated natural rights, also implies a natural right to justice based on the natural law of cause and effect (actions and equal and opposite reactions).[46] Furthermore, the survival of the democratic aspect of the U.S. government and fundamental notions of fairness undergirding the Constitution supply strong policy rationales for redistributive force.[47]

The Fourteenth Amendment justifications for redistributive force are rooted in the Equal Protection Clause.[48] The philosophical foundation of the Equal Protection Clause is the fundamental law of government, protection for allegiance—a principle also underlying the Declaration of

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[43] *Id.*

[44] *Id.*

[45] Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 947 (2011).

[46] *See* discussion *infra* Section "The Ninth Amendment Right to Justice."

[47] *See* ROBERT J. HARRIS, THE QUEST FOR EQUITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 32 (1960); *see also* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1843 (2009).

[48] Huhn, *supra* note 42, at 547.

Independence.[49] Citizens agree to follow the rule of law in exchange for protection from the government and wrongdoers alike. The implication is that no allegiance is due when the government deliberately fails or refuses to protect its citizens.

Government failures to protect race-aggrieved groups from the tyranny of the majority violate the Equal Protection Clause. Criminal justice systems that routinely exonerate white crimes against protected classes also violate it. The question becomes one of remedy. The entire justification for redistributive force is the failure of government. This failure includes both the state and federal governments. So government remedies, by definition, are out of the question. The only options left are either chronic injustice or self-help.

In his Commentaries of the Laws of England, Sir William Blackstone, the father of American law, asserts that self-help is an option "when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[50] This article argues that insufficient sanctions include a state or local government's consistent failure to bring domestic terrorists or tyrannical government officials to justice, or such government's deliberate indifference to chronic inequity in its criminal justice system. Examples of chronic injustices include systematic exclusion from jury and grand jury participation and the refusal of law enforcement to arrest or the state to prosecute. Additionally, the United States Government must fail or refuse to enforce the Equal Protection Clause in the jurisdiction.

A right to use redistributive force is also implicit in the Second Amendment right to rebel. Sean Patrick notes in his best-selling book *The Know Your Bill of Rights Book* that "Americans theoretically have a right to insurrection to correct intolerable and systematic abuses."[51] Thomas Jefferson wrote, "[t]he strongest reason for the people to retain the right to bear arms is, as a last resort, to protect themselves against tyranny in government."[52] The Supreme Court confirmed the right to rebel in *Heller v. District of Columbia* in 2008 and *McDonald v. Chicago* in 2010. [53] Redistributive force framed as a rebellion against systematic government abuses becomes a Second Amendment right.

The Second Amendment also includes a version of the political necessity defense. The Second Amendment political necessity defense vindicates the

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[49] HARRIS, *supra* note 47; Hamburger, *supra* note 47, at 184.

[50] BLACKSTONE, *supra* note 82, at 140–42, n.14.

[51] SEAN PATRICK, THE KNOW YOUR BILL OF RIGHTS BOOK: DON'T LOSE YOUR CONSTITUTIONAL RIGHTS–LEARN THEM! 33 (2012).

[52] *Id.*

[53] District of Columbia v. Heller, 554 U.S. 570, 599 (2008); McDonald v. Chicago, 561 U.S. 742, 742 (2010).

Second Amendment right to rebel. Under this configuration, Carl Lee Hailey would plead political necessity at his trial. He would argue he had a right to rebel against a jury system that tyrannically and unjustly gave impunity to guilty whites. Then Carl Lee would say that the tyrannical jury system resulted from deliberate indifference on the part of Mississippi and the failure of the federal government to intervene. Lastly, he would argue that the political necessity defense vindicated his right to rebel. His actions were politically necessary because the court system in the jurisdiction could not be relied on to protect the lives of African Americans or to mete justice out to civilian oppressors.

The Ninth Amendment to the Constitution is another potential source for the right to redistributive force. The Ninth Amendment preserves natural rights not enumerated in the Constitution. The natural law of cause and effect expressed in Isaac Newton's third law of motion is maybe the most natural law existing.[54] Newton's third law of motion holds that for every action there is an equal and opposite reaction.[55]

Justice is the equal and opposite reaction to injustice. Accountability is the natural response to private violations of the natural rights of others. When government fails to provide the effect natural law demands, the only way to achieve natural balance is extrajudicial justice.

Natural law roots American government. Natural rights, the legal offspring of natural law, is the subject of the Bill of rights. The Ninth Amendment's natural right to justice extends the natural laws undergirding the American government and the natural rights contained in the Bill of Rights.

A. Vigilante Justice

The Legal Information Institute of Cornell Law School defines vigilante justice as "the actions of a single person or group of people who claim to enforce the law but lack the legal authority to do so."[56] The most famous case

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[54] Newton's Third Law, The Physics Classroom, https://www.physicsclassroom.com/Class/newtlaws/u2l4a.html [https://perma.cc/84BD-8C45].

[55] *Id.*

[56] *Vigilante Justice,* LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/vigilante_justice#:~:text=Vigilante%20justice%20often%20describes%20the%20actions%20of%20a,to%20enforce%20the%20law%20in%20a%20given%20area [https://perma.cc/S8GL-TBFT].

of vigilantism grew out of the famed gunfight at the O.K. Corral. The gunfight resulted from a feud between the Earps, a family of lawmen,[57] and the Cochise County Cowboys, outlaws engaged in the trade of cattle smuggling, horse thieving,[58] and stagecoach jacking.[59]

The feud developed from a series of encounters between the Earps and the Cowboys. The first incendiary incident[60] came after Frank Patterson, Cowboy affiliate, duped the U.S. military's 12th infantry led by Captain Joseph H. Hurst and Deputy U.S. Marshal Virgil Earp.[61] The Cowboys had purloined six government mules and were caught red-handed.[62] The commanding officer posted wanted posters for Frank McLaury and the Cowboys.[63] The Cowboys then confronted Virgil Earp about the wanted posters and warned Earp that they would kill him if he continued to look for them.[64] A series of other run-ins occurred over the next several months.[65]

The final series of events that led directly to the gun fight occurred when Ike Clanton, one of the Cowboys, accused Doc Holliday, a friend of the Earps, of falsely accusing him.[66] The two men got into a heated argument which ended with Clanton threatening to kill Holliday the following day.[67] Clanton went hunting for Holliday the next day but was pistol-whipped, disarmed, and detained by Marshal Virgil Earp.[68] Virgil went to find the justice of the peace, leaving his brother Wyatt to supervise Clanton.[69]

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[57] WALTER NOBLE BURNS, TOMBSTONE: AN ILLIAD OF THE SOUTHWEST 252 (1999); STEVEN LUBET, MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP 28 (2004).

[58] DOUGLAS O. LINDER, THE EARP-HOLLIDAY TRIAL: AN ACCOUNT, FAMOUS TRIALS [Hereinafter *Earp-Holliday Trial], https://www.famous-trials.com/earp/503-home*

[https://perma.cc/SDE8-UKEX]; WILLIAM WEIR, HISTORY'S GREATEST LIES: THE STARTLING TRUTHS BEHIND WORLD EVENTS OUR HISTORY BOOKS GOT WRONG 174 (2009).

[59] EARP-HOLLIDAY TRIAL, *supra* note 58.

[60] "*Arizona Affairs" An Interview With Virgil W. Earp*, S.F. EXAMINER (May 28, 1882), *reprinted in* Tombstone History Archives [Hereinafter *Arizona Affairs*], http://www.tombstonehistoryarchives.com/interview-with-virgil-earp---2.html [https://perma.cc/9UQJ-5KQN].

[61] LUBET, *supra* note 57, at 28.

[62] *Id.*

[63] *Id.*

[64] *Arizona Affairs, supra* note 60.

[65] *Id.*

[66] Douglas O. Linder, *Testimony of R. J. Campbell in the Preliminary Hearing in the Earp-Holliday Case*, FAMOUS TRIALS [hereinafter *Testimony of R. J. Campbell*], https://www.famous-trials.com/earp/514-campbelltestimony [https://perma.cc/7PY3-RA3Q].

[67] *Id.*

[68] *Id.*

[69] Id.

Virgil returned with Justice Wallace, and the hearing convened. Wyatt waited outside the courthouse while the judge sentenced Clanton. Outside the courthouse, Wyatt ran into Tom McClaury, who had a pistol on his hip in plain sight, in violation of a municipal ordinance.[70] Meanwhile, Frank McLaury, Tom McLaury's older brother, and Billy Clanton, Ike Clanton's older brother, were headed to town to provide back up to their brothers who they had heard through the scuttlebutt had been in the heat of things.[71]

As Frank and Billy approached the town, Wyatt confronted Tom McClaury about the sidearm and pistol-whipped him.[72] Wyatt, a deputy federal marshal, claimed he was acting as deputy city marshal at the time and thus acted lawfully, although he was off duty.[73] Virgil, Wyatt's brother, and the current city marshal testified that this was true.[74]

The gunfight happened about two hours after the pistol-whipping.[75] When Frank and Billy entered the town, they stopped at the Grand Hotel where they were supposed to deposit their arms.[76] However, they learned that their brothers had been pistol-whipped and kept their weapons locked and loaded.[77] The two men went to the O.K. Corral where a witness overheard them threatening to kill the Earp brothers.[78]

When the Cochise Country Sheriff, Johnny Behan, a confidant of the Cowboys, got the news that the Cowboys were in town and armed and looking for trouble, he went to disarm them and talk them off the ledge.[79]

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[70] Douglas O. Linder, Testimony of A. Bauer in the Preliminary Hearing in the Earp-Holliday Case, FAMOUS TRIALS [Hereinafter Testimony of A. Bauer], https://www.famous-trials.com/earp/509-bauertestimony [https://perma.cc/73F8-KFLR].

[71] *Id.*

[72] Lee A. Silva, *Gunfight at the O.K. Corral: Did Tom McLaury Have a Gun*, HISTORYNET, https://www.historynet.com/ok-corral [https://perma.cc/2QBA-FQGG].

[73] *Id.*

[74] *Id.*

[75] Douglas O. Linder, *Statement of Wyatt S. Earp in the Preliminary Hearing in the Earp-Holliday Case*, FAMOUS TRIALS (citing ALFORD E. TURNER, THE O.K. CORRAL INQUEST (1992)) [Hereinafter *Statement of Wyatt S. Earp*], https://www.famous-trials.com/earp/502-statement [https://perma.cc/SQ6V-LZ4Y].

[76] LUBET, *supra* note 57, at 48.

[77] *Id.* at 3–4.

[78] *Id.* at 49.

[79] *Coroner's Inquest*, Tombstone Epitaph, Oct. 29, 1881.

When he found the men, two, Ike and Tom, claimed they were not armed, and Frank refused to disarm unless the Earps also did.[80]

Marshall Virgil Earp heard the news as well and discovered the Cowboys' location.[81] Growing more and more uneasy about the Cowboys' threats, their presence near the route the Earps traveled home, and their proximity to Doc Holliday's residence; Marshal Virgil finally resolved to disarm the Cowboys.[82] On the way, Virgil, Wyatt, Morgan, and Doc Holliday ran into Sheriff Behan.[83] Behan, who was a friend of the Cowboys, claimed to have already disarmed them, yet beseeched Virgil and company, "For God's sake, don't go down there, or they will murder you!"[84] Later, Behan testified that he had only told Virgil that he had attempted to disarm the Cowboys but was unsuccessful at disarming them.[85]

The Earps moved towards the Cowboy's location, not expecting a fight, partially believing the Sheriff's representation that he had disarmed the Cowboys.[86] When they arrived, Marshall Virgil demanded that the Cowboys disarm and "[t]hrow up [their] hands."[87] The two Cowboys drew their weapons instead and cocked the hammers.[88] Shots rang out.[89] "Wyatt Earp stood and fired in rapid succession as cool as a cucumber," reported the Tombstone Epitaph, and he shot Frank McLaurin in the belly.[90] Holliday stepped from behind a horse, drew a coach gun—a "large bronze pistol"—and shot Tom McLaury in the chest at close range.[91] Holliday then tossed the shotgun aside, pulled out a nickel-plated revolver and released a hail of

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[80] *Id.*

[81] Douglas O. Linder, *Testimony of Virgil Earp in the Preliminary Hearing in the Earp-Holliday Case, heard before Judge Wells Spicer*, FAMOUS TRIALS [hereinafter *Testimony of Virgil Earp*], https://www.famous-trials.com/earp/521-vearptestimony [https://perma.cc/LS3N-6V9C].

[82] *Id.*

[83] *Testimony of Virgil Earp*, *supra* note 81.

[84] *Id.*

[85] Douglas O. Linder, *Testimony of Sheriff John H. Behan in the Preliminary Hearing in the Earp-Holliday Case*, FAMOUS TRIALS [hereinafter *Testimony of John H. Behan*], https://www.famous-trials.com/earp/510-behantestimony [https://perma.cc/ARG4-RYMA].

[86] *Testimony of Virgil Earp*, *supra* note 81; *Statement of Wyatt S. Earp*, *supra* note 75.

[87] *Statement of Wyatt S. Earp*, *supra* note 75.

[88] *Testimony of Virgil Earp*, *supra* note 81.

[89] *Id.*

[90] *Three Men Hurled into Eternity in the Duration of a Moment*, TOMBSTONE DAILY EPITAPH (Oct. 27, 1881), *reprinted in* FAMOUS TRIALS, https://www.famous-trials.com/earp/499-tombstone [https://perma.cc/9V2T-VXPX].

[91] Scott P. WALDMAN, GUNFIGHT AT THE O.K. CORRAL: WYATT EARP UPHOLDS THE LAW 24 (2004); WEIR, *supra* note 58.

288 (2009).

gunfire at Frank McLaurin (who was still shooting despite being hit) and at Billy Clanton.[92]

Ike Clanton, who had started the ruckus, threw his arms around Wyatt and pled for his life.[93] Frank McLaury and Holliday exchanged shots, with the wounded McLaurin getting the best of exchange, grazing Holliday near his right thigh.[94]

Billy Clanton was shot in his gun hand by Morgan Earp.[95] Shifting his weapon to his left hand, he continued to air shots.[96] The two injured outlaws managed to hit Morgan Earp across the back and Virgil Earp in the leg.[97] Not to be outdone, Virgil Earp gathered himself and directed his fire at Billy Clanton.[98] Then, Doc Holliday and Morgan Earp shot at Frank McLaury, who was fully mobile despite being critically injured, hitting him in the back of the head, finally killing him.[99]

An Earp Possee member shot Billy Clanton two additional times, one in the chest and another in the abdomen, causing him to slump to the ground, where he fired more shots before running out of bullets. The boarding house owner then disarmed Clanton. Clanton eventually died from gunshot wounds. When the smoke cleared, three Cowboys lay dead.

Sherrif Behan attempted to arrest the wounded lawmen. Wyatt Earp responded, "I won't be arrested today. I am right here and am not going away. You have deceived me. You told me these men were disarmed; I went to disarm them."[100]

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[92] *Testimony of John H. Behan, supra* note 85.

[93] ALFORD E. TURNER, THE O.K. CORRAL INQUEST (1981).

[94] Jeff Morey, *"Blaze Away!"Doc Holliday's Role in the West's Most Famous Gunfight*, TOMBSTONE HISTORY ARCHIVES, http://www.tombstonehistoryarchives.com/historical-articles.html [https://perma.cc/V4XP-CDDR].

[95] TURNER, *supra* note 93.

[96] *Id.*

[97] Morey, *supra* note 94.

[98] *Id.*

[99] *Id.*

[100] FRED DODGE, UNDER COVER FOR WELLS FARGO: THE UNVARNISHED RECOLLECTIONS OF FRED DODGE 336 (Carolyn Lake ed., 1999).

Following the incident, the state brought murder charges against Doc Holliday and the Earp brothers. A judge found that Virgil had acted in his capacity as a lawman. There was insufficient evidence to indict the others.[101]

The Cowboys retaliated by ambushing Morgan and Vigil Earp, killing one and maiming the other.[102] Several of the suspects were apprehended and prosecuted. However, all were released either due to a technicality or alibi evidence.[103]

This sequence of events was one of the most famous vigilante justice crusades in American history. The Earp Vendetta Ride, as it came to be known, grew out of Wyatt Earp's outrage at what he deemed to be the failure of the judicial system.[104] He resolved to take matters into his own hands.[105] Earp assembled a federal posse, a vigilante killer squad, including a cast of characters like the now legendary Doc Holliday, and set out to hunt the outlaws down and bring them to frontier justice.[106]

The posse encountered two Cowboys while escorting the maimed Virgil Earp and his wife to a train in Tuscon, Arizona.[107] The posse ran down one of the outlaws, Frank Stilwell, cutting him down without hesitation. The other, Ike Clanton, escaped.[108] Temporarily.

The government issued warrants for the posse's arrest for extrajudicial murder.[109] When Wyatt Earp and other posse members returned home to Tombstone, Sheriff Behan, friend to the Cowboys, attempted to arrest them.[110] He was unsuccessful. When Sheriff Behan approached the Earp posse, he said, "Wyatt, I want to see you." Wyatt responded, "You may see me once too often," and kept walking.[111]

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[101] Douglas O. Linder, Decisio*n of Judge Wells Spicer after the Preliminary Hearing in the Earp-Holliday Case,* FAMOUS TRIALS [Hereinafter *Decision of Judge Wells*], https://www.famous-trials.com/earp/501-spicerdecision [https://perma.cc/232U-C3MY].

[102] *American Experience: Wyatt Earp* (PBS television broadcast Jan. 25, 2010).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Weekly Citizen*, ARIZ. WEEKLY CITIZEN, Apr. 2, 1882, at 4.

[108] Peter Brand, *Wyatt Earp's Vendetta Posse*, WILD WEST MAG., Apr. 1, 2007, at 44, 46; GARY L. ROBERTS, DOC HOLLIDAY: THE LIFE AND LEGEND (2006); *Arizona. The Tucson Tragedy—Verdict of the Coroner's Jury—The Earp Party—How Masonic Hall*, SACRAMENTO DAILY UNION, Mar. 23, 1882 at 1, 1 [hereinafter *The Tuscon Tragedy*].

[109] *The Tuscon Tragedy, supra* note 108, at 1.

[110] Brand, *supra* note 108, at 47.

[111] *Id.*

Not to be outdone, Sheriff Behan assembled his own posse, the Cowboys. Sheriff Behan deputized friends of Frank Stilwell and Ike Clanton; including Johnny Ringo, Pheineas Clanton, and nineteen others.

After making sure Virgil, his family, and Morgan's family were safe aboard their train to California, the Earp Vendetta Posse struck out again to track down the other Cowboys. The posse eventually ran down and killed three other Cowboys.

The posse chased down Cowboy Florentino Cruz and riddled him with bullet holes.[112] The eight-member posse ran across their next victim by surprise when they reached the top of a small hill.[113] The group was surprised to see nine cowboys, including Curly Bill, camping and preparing dinner.[114] A shoot-out ensued. Wyatt's gunfire punched a hole in Johnny Barnes' chest, ripped through Milt Hick's arm, and nearly chopped Bill's body into hemispheres.[115] The Cowboys returned fire.[116] But to no avail. Although the lawmen were outmanned and outgunned, the Cowboys eventually ran for the hills.[117] Wyatt was unscathed.[118]

Sheriff Behan's attempts to track down and arrest the Earp Vendetta Posse were unsuccessful.[119] The posse members' whereabouts were public knowledge.[120] The law eventually arrested Doc Holliday in Denver. With the help of his friend, Trinidad, and Colorado Sheriff, Bat Masterson, Wyatt

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[112] *Arizona. Another Murder by the Earp Party*, SACRAMENTO DAILY UNION, Mar. 24, 1882 at 1, 1.

[113] Brand, *supra* note 108.

[114] *Id.*

[115] Allen Barra, *Who Was Wyatt Earp?From Law Officer to Murder to Hollywood Consultant: The Strange Career of a Man Who Became a Myth*, AMERICAN HERITAGE (Dec. 1998), https://www.americanheritage.com/who-was-wyatt-earp#1 [https://perma.cc/TZ3A-MKQC].

[116] *Id.*

[117] Wyatt Earp: An Amazingly Documented 10-Gauge Shotgun Used by Him to Kill "Curly Bill" Brocius, Heritage Auctions (Feb. 20, 2020), https://historical.ha.com/itm/shotgun/double-barrel/wyatt-earp-an-amazingly-documented-10-gauge-shotgun-used-by-him-to-kill-curly-bill-brocius/a/621543400.s#auction-info [https://perma.cc/BF84-ZS2F].

[118] Catherine Holder Spude, The Shooting of the Saddle Horn at Iron Springs 24 March 1882, Wayback Machine (June 2008), https://web.archive.org/web/20120310110310/http:/www.montanadawn.com/Wyatt_Earp_s_Saddle_Horn.html [https://perma.cc/22SD-BFZD].

[119] CHUCK HORNUNG, CIPRIANO BACA, FRONTIER LAWMAN OF NEW MEXICO 70 (2013).

[120] *Id.*

persuaded the Governor of Colorado to deny Arizona's extradition request.[121] Shortly after that, the law arrested Wyatt and his brother Warren in Arapahoe County, Colorado and detained five other members of the Earp Vendetta Posse in Denver.[122] Sheriff Bat Masterson again intervened, and the men were released from custody.[123] Ultimately, vigilante justice prevailed—with the help of government officials, of course.

Many Early American cities organized vigilante groups called vigilance committees. Civilians formed these groups to administer law and order in areas where the government failed in this department.

One of the more well-known acts of vigilante committee justice occurred in San Francisco in the 1850s. Crime and political corruption were rampant in San Francisco at the time, and the city's rapid growth due to the gold rush overwhelmed the city's criminal justice apparatus. In response, a group of citizens formed the San Francisco Committee of Vigilance.

The committee, far from a discreet organization, published its mission statement in the local paper:

> *Whereas*, It has become apparent to the citizens of San Francisco that there is no security to life and property, either under the regulations of society as it at present exists, or under the laws as now administered, therefore, the citizens whose names are hereunto to attached, do unite themselves into an association, for the maintenance of the peace and good order of society and the preservation of the lives and property of the citizens of San Francisco, and do bind ourselves, each unto the other, to do and perform every lawful act for the maintenance of law and order, and to sustain the laws when faithfully and properly administered. But we are determined that no thief, burglar, incendiary or assassin shall escape punishment either by the quibbles of the law, the insecurity of prisons, the carelessness or corruption of the police, or laxity of those who pretend to administer justice.[124]

The committee, comprised of over 700 members,[125] executed eight individuals extrajudicially and forced a number of politicians out of office

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121 ROBERT K. DEARMENT, BAT MASTERSON: THE MAN AND THE LEGEND 230–31 (1979).

122 *Arizona. The Capture of the Earps*, SACRAMENTO DAILY UNION, May 17, 1882, at 3.

123 *Id.*

124 *Organization of the Vigilance Committee*, 2 DAILY ALTA CALIFORNIA 185, at 2 (emphasis added).

125 PHILIP J. ETHINGTON, THE PUBLIC CITY: THE POLITICAL CONSTRUCTION OF URBAN LIFE IN SAN FRANCISCO, 1850–1900, 88–89, 94 n.23 (Univ. of Cal. Press 2001) (1994).

without legal process during its tenure.[126] The Committee headquarters doubled as a black site where suspects were interrogated and incarcerated without due process.[127] The committee also deported, ostracized, and remitted to law enforcement dozens of other residents.

Nineteenth-century abolitionists also organized vigilance committees to liberate enslaved people and transport them to free territories.[128] The system of transporting enslaved Americans to freedom was known as the Underground Railroad.[129] The Pittsburgh Vigilance Committee, for instance, consisted of Black abolitionists who kidnapped enslaved Americans and delivered them to freedom via the Underground Railroad.[130] One of the hubs of the National Underground Railroad was Arthursville, on the outskirts of Pittsburgh.[131] The Black community in Arthursville was tight-knit, and it featured a cross-section of prominent black professionals and working-class black people.[132] Committee members included the richest black man in Pittsburg as well as barbers, educators, and African Episcopal Church ministers.[133] The community was also politically savvy.[134] The committee reflected this diversity and political acumen.[135]

The Monongahela House in Arthursville was one of the finest hotels in the region.[136] It was also the secret hub of the vigilance committee, and the clandestine nature of the facility was a well-kept secret.[137] The committee met

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[126] BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 363 (Indep. Inst. 2001) (1990).

[127] *Id.* at 677–80.

[128] Ervin Dyer, *Arthursville abolitionists ran Underground Railroad through Pittsburgh*, POST-GAZETTE, https://old.post-gazette.com/blackhistorymonth/19990222arthur.asp [https://perma.cc/5E2Q-SCA9].

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Ervin Dyer, *Arthursville abolitionists ran Underground Railroad through Pittsburgh*, POST-GAZETTE, https://old.post-gazette.com/blackhistorymonth/19990222arthur.asp [https://perma.cc/5E2Q-SCA9].

[135] *Id.*

[136] *Id.*

[137] *Id.*

at the Monongahela House to plan and organize anti-slavery stealth missions.[138]

Wealthy white businessmen, including slavers traveling through Pittsburg, would often stop at the establishment.[139] When one slaver brought his enslaved people to the establishment, committee affiliates quickly abducted her, disguised her as a man, and whisked her right past her enslaver.[140]

One of the more recent incidents of vigilantism was the controversial case of Bernhard Goetz.[141] The setting was mid-1980's New York City.[142] The city was crime-ridden.[143] President Ronald Reagan's attack on social safety nets caused a crime explosion.[144] The problem was so bad in New York City that it provided the backdrop for the Batman saga.[145] As the saga refers to it, Gotham City was crime-infested and replete with corrupt politicians, ineffective law enforcement, and rampant drug addiction.[146] The protagonist of the story, Bruce Wayne, is a multi-millionaire inheritor of the Wayne business empire.[147] When he was just a boy, he watched his mother and father killed by a gunman in an alley and resolved to track down his parent's killers when he was older.[148] Determined to bring his parent's killers to justice and reign in the city's crime problem, he created an alternate identity, Batman, that he would use to disguise his criminal activity, the administration of extrajudicial justice.[149] Batman, probably the best-known vigilante superhero, takes the law into his own hands under cover of night.[150] He creeps around

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[138] *Id.*

[139] *Id.*

[140] Ervin Dyer, *Arthursville abolitionists ran Underground Railroad through Pittsburgh*, POST-GAZETTE, https://old.post-gazette.com/blackhistorymonth/19990222arthur.asp [https://perma.cc/5E2Q-SCA9].

[141] Douglas O. Linder, *The Trial of Bernhard Goetz: An Account*, FAMOUS TRIALS [Hereinafter *Trial of Bernhard Goetz*], https://www.famous-trials.com/goetz/133-home [https://perma.cc/33V2-5DWA].

[142] *Id.*

[143] *Id.*

[144] David E. Rosenbaum, *Reagan's 'Safety Net' Proposal: Who Will Land, Who Will Fall; News Analysis*, N.Y. TIMES (Mar. 17, 1981), https://www.nytimes.com/1981/03/17/us/reagan-s-safety-net-proposal-who-will-land-who-will-fall-news-analysis.html [https://perma.cc/HXE4-VQ24].

[145] Justin Mann, *The "Vigilante Spirit": Bernhard Goetz, Batman, and Racial Violence in 1980s New York*, 15 SURVEILLANCE & SOCIETY 56, 57 (2017).

[146] *Id.* at 62.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

the city disrupting muggings, corralling criminals, and handing out gratuitous beatings for good measure.[151] These were the eyes through which Bernhard Getz saw New York City.[152]

Goetz had been mugged three times by the time he encountered three African American teenagers on a New York City subway car.[153] One of the teenage boys, Troy Canty, asked Goetz for five dollars or demanded that he give it to him depending on one's view of the facts. [154] His words, according to Goetz, were "give me five dollars." Other than, possibly, the young man's tone, his actions were otherwise unremarkable. [155] He exposed no weapon, made no intimidating gestures, or took no questionable action. [156] Goetz was also not surrounded by the four boys, which would have unquestionably exposed ill-intentions, coupled with the request for funds. [157] Two of Canty's travel mates were near the corner of the subway car, not engaged in the interaction at all. [158] The remaining associate, James Ramseur, stood near Cabey but also made no suspect movements. [159]

What Goetz did suggest, that he not only acted in the moment based on the facts immediately before him, but that, in his mind, he was also attacking his prior assailants and maybe even crime itself in New York.[160]

While Canty stood with his hand out, Goetz reached into his pocket, produced a pistol, and shot the teenager in his chest. [161] He then shot Ramseur in his and left side. But he was not finished. [162] Goetz then turned

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[151] Justin Mann, *The "Vigilante Spirit": Bernhard Goetz, Batman, and Racial Violence in 1980s New York*, 15 SURVEILLANCE & SOCIETY 56, 57 (2017).

[152] *Id.*

[153] *Trial of Bernhard Goetz*, *supra* note 141.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Douglas O. Linder, The Trial of Bernhard Goetz: An Account, FAMOUS TRIALS [Hereinafter Trial of Bernhard Goetz], https://www.famous-trials.com/goetz/133-home [https://perma.cc/33V2-5DWA].

[160] *Id.*

[161] *Id.*

[162] *Id.*

towards the two boys in the corner of the subway. [163] In a version of guilt by association worthy of Wyatt Earp, he shot Barry Allen and Darry Cabey, who obviously had nothing to do with any mischief. [164] When Cabey moved a tad after being shot, Goetz yelled, "[y]ou seem to be alright; here's another."[165] He then hit the teenager again, severing his spine and crippling him for life.[166] When it was all said and done, Goetz was everything but repentant. He told investigators that he developed a "pattern of fire" from left to right before shooting.[167] He also remarked that he meant to kill the boys, but he was so flush with adrenaline he could not aim properly.[168] Goetz's motive was revenge. His actions constituted premeditated attempted murder, not self-defense.[169]

Despite the prodigious evidence of premeditation and deliberation, a predominately white jury exonerated Goetz.[170] The jury acquitted Goetz because the four boys represented an image of crime that terrorized the imaginations of New Yorkers.[171] It could not have been because the young men, particularly Allen and Cabey, represented a threat to Goetz.[172] The verdict was about rampant crime in New York City and the failure of law enforcement to corral its proliferation.[173]

Goetz's shooting spree was not vigilante justice technically. It was vigilantism without the justice part. His intent was not to bring to justice criminals who had evaded the criminal justice system or punish criminals the criminal justice apparatus was bound to absolve. Goetz did not have the Batman motive, salvaging justice from corrupt politicians who protected influential criminal elements. Nor did he have the Earp motive to dispatch justice to outlaws who might skirt justice because of their affiliations with law enforcement or the San Francisco Vigilance Committee's purpose of supplementing an overwhelmed law enforcement apparatus. His jury,

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[163] *Id.*

[164] *Id.*

[165] Douglas O. Linder, *The Trial of Bernhard Goetz: An Account*, FAMOUS TRIALS [Hereinafter *Trial of Bernhard Goetz*], https://www.famous-trials.com/goetz/133-home [https://perma.cc/33V2-5DWA].

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Douglas O. Linder, *The Trial of Bernhard Goetz: An Account*, FAMOUS TRIALS [Hereinafter *Trial of Bernhard Goetz*], https://www.famous-trials.com/goetz/133-home [https://perma.cc/33V2-5DWA].

[172] *Id.*

[173] *Id.*

however, seemed to apply such motives. In the jurors' minds, the boys and their profiles also represented threats, and Goetz provided the response that the threats deserved.

B. Birth and Background of the 14th Amendment

The right to vigilante justice is rooted, primarily, in the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause is based on the grounding tenant of the Declaration of Independence: "allegiance-for-protection."[174] The tenant proclaims that individual's assent to government and agreement to abide by its laws in exchange for protection from unlawful deprivations of life, liberty, and property at the hands of government and private citizens alike.[175]

The story of the Fourteenth Amendment begins with *Dred Scott v. Sanford.* In *Dred Scott*, the Supreme Court held that African Americans had no rights that white Americans were obliged to respect because Blacks historically were considered property subservient to the dominant race.[176]

Scott and his family had accompanied their then enslaver into two free territories, the State of Illinois and the Wisconsin Territory.[177] They resided in each jurisdiction for extended periods.[178] Each jurisdiction provided that enslavers relinquished their rights to their slaves-by-law, if they became residents in the jurisdiction.[179]

Scott later filed suit, arguing that he was free since his master-by-law brought him into a territory that forbade slavery at pains of forfeiting ownership.[180] The Supreme Court found that Mr. Scott had no right to sue in Court because Blacks, enslaved or free, were not citizens of the United States.[181] The Court also held that Mr. Scott was still enslaved because the Missouri Compromise, which made the Wisconsin Territory free, was

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[174] Richard D. Fry, *Allegiance & Protection: Allegiance and Protection in Perspective*, PATRIOT COAL., https://www.patriotcoalition.org/allegiance-protection [https://perma.cc/J9NU-ARTR].

[175] *Id.*

[176] 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 216 (2d ed., 2017).

[177] *The Dred Scott Case*, NAT'L PARK SERV. (June 5, 2020), https://www.nps.gov/jeff/planyourvisit/dredscott.htm [https://perma.cc/8YYG-JNXR].

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] GAYLORD ET AL., *supra* note 176, at 218.

unconstitutional.[182] The Court claimed that the Compromise seized property from enslavers without due process of law.[183] Scott Gaylord notes, "The Civil War, and the resulting Reconstruction Amendments, were in part caused and were reactions against…*Dred Scott v. Sanford*."[184]

Slavery technically ended with the passage of the Thirteenth Amendment, the first of the Reconstruction Amendments, in 1865. The amendment provided that:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation[185]

Congress meant for the Thirteenth Amendment to not only abolish slavery but to bestow the benefits of American citizenship to African Americans. In other words, Congress intended the Thirteenth Amendment to overturn the *Dred Scott* decision.

However, the southern states responded with the Black Codes, onerous laws that endeavored to return the newly freed to a de facto state of servitude. The Black Codes were so bad that one Congressman exclaimed, "[the freedman] is worse off than before."[186] The Black Codes made it a crime punishable by imprisonment to be unemployed, to travel city to city without a work permit,[187] to own a gun, etc. The Codes also subjected the newly freed to "every species of violence, insult, and fraud without redress."[188] Gaylord notes, "[t]hese laws impeded the freedom of black southerners to such an extent that the result was, effectively, a return to slavery."[189]

One of the most effective uses of the Black Codes was to deprive African Americans of their Second Amendment rights to bear arms and, by extension, their Second Amendment rights to self-defense. State militias actively suppressed Freedman.[190] Stephen P. Halbrook, one of the foremost

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[182] *Id.*

[183] *Id.* at 214.

[184] *Id.*

[185] U.S. CONST. amend. XIII, § 1–2.

[186] GAYLORD ET AL., *supra* note 176, at xxxiii.

[187] *Id.* at 30.

[188] PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, HELD IN ZION CHURCH, CHARLESTON 24–25 (1865).

[189] GAYLORD ET AL., *supra* note 176, at 29.

[190] STEPHEN P. HALBROOK, SECURING CIVIL RIGHTS 5 (1998).

authorities on the Second Amendment, points out: "[t]o restore slavery in fact, planters advocated that 'the possession of arms or other dangerous weapons [by the freedmen] without authority should be punished by fine or imprisonment and the arms forfeited."[191]

A perturbed Republican congress, which "viewed the mistreatment of freedmen as an affront to the victory for freedom that the Union had secured,"[192] responded with the Civil Rights Act of 1866, which included measures to counteract the Black Codes. Congress believed it had the authority to bind the states with this legislation under Section 2 of the Thirteenth Amendment, which read "Congress shall have power to enforce this article by appropriate legislation."[193] However, the Democratic party pushed back, arguing that Congress had no right to create federal laws regulating activity that was traditionally under the exclusive purview of the state and that the states defined the benefits of citizenship, not the federal government.[194] In other words, the Democrats maintained that Congress was without power to compel the states, for instance, to allow African Americans to criticize elected officials openly or to own a gun[195] for self-defense. According to the Democrats, the "state remained the primary source of law and Congress would step in to protect constitutional rights when states failed to do so."[196]

As a result, the Civil Rights Act of 1866 became the Fourteenth Amendment's precursor. Congress passed the Fourteenth Amendment in case the Supreme Court was to find that Congress did not have the power to confer the benefits of citizenship or vanquish the Black Codes under section 2 of the Thirteenth Amendment.[197]

The framers of the Fourteenth Amendment intended for the Amendment to hold the states accountable to the Bill of Rights, giving the federal government the power to obliterate the Black Codes and protect the

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[191] *Id.* at 11.

[192] GAYLORD ET AL., *supra* note 176, at 30.

[193] *Id.* at 31.

[194] *Id.*

[195] *Id.* at 37.

[196] *Id.* at 4.

[197] *Id.* at 34-35, 37.

civil rights of the newly freed and white sympathizers.[198] Congress passed the Amendment in 1867, and the states ratified it in 1868.

The Fourteenth Amendment contains four clauses that would come to revolutionize American democracy:[199] (1) the Citizenship Clause, (2) the Privileges and Immunities Clause, (3) the Equal Protection Clause, and the (4) Due Process Clause.[200]

The Citizenship Clause in section one of the Amendment grants citizenship to "all persons born or naturalized in the United States . . .", creating the concept of so-called birth-right citizenship.[201] The privileges and immunities clause, the second clause in section one, reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."[202] Congress envisioned this Clause as the primary means for protecting the newly freed's substantive civil rights and liberties.[203] Congress meant to import the first eight Amendments to the Constitution into the Fourteenth Amendment through this clause, thus hamstringing the states to the Bill of Rights.[204] The Privilege and Immunities Clause prevented states from infringing on citizens' right to free speech, assembly, religion, self-defense, etc.[205] The Clause also included "fundamental rights . . ." such as "personal security . . ." and "the protection provided by the courts and law enforcement . . . ."[206]

However, in the first of a series of federal betrayals spanning eight decades, the Supreme Court held in the *Slaughter-House Cases* of 1873 that no privileges and immunities of United States citizenship existed akin to the rights contained in the Bill of Rights.[207] The Court held the Fourteenth Amendment only bestowed the rights of U.S. Citizenry. These rights only included the right to sue the federal government, to access its sea ports, to assemble, to a writ of habeas corpus, and protection by the federal government "when on the high seas or within the jurisdiction of a foreign government…".[208] Against a clear congressional record, the Supreme Court

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198 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 27 (2d ed., 2017).

199 U.S. CONST. amend. XIV, § 1.

200 GAYLORD ET AL., *supra* note 176, at xix–xx.

201 *Id.* at xxxii.

202 *Id.* at xxxii.

203 *Id.* at xix.

204 *Id.* at 37.

205 *Id.*

206 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 37 (2d ed., 2017).

207 *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 36 (1873).

208 GAYLORD ET AL., *supra* note 176, at 42–43.

found that the Fourteenth Amendment only required the states to do unto black men as they did unto white men and nothing more.[209] The Fourteenth Amendment "simply afforded the protection of a state's privileges and immunities to out of state citizens."[210] According to the Court, the states defined the privileges and immunities of state citizenship. The states were just obliged to extend these privileges and immunities to out-of-state citizens traveling within the states' borders.[211]

Congress intended the Due Process Clause of the Fourteenth Amendment to be the state-applicable version of the Fifth Amendment Due Process Clause. It reads, "Nor shall any State deprive any person of life, liberty, or property, without due process of law."[212] Ultimately, the Clause became the primary vehicle for importing key provisions of the Bill of Rights into the Fourteenth Amendment.[213]

The most important Clause, as far as this article is concerned, is the Equal Protection Clause. The Clause would eventually become the means of enforcing equal dispensation of state-afforded privileges, immunities, and protections.[214]

Before Congress drafted the Fourteenth Amendment, it was unclear whether the several states or the federal government determined the privileges and immunities of national citizenship.[215] Now it would be the federal government and not the state governments who defined and determined the privileges of U.S. citizenship.[216] The primary author of the Fourteenth Amendment, John Bingham, clarified that the Amendment included "all the limitations for personal protection of every article and section of the Constitution."[217]

After the passage of the Fourteenth Amendment, a debate arose over Congress' power to regulate private violations of Fourteenth Amendment

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[209] *Id.* at 41.

[210] *Id.*

[211] *Id.* at 34.

[212] *Id.* at xxxiii.

[213] *Id.* at xix–xx.

[214] 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW xx (2d ed., 2017).

[215] *Id.* at 35.

[216] *Id.* at 36.

[217] CONG. GLOBE, 39th Cong., 2d Sess. 81 (1867) (statement of Rep. John Bingham).

precepts.[218] However, "Congress adopted the Fourteenth Amendment in response to, among other things, the pervasive private violence occurring in the South against newly-freed black Americans" that "was actively assisted and not punished by the States."[219] Additionally, Congress's Reconstruction legislation establishes that Congress possessed the authority to regulate private conduct.[220]

Congress then passed the Civil Rights Act of 1871, better known as the Ku Klux Klan Act, under authority granted by section five of the Fourteenth Amendment. Section five states, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[221] Congress passed the Act in response to "depredations performed by private individuals such as Klan members, with either the active support by or inactive acquiescence of southern states."[222] Amongst other private conduct, the act made conspiracies to violate federal rights a criminal offense punishable by the federal government.[223]

As pointed out by Representative Garfield at the time:

> The chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic administration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.[224]

That is, the Equal Protection Clause not only prohibits a state's active involvement in the deprivations of rights. It also operates "when a state fails to enforce its laws equally and fairly."[225] For example, if a state refuses to prosecute a white male for kidnapping and raping several black women, that state violates the Equal Protection Clause. That is, the Equal Protection Clause covers both affirmative actions taken by the states and a "state's failure to protect black citizens."[226]

Before Congress passed the Fourteenth Amendment, Representative Garfield identified the particular clause addressing state-sponsored injustice meted out by private citizens: "When a state of facts is clearly made out, I

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[218] GAYLORD ET AL., *supra* note 176, at 3.

[219] *Id.*

[220] *Id.* at 3–4.

[221] *Id.* at xxxiii.

[222] *Id.* at 4.

[223] *Id.*

[224] 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 4 (2d ed., 2017).

[225] *Id.* at 3.

[226] *Id.*

believe the last clause of the first section of the Fourteenth Amendment empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection."[227] Congressman Burton Cook also indicated in the debates that Congress was empowered to protect the citizens of the states when the states failed in their duty to do the same.[228] Further evidence that Congress intended the Fourteenth Amendment to empower the federal government to regulate private conduct enabled by state inaction is that all of the congressmen who voted for the Fourteenth Amendment also voted for the Klu Klux Klan Act.[229] Therefore, the Congressional Republicans who passed the Fourteenth Amendment believed that it afforded them the authority to craft legislation like the Klu Klux Klan Act, which made the states accountable for passive facilitation of private injustice and active state perpetrations.

However, the Supreme Court undermined the Equal Protection Clause and gutted the most effective provisions of the Klu Klux Klan Act in *The Civil Rights Cases of* 1883. The Court held that that the Fourteenth Amendment did not privilege Congress to regulate private conduct. The Court stated:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.…Civil rights cannot be impaired by the wrongful acts of individuals unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings…The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.… An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in court, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use

[227] *Id.*

[228] *Id.* at 4.

[229] *Id.*

> ruffian violence at the polls, or slander the good name of a fellow-citizens; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right. . . .[230]

The Court's holding that a private entity or citizen may "commit an assault against the person, or commit murder, or use ruffian violence at the polls"[231] without offending the Fourteenth Amendment meant that a state could facilitate private violations of the Fourteenth Amendment with impunity. States were responsible for punishing themselves for their intentional failures to protect.

Dissenting Justice J. Harlan predicted the ramifications of the Court's holding, noting that African Americans would effectively be without any government protection from individuals and private organizations "wielding power under public authority."[232] For decades after the ruling, southern domestic terrorist organizations like the Klan, largely peopled by local and state law enforcement and government officials, terrorized the African American community because no state would prosecute or jury convict. The federal government, by and large, assented to the terror by failing to intervene or pass curative legislation.

II. AN UNINTERRUPTED HISTORY OF UN-PROTECTION

For most, if not all of American history, government, on some level, has failed to protect African Americans "from violence" or to "enforce their rights through the court system."[233] If the white Founders and their posterity were to find themselves in the position of the African American at any point in American history, they would have thought to topple the entire government.

There is an uninterrupted history of government on one level or the next expecting something for nothing from the African American community: of demanding lawfulness while allowing lawlessness, of expecting obedience in exchange for obstruction, of requiring civility while withholding citizenship, of enforcing civility while denying civil rights, and expecting patriotism without providing access.

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[230] 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 8 (2d ed., 2017).

[231] *Id.*

[232] *Id.*at 10.

[233] THE ELAINE MASSACRE: THE RED SUMMER OF 1919, 35:58, PRIME VIDEO (2019) https://www.amazon.com/Elaine-Massacre-Red-Summer-1919/dp/B0817JQHDB [https://perma.cc/2ZR5-LEP7].

A. Federal Betrayal

The United States government's failures to protect date back to the Declaration of Independence and the Constitution. Thomas Jefferson's initial draft of the Declaration of Independence contained the following provision:

> [His majesty] has waged cruel war against human nature itself, violating its most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. his piratical warfare, the opprobrium of infidel powers, is the warfare of the CHRISTIAN king of Great Britain. determined to keep open a market where MEN should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce: and that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people upon whom he also obtruded them; thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another.[234]

The final version, of course, omitted this language on the grounds of political expedience. Other slavers who helped framed the Declaration objected for business reasons.

The Constitution immortalized the next failure of the federal government. A few delegates to the Constitutional Convention wanted to write slavery out of the Constitution.[235] They, however, were opposed by the majority of delegates who either were not hostile to slavery, believed there was no chance delegates would agree to end the institution, and a minority

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[234] 1 Thomas Jefferson, *Jefferson's "original Rough draught" of the Declaration of Independence,* THE PAPERS OF THOMAS JEFFERSON, (1760–1776), https://jeffersonpapers.princeton.edu/selected-documents/jefferson%E2%80%99s-%E2%80%9Coriginal-rough-draught%E2%80%9D-declaration-independence [https://perma.cc/9CKD-SJ64].

[235] ANGELA SAILOR ET AL., SLAVERY AND THE CONSTITUTION 16 (2021), https://www.heritage.org/the-constitution/report/slavery-and-the-constitution [https://perma.cc/Q3YY-B9XW].

contingency of slave state delegates, who threatened there would be no Constitution at all, except one that allowed slavery.[236] In the worse case of political expedience in American history, the two sides compromised to shield slavery from Congressional attack until 1808.[237]

Starting with the Civil War, the federal government would be the protector-in-chief of African Americans for roughly fourteen years.[238] The Radical Republican Congress pushed out a series of Constitutional Amendments and civil rights acts, designed to liberate the enslaved, place them on the same footing as their white counterparts, guarantee Black men the right to vote, and enforce these freedoms via military occupation of the South.[239] Congress's actions led to a revolution in black political, educational, and economic advancement called Reconstruction.[240]

The federal government helmed by the Republican Party would abandon African Americans in 1877 to maintain the presidency.[241] The Southern Democrats agreed to withdraw the election contest, if the federal government would remove the military from the Southern states.[242] The federal government left African Americans to the southern wolves for the next eighty-plus years. The period would come to be known as the Jim Crow Era.[243]

C. Van Woodward notes, "[t]he Redeemers who overthrew Reconstruction and established 'Home Rule' [the system of racial segregation meant to dehumanize blacks] in the Southern states conducted their campaign in the name of white supremacy."[244] Jim Crow was yet another devious move by the obstinate south to recreate the social, economic, and political order of slavery.

B. White Supremacy and White Impunity

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[236] *Id.* at 14–16.

[237] Guy Chet, *If the Founders Didn't Compromise on Slavery, The Constitution and United States Wouldn't Exist*, THE FEDERALIST (Aug. 29, 2020), https://thefederalist.com/2020/08/29/if-the-founders-didnt-compromise-on-slavery-the-constitution-and-united-states-wouldnt-exist [https://perma.cc/GT8P-PFLJ].

[238] Jeff Wallenfeldt, *Radical Reconstitucion: United States history*, BRITANNICA (Jan. 30, 2022), https://www.britannica.com/topic/Radical-Reconstruction [https://perma.cc/GP2M-QB9K].

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] C. VANN WOODWARD ET AL., THE STRANGE CAREER OF JIM CROW 31 (3d ed. 2002).

White paramilitary groups like the White League were now free to pursue their agendas of terror and intimidation unobstructed. And they did. Not long after Reconstruction, the Democratic party, run by white supremacists, regained political power around the south through murder, intimidation, and terrorism at the voting polls.[245] Mobs of jealous whites razed to the ground African American communities that rose above the status quo. Armies of armed whites mowed down African Americans for challenging the status quo. Southern whites accomplished these murderous rampages with impunity. States failed to prosecute, and the United States failed to intervene. Even when the federal government intervened, it joined the side of the terrorist.

Historian Gregory Downs estimates that white domestic terrorists killed up to fifty thousand black Americans from 1865-1895 alone.[246] Most of the terrorists went unpunished.[247]

1. Jim Crow Massacres

In 1898, the first and only successful coup of a democratically elected government on American soil occurred in Wilmington, North Carolina.[248] Black businesses dominated the city. Black politicians and Radical

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[245] *Id.* at 53–54.

[246]Gregory P. Downs, *Why the Second American Revolution Deserves as Much Attention as the First*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/07/19/why-the-second-american-revolution-deserves-as-much-attention-as-the-first [https://perma.cc/YX8R-WL5T].

[247] Clay Cane, *Not Just Tulsa: Race Massacres That Devastated Black Communities in Rosewood, Atlanta, and Other American Cities*, BET (May 31, 2021, 10:34 AM), https://www.bet.com/news/national/2019/12/17/not-just-tulsa--five-other-race-massacres-that-devastated-black.html [https://perma.cc/2V4T-6DT3].

[248] *See generally* DAVID ZUCCHINO, WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY (2020) (outlining the background and events of the coup in Wilmington, North Carolina). *See also* Ta-Nehisi Coates, *Black Pathology Crowdsourced: Why We Need Historians in Debates About Today's Cultures*, THE ATLANTIC, (Apr. 4, 2014), https://www.theatlantic.com/politics/archive/2014/04/black-pathology-crowdsourced/360190 [https://perma.cc/KJE6-WSG7]; John DeSantis, *Wilmington, N.C., Revisits a Bloody 1898 Day and Reflects*, N.Y. TIMES (June 4, 2006), https://www.nytimes.com/2006/06/04/us/04wilmington.html [https://perma.cc/5RDX-48TF]; Kent McCoury, *Waddel, Alfred Moore (1834–1912)*, N.C. HIST. PROJECT, https://northcarolinahistory.org/author/kent-mccoury [https://perma.cc/QQS7-NAWL]; Richard L. Watson Jr., *Furnifold M. Simmons and the Politics of White Supremacy*, *in* RACE, CLASS, AND POLITICS IN SOUTHERN HISTORY (Jeffrey J. Crow et al., eds., 1989).

Republicans ran the city. Then, White democrats staged a coup.[249] They slaughtered up to three hundred African Americans, mainly unarmed men, women, and children, to usurp the government and curtail any future opposition.[250] The white supremacist Democrats took Wilmington without intervention by either the state or federal government.[251]

In 1906, a white mob, ten thousand strong, rampaged the streets of Atlanta, murdering as many as a hundred African Americans and wounding several hundred more.[252] Democratic candidates for Georgia governor Clark Howell and Hoke Smith incited the massacre by stoking the fear of working-class whites of the ascending Atlanta black middle class.[253] No whites were convicted.[254]

White East St. Louis residents killed hundreds of African Americans in the East St. Louis riot of 1917.[255] The massacre came on the heels of a rumor that a Black man had killed a white man.[256] However, that was just the tip of the iceberg.[257] The riot was attributable to the threat of black economic advancement.[258] A factory holding government contracts had begun employing black workers. In addition to the staggering death toll, white terrorists expelled six thousand African Americans from their homes and stabbed, wounded, and maimed hundreds of others indiscriminately.[259] The riot lasted an entire week.[260] No government intervened, and no whites were convicted.

The most demonstrative case of state-sponsored terrorism and government failures on all levels developed in Elaine, Arkansas, in 1919.

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[249] Lauren Collins, *A Buried Coup d'Etat in the United States*, THE NEW YORKER (Sept. 12, 2016), https://www.newyorker.com/magazine/2016/09/19/a-buried-coup-detat-in-the-united-states [https://perma.cc/X6Y6-PBWB].

[250] *Id.*

[251] James W. Loewen, *Democracy Betrayed: The Wilmington Race Riot of 1898 and Its Legacy*, 6 S. CULTURES 3, 90–93 (2000) (book review).

[252] *Id.*

[253] *See* Clifford Kuhn & Gregoy Mixon, *Atlanta Race Riot of 1906*, NEW GA. ENCYCLOPEDIA (Aug. 27, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/atlanta-race-riot-1906. *See also* MARK BAUERLEIN, NEGROPHOBIA A RACE RIOT IN ATLANTA 1906 135–39 (2001).

[254] *Id.*

[255] CHARLES L. LUMPKINS, AMERICAN POGROM: THE EAST ST. LOUIS RACE RIOT AND BLACK POLITICS 126–27 (2008).

[256] *Id.* at 61.

[257] *Id.* at 61–62.

[258] *Id.*

[259] *Id.*

[260] *Id.*

White supremacists murdered hundreds of black women, men, and children after black workers dared to unionize in Elaine, Arkansas.[261] The death toll increased exponentially after a lynch mob fired into a church where several black targets were hiding. The friendly fire killed one of the mob members. However, the word went out throughout the states and neighboring states that blacks were shooting back in Elaine, Arkansas.[262] Posses comprised of plantation owners formed throughout the area.[263] White supremacists from around the state and neighboring states flooded Elaine. The first target of the invaders was an elderly black woman just standing on her porch.[264] The invaders then continued down the road and started "just shooting blacks further up closer to Helena that are still out in the fields not aware of this, just shootin' them left and right."[265] To make matters worse, the Governor of Arkansas contacted the White House and requested that the President send the U.S. military to quash the rebellion. Absurdly, the Governor designated the blacks as the rebels. The military came in and started firing at African Americans on sight. They shot workers tending the fields down like "rabbits…with machine guns"[266] and others who had been held up in their homes, scared to death, who believed, tragically, that the military was there to protect them from the possess and lynch mobs.[267] Of course, no one was brought to account except several of the black victims of the terrorism.[268]

In 1921, white supremacists in Tulsa, Oklahoma, obliterated one of the most prosperous black communities in the country's history.[269] Envious of the community's prosperity, the terrorists dropped bombs on black businesses and homes from aircrafts and mowed down black civilians with hot lead from rapid-fire machine guns.[270] When the smoke cleared, several

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[261] Cane, *supra* note 248.

[262] THE ELAINE MASSACRE: THE RED SUMMER OF 1919 (Prime Video 2019).

[263] *Id.*

[264] *Id.*

[265] *Id.* at 29:45.

[266] *Id.* at 31:44.

[267] *Id.*

[268] THE ELAINE MASSACRE, *supra* note 263.

[269] TIM MADIGAN, THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921 xiii (2001).

[270] *Id.* at 125–42.

hundred innocent black Americans, citizens of Tulsa, lie slain, riddled with bullets, or sheathed in charred skin.[271] The terrorists went unpunished.

In 1923, in Rosewood, Florida, white domestic terrorists murdered up to one hundred and fifty African Americans in cold blood after, predictably, a white woman claimed an African American man assaulted her.[272]

White massacres also dominated the forties. Most of the killings corresponded to upwardly mobile black people integrating white spaces. Examples include the Airport Homes Riots and Fernwood Park White Massacre in Chicago, The Fairground Pool Riots in St. Louis, The Anacostia Pool Riot in Washington D.C., The Peekskill White Riots in Peekskill, New York, and the Englewood White Riot in Englewood, Chicago. The fifties also featured white domestic terrorist events like the Cicero White Riot in Cicero, Illinois.

The single thread running through these acts of domestic terrorism from the end of Reconstruction into the 1950s was white impunity and deliberate federal indifference.

2. Jim Crow Lynchings

The Ku Klux Klan lynched over 400 hundred African Americans between 1868 to 1871 alone, following the adoption of the Fourteenth Amendment. Lynchings decreased substantially during Reconstruction primarily due to the presence of federal troops in the South. After Reconstruction ended, between 1882 and 1968, white domestic terrorists lynched almost thirty-five hundred African Americans,[273] including dozens of African American women.[274] Predictably, states serially failed to prosecute the murderers, grand juries refused to indict them, and if they did, all-white juries were ready to acquit them.

Lynch law supplemented southern states' criminal codes from the end of Reconstruction to the passage of the voting rights act of 1965.[275] Lynch law describes a southern brand of punitive injustice, operating independently, at

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[271] *Id.*

[272] Cane, *supra* note 248.

[273] *Lynchings: By Year and Race,* UMKC SCH. OF L., http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html [https://perma.cc/4XLX-DBZ8].

[274] Maria DeLongoria, *"Stranger Fruit": The Lynching of Black Women The Cases of Rosa Richard son and Marie Scott* (Dec. 2006). (Ph.D. dissertation, University of Missouri-Columbia) (on file with author).

[275] Karlos K. Hill, *21st Century Lynching?*, CAMBRIDGE BLOG (Feb. 29, 2016), http://www.cambridgeblog.org/2016/02/21st-century-lynchings [https://perma.cc/QEV2-Q2AA].

least officially, from legal authority.[276] Lynch law was tacitly agreed to, supported, or unopposed by state and local southern governments and public sentiment when whites alleged a black man assaulted a white person, particularly white women. Lynch law was the worse form of vigilantism because blacks accused of violating whites would all but undoubtedly be arrested, prosecuted, and convicted. At least one-third of the African Americans lynched were falsely accused.[277] Furthermore, the primary goal of lynch law was not to bring the guilty to justice. Lynch law was not an exercise of last resort but all too often a punishment of the possibility, even the idea, of black on white impropriety. Its primary function was social control, rank racial intimidation, and enforcing the illusion of white supremacy.[278] Southern Studies Scholar Amy Louise Wood writes that lynching was "representational, conveying messages about racial hierarchy and the frightening consequences of transgressing that hierarchy."[279] According to Wood, the spectacle of lynching had more to say, in that they:

> [I]mparted powerful messages to whites about their own supposed racial dominance and superiority. These spectacles produced and disseminated images of white power and black degradation, of white unity and black criminality, that served to instill and perpetuate a sense of racial supremacy in their white spectators.[280]

In sum, the primary motives for lynching completely undermine any socially redeeming value associated with it as a form of vigilante justice, as vigilante justice typically results from the systematic failure of the legal apparatus to punish lawbreakers. Indeed, in this way, lynch law was the polar opposite of vigilante justice. It was the lynchers who were the criminals the criminal justice system systematically refused to punish. As a result, lynching is more appropriately the target of vigilante justice than the means.

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[276] CHRISTOPHER WALDREP, THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA 21 (2002).

[277] GUNNAR MYDRAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 561 (1944).

[278] AMY LOUISE WOOD, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940 2 (2009).

[279] *Id.*

[280] *Id.*

Jim Crow lynching became so bad and state and local government complicity so brazen that Congress proposed the Dyer Anti-lynching Bill of 1918.[281] It stated:

> To assure to persons within the jurisdiction of every State the equal protection of the laws, and to punish the crime of lynching. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the phrase "mob or riotous assemblage," when used in this act, shall mean an assemblage composed of three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.[282]

However, once again, the federal government failed to protect African Americans.[283] Southern senators held the Bill hostage in the Senate, and it died a natural death.[284]

3. Injustice on the Jury

Southern governments occasionally prosecuted acts of domestic terrorism.[285] However, all-white juries acquitted the terrorists time and time again, despite damning evidence, smoking guns, and dangling ropes.[286] In many instances, the culprits took pictures in front of the dangling bodies of their victims like they were proudly displaying a fish they caught, as women and children in the background smiled, played, and pointed up at black bodies swinging from ropes.[287] It was as though they were having a picnic at a family reunion.

As Colbert notes, "the all-white jury has played an historic role in denying justice to African Americans unfairly accused of crimes or victimized

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[281] Dyer Anti-Lynching Bill, H.R. 11279, 67th Cong. (2d Sess. 1922) [hereinafter Dyer Anti-Lynching Bill].

[282] *Id.*

[283] Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon,* 17 Const. Comment. 295, 308–14 (2000); Daniel Byman, *White Supremacy, Terrorism, and the Failure of Reconstruction in the United States*, 46 Q. J.: INT'L SEC. 53, 57 (2021).

[284] *Dyer Anti-Lynching Bill*, NAACP, https://naacp.org/find-resources/history-explained/legislative-milestones/dyer-anti-lynching-bill [https://perma.cc/QZ4F-WFA3].

[285] *History of Lynching in America*, NAACP (2022), https://naacp.org/find-resources/history-explained/history-lynching-america [https://perma.cc/APJ7-QF6J].

[286] *Id.*

[287] *Id.*

by racial violence."[288] Robert D. Loevy adds, "[a]nother part of the system of black oppression was 'the free white jury that will never convict.'"[289]

After African American soldiers returned home from World War I, white domestic terrorist violence intensified in both the North and South.[290] In 1919, white domestic terrorists lynched more African Americans than the previous eleven years combined.[291] However, Colbert notes, "local law enforcement and all-white juries combined to absolve virtually every responsible white attacker."[292] Ron Chernow writes, "No southern sheriff would arrest the hooded night riders who terrorized black citizens and no southern jury would convict them." [293] Indeed, domestic terrorists' faith in the all-white jury made lynching "a less preferred response to charges of interracial violence after 1935."[294]

In the early 1960s, J.P. Coleman, a staunch segregationist, was ousted from the Governorship of Mississippi because "he had the audacity to believe that lynchers who dragged a black man out of a jail, beat and chained him, then threw him into the river, should be prosecuted."[295] Ross Barnett, whose single campaign platform was white supremacy, defeated Coleman. Coleman's advocacy of the rule of law in lynching cases was "heresy bordering on blasphemy."[296]

From 1955–1965, the government charged white southern domestic terrorists with fifty-eight civil rights-related murders.[297] A jury of their peers convicted only six of the terrorists and less than that served time in prison.[298]

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[288] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 110 (1990).

[289] Robert D. Loevy, *Introduction to The Civil Rights Act of 1964: The Passage of the Law That Ended Racial Segregation*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 1,8 (Robert D. Loevy et al., eds., 1997).

[290] Colbert, *supra* note 289, at 79.

[291] *Id.*

[292] *Id.*

[293] RON CHERNOW, GRANT xxi (2017).

[294] Colbert, *supra* note 289, at 80.

[295] CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 99 (2020).

[296] *Id.*

[297] Colbert, *supra* note 289, at 87.

[298] *Id.*

The all-white jury became so notorious that President Lyndon Johnson was compelled to address the nation in 1965 about "injustice to Negroes at the hands of all-white juries."[299] He added, "[i]f [the trial jury's] composition is a sham, its judgment is a sham. And when that happens, justice itself is a fraud, casting off the blindfold and tipping the scales one way for whites and another way for Negroes."[300]

The all-white jury was a product of the systematic exclusion of African Americans from the jury system. Thomas Ward Frampton reveals the reasons for the exclusion: "[i]ntegrating the jury box serve[s] several significant purposes [including] countering impunity for white purveyors of racial violence."[301]

During Reconstruction, African Americans routinely served as jurors.[302] They benefited from The Civil Rights Act of 1871, which prohibits racial discrimination in jury selection "in any court . . . of any State. "[303] However, by 1900, "they virtually disappeared from the southern jury box . . . even in counties where they constituted an overwhelming majority of the local population."[304]

White southerners viewed jury service "as a form of political officeholding," and for many, black jury service "was even more objectionable than black suffrage."[305]

So, as Frampton notes, "Steadily testing the limits of the courts' credulity, the former confederate states in the 1880s and 1890s" developed schemes to circumvent the Civil Rights Act and prevent African Americans from sitting on juries.[306] As a result, at the turn of the century, "the all-white jury was firmly re-entrenched in the southern courtroom."[307] So much so that "[i]t was unthinkable that a black person would ever serve as a juror in any felony case . . . prior to World War II."[308]

Courts were complicit also. In 1894, the State of Louisiana prosecuted James Murray for murder. The state had a law that allowed judges to select

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[299] *Id.* at 88.

[300] *Id.*

[301] Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1602 (2018).

[302] Colbert, *supra* note 289, at 78.

[303] Frampton, *supra* note 302, at 1600–01.

[304] Colbert, *supra* note 289, at 78.

[305] JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 145 (2006).

[306] Frampton, *supra* note 302, at 1605.

[307] Colbert, *supra* note 289, at 78.

[308] *Id.* at 90.

"qualified" voir dire members. The judge in Murray's case empaneled an all-white jury. Murray objected to the absence of black jurors. The judge countered, "[c]olored men are not discriminated against as a race or a class . . . but because of their lack of intelligence and of moral standing."[309]

The Supreme Court and the federal government would allow the exclusion of black jurors for several more decades. In *Norris v. Alabama*, the Supreme Court reversed the convictions of several African American teenagers falsely accused of rape, holding that the State discriminatorily excluded African Americans from the jury pool.[310] The evidence established that two Alabama counties allowed not a single African American to serve on a grand jury or trial jury for fifty years.[311]

However, the Supreme Court was not interested in the overall issues of fairness and equal justice that representative juries secured. In *Akins* v. *Texas*, the Court held that Dallas County Texas' token plan to seat only one black person per jury did not violate the Constitution.[312]

The Supreme Court "again refused to condemn" this practice in *Cassell v. Texas*.[313] The upshot was "a state could withstand constitutional scrutiny by accommodating one or more black persons on a grand jury, where their votes would be powerless to change the outcome of the predominantly white body's decision."[314] Colbert notes, "[t]his loophole allowed the all-white jury to remain a firmly entrenched institution in the South during the thirty-year period following *Norris*."[315] Colbert also notes, "[t]he emerging picture of the northern trial jury resemble[d] the all-white jury of the South."[316]

III. THE FOURTEENTH AMENDMENT RIGHT TO VIGILANTE JUSTICE

The Fourteenth Amendment arguably authorizes vigilante-type justice. There is a Fourteenth Amendment right to self-help in certain circumstances and under certain conditions: (1) The circumstances are manifest when the

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[309] Frampton, *supra* note 302, at 1605–06.

[310] Norris v. Alabama, 294 U.S. 587, 587 (1935).

[311] Colbert, *supra* note 289, at 81–83.

[312] Akins v. Texas, 325 U.S. 398, 407 (1945).

[313] Colbert, *supra* note 289, at 84.

[314] *Id.* at 85.

[315] *Id.*

[316] *Id.* at 92.

state is chronically unable or unwilling to protect the lives, liberties, or property of members of a discrete and insular class; or (2) when the state denies equal access to extrajudicial justice or equal impunity to such a class; or (3) where a private or public party assaults a victim or conspires to assault a group of victims because of the victims' membership in a minority group and the state effectively shields the attacker from accountability due to their position or class affiliation.

An example of the first justification, the failure to protect justification, is Hooded Justice's killing of the White supremacists in *Watchmen* who were programming African Americans in Tulsa to self-destruct. During this period, state and local governments routinely failed to protect African Americans from mob violence and racial terror. In many cases, government officials were central players in domestic terrorism.

The second justification, the equal access justification, would have allowed black lynch mobs in the Jim Crow South to lynch members of white lynch mobs who lynched African Americans or, in William's case, to force the police chief to hang himself via hypnotic video. William's video-induced lynching of the police chief also exemplifies the above-the-law justification, the last category. Officials in the Oklahoma government's highest rungs were in league with the Police Chief. He was outside the reach of legal justice. Under such circumstances, assuming the federal government's failure, killing him was the last available means to protect African Americans in Tulsa..

The gander rule,[317] as coined here, enables discrete and insular groups or individuals to use self-help or institute vigilance committees in all of these circumstances. The gander rule authorizes redistributive force as a last resort. For instance, when a jury system routinely excludes blacks from jury pools and routinely exonerates whites for crimes against blacks, the gander rule allows the victims or others with shared interests to bring the defendants to justice and maybe even the officials who facilitated the discriminatory system.

A. *Failure to Protect*

In making his case for the colonists' refusal to abide by the laws of the British Government, John Adams argued: "[a]re not protection and allegiance reciprocal? And if we are out of the king's protection, are we not discharged from our allegiance?"[318]

African Americans in the Jim Crow South might have posed the same question. Southern governments refused to protect African Americans from white supremacist terror, often facilitating the same. The last line of defense,

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[317] The name comes from the popular saying, "what's good for the goose is good for the gander."

[318] JOHN D. ADAMS, THE WORKS OF JOHN ADAMS 162 (Charles Francis Adams ed.,1856).

the federal government, then failed to protect African Americans from the Jim Crow South.

The Radical Republican Congress adopted the Fourteenth Amendment to protect the newly-freed from private and public violence in the South.[319] Often, private and public violence merged because "private violence was actively assisted and not punished by the states."[320] As a prominent historian, Ron Chernow, writes: "Through the Klan, white supremacists tried to overturn the Civil War's outcome and restore the status quo ante. No southern sheriff would arrest the hooded night riders who terrorized black citizens and no southern jury would convict them."[321]

The original meaning of the Equal Protection Clause of the Fourteenth Amendment is that it was a state government's duty and responsibility to protect all persons and their property "from violence and to enforce their rights through the court system."[322] The "duty-to-protect" foundation of the Equal Protection Clause was based on the precept of "allegiance-for-protection."[323]

Sir William Blackstone asserts in his *Commentaries* that government has a responsibility to protect its citizens and their property because of the allegiance government demands of its citizens to its traditions and its laws.[324] John Lock described allegiance-for-protection as a "social compact" where a citizen forfeits his natural right of self-governance in exchange for government protection.[325]

The Declaration of Independence also underscores the centrality of allegiance for protection in the American government. The Declaration

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[319] Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 917–27 (2008).

[320] GAYLORD ET AL., *supra* note 176, at 3.

[321] RON CHERNOW, GRANT xxi (2017).

[322] GAYLORD ET AL., *supra* note 176, at 220 (quoting Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-enactment History*, 19 GEO. MASON UNIV. CIV. RTS. L.J. 1, 3 (2008)). *See also* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application,* 19 GEO. MASON UNIV. CIV. RTS. L.J. 219, 221–22 (2009).

[323] GAYLORD ET AL., *supra* note 176, at 220 (quoting Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-enactment History,* 19 GEO. MASON UNIV. CIV. RTS. L.J. 1, 34–43 (2008)).

[324] *Id.*

[325] ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 32 (1960).

explicitly cites Britain's failure to keep their end of the allegiance-for-protection bargain as justification for "throwing off" British rule of law:[326]

> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them . . . He has abdicated Government here, by declaring us out of his Protection and waging War against us.[327]

The Declaration's logic also underlies the Fourteenth Amendment. Congressman Thaddeus Stevens stated in the Fourteenth Amendment's congressional debates that the Amendment was in some ways a restatement of the Declaration of Independence.328 Furthermore, the framers of the Equal Protection Clause intended for it to "forc[e] states to live up to their end of the allegiance-for-protection bargain with their black citizens."329 These framers meant for the Clause to apply to "affirmative state actions as well as state inaction," because both could "just as easily result in the denial of equal protection."330 Furthermore, congressional Republicans explicitly invoked the allegiance-for-protection precept to justify Reconstruction legislation, including the pre-cursor of the Fourteenth Amendment, the Civil Rights Act of 1866.331

Before Congress passed the Fourteenth Amendment, state and local governments actively or passively supported domestic terrorist organizations and allowed terrorists to murder and maim African Americans with impunity.332 As recounted by a congressman in 1871, "the state made no successful effort bring the guilty to punishment or afford protection or redress to the outraged and innocent. The state, "from lack of power or inclination, practically denied the equal protection of the law to these persons."333 Furthermore, "Southern governments were often unsympathetic to victims, and sometimes even encouraged mob violence."334 Therefore, "For the Equal Protection Clause's drafters, the

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

327 *Id.* at paras. 4, 25.

328 GAYLORD ET AL., *supra* note 176, at 221 (citing Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866)).

329 *Id.* at 222.

330 *Id.*

331 *Id.* at 221 (citing Cong. Globe, 39th Cong., 1st Sess. 2799 (May 24, 1866)).

332 *Id.* at 222.

333 *Id.* at 223 (citing Cong. Globe, 42d Cong., 1st Sess. 428 (Apr. 3, 1871)).

334 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 223 (2d ed., 2017).

Clause helped remedy these depredations by mandating that southern governmental officials actively enforce laws against murder and theft…."335

Even after the passage of the Fourteenth Amendment, Congress had to "intervene against rampant private acts of violence committed by the Ku Klux Klan" that "went unpunished and were frequently aided by southern officials."336 The Civil Rights Act of 1871 targeted domestic terrorist groups like the Ku Klux Klan that interfered with, obstructed, or prevented the operation of justice in any state.337

The Fourteenth Amendment authorized Congress to pass the legislation because of southern states' habitual violations of the Amendment's mandate to enforce the states' laws equally, particularly its criminal prohibitions.338 In other words, congressional Republicans were compelled to create criminal laws, which were the traditional province of the States, to enforce the Fourteenth Amendment.339

When proponents of the Ku Klux Klan Act argued that the Fourteenth Amendment's equal protection function only applied to state legislative actions, congressional republicans shot back:

> Gentlemen contend that this provision will operate only where a State fails to pass equal laws and excludes a class of citizens from protection; but the language is, "equal protection of the laws." The words "the laws" imply existing laws; and the benefit secured is the "protection" of the laws, and this requires their execution. Unexecuted laws are no "protection." And this brings us to the very case: the States have laws providing for equal protection but they do not, because either they will not or cannot, enforce them equally; and hence a class of citizens have not "the protection of the laws. Union men, white and black, are "denied" the protection of laws.[340]

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335 *Id.* at 222.

336 *Id.* at 224.

337 *Id.*

338 *Id.*

339 *Id.* at 224–25.

340 5 SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW 224–25 (2d ed., 2017) (citing Cong. Globe, 42d Cong., 1st Sess. 697 (Apr. 14, 1871) (statement of Senator George Franklin Edmunds)).

Congressional Republicans were making a common-sense argument that when states violated the Fourteenth Amendment by refusing to enforce state laws equally, Congress' only remedy to protect African Americans was through its own set of criminal and civil statutes. According to the congressional Republicans, "it was the federal government's duty to execute the laws, and not to compel protection through legislation."[341]

Senator John Pool provided a summary of the Republican view of the Equal Protection Clause during the debates over the Civil Rights Act of 1871:

> The [Equal Protection Clause] relates more particularly to the executive branch of the State governments, and embraces failure to act. It is in these words: "Nor deny to any person within its jurisdiction the equal protection of the laws." The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. Rights confedered by laws are worthless unless the laws be executed. The right to personal liberty and personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves. By the first section of the fourteenth amendment a new right, so far as it depends on express constitutional provision, is conferred upon every citizen: it is the right to the protection of the laws. This is the most valuable of all rights, without which all others are worthless and all rights and all liberty but an empty name. To deny this greatest of all rights is expressly prohibited to the States as a breach of that primary duty upon them by the national constitution. Where any State, by commission or omission, denies the right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it. But Congress must deal with individuals, not States. It must punish the offender against the rights of the citizen; for in no other way can protection of the laws be secured and its denial prevented."[342]

Not only did state governments have a duty to protect, but according to Representative John Bingham, the father of the Fourteenth Amendment, so

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[341] *Id.* at 224.

[342] *Id.* at 225 (citing Cong. Globe, 42d Cong., 1st Sess. 608 (Apr. 12, 1871) (statement of Senator John Pool)).

did the federal government. In the view of Bingham, it was this duty to protect that enabled the federal government to create laws holding private individuals accountable when states failed to do so based on race.343 In other words, when the federal government refuses to remedy a state government's failure to protect, the federal government violates its own duty to protect.

The Supreme Court of the United States saw it differently regardless. In The Civil Rights Cases of 1883, the Court, ignoring the Fourteenth Amendment's Equal Protection Clause and the affirmative duty it imposed on the States to protect its citizens equally, held that "Individual invasion of individual rights is not the subject-matter of the amendment…" and that the Amendment "nullifies and makes void" only "state legislation…." "which denies to any of them the equal protection of the laws."[344]

Dissenting Justice J. Harlan predicted the consequences of the Court's holding: "the race is left, in respect of the civil rights under discussion, practically at the mercy of corporations and individuals wielding power under public authority."345 Of course, eighty years of southern lawlessness proved him correct.

To conclude, the federal government, represented by the Supreme Court, Congress, and the executive branch, violated its duty to protect African Americans in the Jim Crow South and, thus, was accountable along with the Southern states for the mayhem that followed. African Americans in the South, ninety percent of all African Americans, had no government protection, and thus owed no allegiance to either southern state governments or the federal government. The same criminal laws Justice Joseph Bradley identified in the Civil Rights Cases as being the exclusive province of the states were not enforced when African Americans were the victims. Since state criminal laws did not protect them, African Americans were theoretically free to exact their own justice. But freedom is nothing without the power to protect it.

However, another Equal Protection right might have served to protect African Americans in the Jim Crow South, like Hooded Justice, guilty of state crimes. This right would have allowed individuals like Hooded Justice to temporarily abandon the social contract of allegiance-for-protection, giving the federal government another opportunity to establish its end of the bargain. This right, the right to equal impunity, empowers the federal

343 *Id.* at 225.

344 *Id.* at 6.

345 *Id.* at 10.

government to reassert itself despite the failures of other federal branches like the Supreme Court.

Sheri Lyn Johnson notes, "an equal protection issue is raised even if the convicted black defendant is not innocent in any sense of the word, so long as a white defendant in the same circumstances would have been acquitted."346 Under equal impunity, the federal government is authorized to provide sanctuary to black defendants likely to be convicted by a white-dominated jury like those prevailing during Jim Crow, whether guilty or not. Equal impunity also allows post-conviction relief to blacks convicted of crimes by all-white juries. The aggrieved party would file a writ of mandamus, a writ of habeas corpus, or a civil suit in the appropriate federal circuit court (unless the circuit features the same inequity) based on the Fourteenth Amendment right to equal impunity. The federal court would grant safe harbor to the defendant anywhere, provided the defendant submits evidence supporting the claim.

The federal government did something similar during the Civil War. The U.S. military gave sanctuary to thousands of escapees from slavery. After this, Congress passed the Confiscation Act.347 The Act incentivized the enslaved to break the law, particularly the laws prohibiting escape. Congress believed that the rebel states were no longer a part of the U.S. when they succeeded from the Union. Therefore, the United States had no obligation to respect the Fugitive Act, which required Northern states to return escapees from the South.348 The Contraband Act offered the enslaved who were willing to escape their enslavers sanctuary in the North.

IV. THE SECOND AMENDMENT RIGHT TO VIGILANTE JUSTICE

The Second Amendment potentially provides an additional source for the right to redistributive force. The Second Amendment, believe it or not, gives Americans the "right to insurrection to correct intolerable and systematic abuses."[349] Thomas Jefferson explained that the Second Amendment provides, "as a last resort," the means for citizens "to protect themselves against tyranny in government."[350]

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346 Sheri Lynn Johnson*, Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1617 (1985).

347 Confiscation Act, Pub. L. No. 37–60, 12 Stat. 319 (1861).

348 *Fugitive Slave Acts*, HISTORY (Feb. 11, 2020), https://www.history.com/topics/black-history/fugitive-slave-acts [https://perma.cc/TGD3-VZGU].

349 PATRICK, *supra* note 51, at 33.

350 *Id.*

The Supreme Court confirmed the Second Amendment right to rebel in *District of Columbia v. Heller* in 2008 and *McDonald v. Chicago* in 2010.[351] In *Heller,* the Supreme Court found that self-defense is the "*central component*"[352] of the Second Amendment. However, Second Amendment self-defense goes beyond traditional notions of self-defense, which requires an imminent threat before the defender can use counterforce. The *Heller* Court confirms that Second Amendment self-defense outstretches conventional self-defense parameters: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny . . . 'the natural right of resistance and self-preservation' is a right protecting against both public and private violence."[353] The Court also echoes the views of David B. Kopel that the Second Amendment was framed to "deter tyranny and allow popular revolution to unseat a tyrant."[354]

In *McDonald,* the Court noted that Second Amendment self-defense was a fundamental and natural right.[355] The Second Amendment simply codified this pre-existing natural right. Darrell A.H. Miller notes, the Courts' "sweeping natural law rhetoric pulses with anarchy."[356]

Both Courts found that the Second Amendment contained an individual right to arm against government threats and a group right to organize in arms to oppose tyranny.[357] The *McDonald* Court recounts how the Radical Republican Congress passed the Fourteenth Amendment, in part, to secure the newly freed's Second Amendment rights: "the right of freedmen to keep arms in opposition to searches and seizures of arms by state militias."[358] The congressional Republicans understood that the "municipal police officer, in conjunction with state militias, terrorized freedmen, sometimes alone, sometimes in collusion with unofficial citizen patrols and groups like the

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[351] District of Columbia v. Heller, 554 U.S. 570, 570 (2008); McDonald v. Chicago 561 U.S. 742, 742 (2010).

[352] District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (emphasis in original).

[353] *Id.* at 598. *See also* Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 940 (2011).

[354] David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1390 (1998).

[355] McDonald v. Chicago, 561 U.S. 742, 843–44 (2010).

[356] Miller, *supra* note 354, at 947.

[357] *Id.*

[358] *Id.* at 965 (quoting STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 69 (1998)).

Klan." [359] The Court observed that African Americans "had as much to fear from Southern law enforcement as they did from terrorist organizations like the Klan."[360]

In passing the Fourteenth Amendment, the Radical Republican Congress essentially authorized African Americans to use arms to defend themselves against disarmament by southern law enforcement officials.[361] That is, Black southerners (and all other citizens) were constitutionally authorized to use deadly force against government officials to protect their persons, property, freedom, and constitutional rights. More particularly, the Second Amendment gave African Americans the right to rebel against tyrannical Southern law enforcement officials.

It is clear that the Second Amendment affords the right to rebel against affirmative government tyranny. However, what about a state government's failure to protect? The right to use redistributive force to compensate for a state government's failure to protect hinges on what the Declaration of Independence, which the Bill of Rights codifies, refers to as utter neglect:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them . . . He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.[362]

Thus, the Jim Crow South's utter neglect of African Americans' right to equal protection anchors the right to redistributive force under the Second Amendment.

V. THE NINTH AMENDMENT RIGHT TO JUSTICE

The Ninth Amendment recognizes that the Bill of Rights does not contain all of citizens' natural rights. It reads, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[363]

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[359] Miller, *supra* note 354, at 943.

[360] *Id.* at 959.

[361] *Id.* at 943.

[362] THE DECLARATION OF INDEPENDENCE paras. 2, 4, 6 (U.S. 1776).

[363] PATRICK, *supra* note 51, at 80.

The Ninth Amendment protects natural rights.[364] Natural rights are rights that "preexist government" and are "inherent in human nature."[365] These rights result from "the social compact that creates government."[366] The Declaration of Independence provides three of the categories of natural rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[367] Most importantly, that Framers of the Declaration believed "that all had a right to equal justice."[368]

The fundamental Ninth Amendment inquiry is whether an unenumerated right is "in line with the ideals on which our nation was founded," and whether the right is worthy of protection. If the Ninth Amendment means anything, it is a right to justice and equal justice. The "social compact that creates government" is allegiance in exchange for protection.[369] The right to justice and the right to equal justice grow out of the compact. Southern state and local governments utterly neglected to protect African Americans in the Jim Crow South. Consequently, these state and local governments violated each African American's Ninth Amendment right to justice who was lynched, massacred, or maimed with impunity and with the active or passive support of state and local governments. State and local governments denied African American's equal justice when they failed to prosecute or intentionally failed to convict the perpetrators of these atrocities.

The question is then one of remedy. The right is natural and thus belongs to the violated party. When there is no government to enforce the right, the unprotected party returns to a state of nature, where all the party's natural rights return to them. The party becomes a government of one free to protect the party's own natural rights. Thus, any party that has returned to a state of nature may use redistributive force. If a party in this state executes their right to justice by punishing an infractor, the government is without lawful authority to intervene.

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364 *Id.*

365 *Id.*

366 *Id.*

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

368 PATRICK, *supra* note 51, at 81.

369 *Id.* at 80. *See also* GAYLORD ET AL., *supra* note 176, at 220.

The same would apply to protected classes as a group. If a state or local government is utterly negligent in protecting the group's right to justice, the duty to protect falls on the federal government. For instance, during Reconstruction, when the South failed to protect African Americans, the federal government enforced the Reconstruction Amendments by dispatching federal troops to the South.

However, where the federal government fails, the unprotected class assumes the federal government's powers, authority, and prerogatives. The group is, thus, authorized under the natural right to justice to organize enforcement bodies, vigilance committees, posses, or interim governments to stand in for the federal government. There is no other option aside from relinquishing a natural right, which violates natural law and constitutes a denial and deprivation of the group's own humanity.

The right to equal justice also implies a right to equal impunity. Where the state consistently fails to prosecute dominant-group violators, or where the dominant group predominates juries that consistently exonerate whites for crimes against Blacks but not vice versa, the Ninth Amendment demands that similarly situated black defendants be exonerated as well. In other words, the Ninth Amendment, like the Fourteenth Amendment, contains a gander rule.

The scientific principle of cause and effect also supports a Ninth Amendment right to justice. Isaac Newton's third law of motion holds that when an object exerts a force on a second object, the second object exerts a force that is equal in magnitude and opposite in direction on the first object.[370] Isaac Newton's scientific theories and discoveries had "a direct influence on the development of American political and constitutional thought."[371] Clinton Rossiter writes, "[b]asic to the Newtonian system were the great generalizations of a universe governed by immutable natural laws . . . ."[372] He also notes that it is a fundamental principle of American political philosophy that "[t]he political and social world is governed by laws as certain and universal as those which govern the physical world."[373]

Natural rights are conferred by natural law. St. Thomas Aquinas provided the foundation of natural law as a comprehensive system.[374] Aquinas believed

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[370] *Newton's Third Law*, *supra* note 54.

[371] CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 133 (1953).

[372] *Id.*

[373] *Id.* at 440.

[374] Jacques Maritain, *Human Rights and Natural Law*, THE UNESCO COURIER (2018), https://en.unesco.org/courier/2018-4/human-rights-and-natural-law [https://perma.cc/YMM5-EE99].

that reason was the basis of natural law.[375] Reason was the divine spark of diety in the individual, making human life sacred and equal.[376] Because human life is sacred and equal, it is invested with irremovable pretanatural rights.[377]

The natural social and political laws underlying the establishment of American government resulted from the Enlightenment, a period marked by new understandings of science and government.[378] Philosophers like John Locke and Adam Smith began to ask questions about whether there were social and political counterparts to the laws of science.[379] More radical voices argued that "monarchies of any sort were an unnatural imposition on the sovereignty of the people."[380] These voices concluded that the "only true and natural form of Government was a republic."[381]

Thomas Jefferson consumed the books of Locke about government, Smith about commerce, and other Enlightenment philosophers like Beccaria, who wrote *Crimes and Punishments*.[382] In his *A Summary View of the Rights of British America,* Jefferson wrote "in good Lockean fashion," "[o]ur Ancestors possessed a right which nature has given to all men of establishing new societies under such laws and regulations as to them shall seem most likely to promote public happiness. They, the people, and not the kings are the true sovereigns of America."[383] Jefferson's work secured him an invitation to the Second Continental Congress, where he wrote the Declaration of Independence.[384]

The Bill of Rights, which incorporates the Declaration of Independence, is premised on natural rights. For example, the First Amendment is premised on the natural right to freedom of speech. The Second Amendment is based on the natural right to self-defense.

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375 *Id.*

376 *Id.*

377 *Id.*

378 *Id.*

379 Allen C. Guelzo, *America's Founding Fathers: Thomas Jefferson's Books*, THE GREAT COURSES (2017) (accessed on Wondrium), https://www.wondrium.com/americas-founding-fathers?tn=632_tray_Course_1_0_681&lec=5.

380 *Id.* at 15:24.

381 *Id.* at 15:34.

382 *Id.*

383 *Id.* at 20:40.

384 *Id.*

Republican government is rooted in natural law. The Bill of rights is too. The Ninth Amendment preserves natural rights not enumerated in the Constitution. The natural law of cause and effect expressed in Newton's third law of motion is maybe the most natural law existing. Justice is the natural effect of private citizens' violations of the natural rights of others. That is, a violation of the natural rights of others demands an equal and opposite punishment. When government fails to provide the effect natural law demands, the only way to achieve natural balance is extrajudicial justice, an equal violation of the natural rights of the perpetrator. Thus, a Ninth Amendment natural right to justice simply extends the inviolable natural laws underlying American government and the Bill of Rights.

VI. APPLICATION

Assessing Hooded Justice/William's actions in *Watchmen* and the father's action in *A Time to Kill* illustrates how the Fourteenth Amendment, Second Amendment, and the Ninth Amendment right to redistributive force works. Hooded Justice's actions best describe the Fourteenth and Secondment rights to redistributive force.

The Fourteenth Amendment analysis of Hooded Justice's use of redistributive force involves Oklahoma's deliberate indifference to or participation in the White Supremacists' efforts to program black Tulsans in the Jim Crow South. Presuming the federal government's breach of its duty to protect, black Tulsans had the right to temporarily terminate their social compact with both governments and return to a state of nature. That is, the state and national governments failed to protect Black Tulsans, so Black Tulsans owed no allegiance to Oklahoma or the United States government's rule of law.

But where did Hooded Justice's authority to protect Black Tulsans comes from since the hypnotizing film did not directly harm him? The same allegiance-for-protection model underlying the Equal Protection Clause of the Fourteenth Amendment underlies the Declaration of Independence.[385] Indeed, the drafters of the Fourteenth Amendment viewed the Amendment as a second Declaration of Independence. The Declaration of Independence was not an individual response to Brittan's utter neglect, but a group response based on multiple oppressions that defined the group. The American Revolution was not an individual contest. It was a war between groups defined by disparate interests.

Hooded Justices' interests aligned with those of black Tulsans, his group. The interests they shared were freedom from race-based government tyranny and the destruction of the group. As a child, Hooded Justice

[385] Hamburger, *supra* note 47, at 1843.

witnessed the dangers of government-protected white supremacy during the Tulsa Race Massacre of 1921. Furthermore, multiple oppressions in the Jim Crow South defined Black Tulsans (indeed black southerners generally), including white domestic terrorism. Thus, Hooded Justice's authority derived from his membership in an oppressed group, a group that government failed time and time again, and a group that shared the interest of preventing the group's oppression, which trickled down to the individual members of the group. In other words, damage to the group damaged Hooded Justice personally because he is a part of the group. In this way, he was a member of an army authorized to ensure the protection of the group.

But how about Hooded Justice's murder of individuals who were under the state's protection? Are they not owed equal protection too? That may be, but the Fourteenth Amendment also demands equal impunity. Since the white supremacists were murdering African Americans (by causing them to self-destruct) with impunity, Hooded Justice had a right to impunity.

Hooded Justice's actions were also justifiable under the Second Amendment right to rebel. The right to rebel is premised on government tyranny, which the Declaration of Independence confirms relates both to government aggression and utter neglect. Hooded Justice witnessed The Tusla Race Massacre of 1921 as a child. He knew government tyranny and utter neglect firsthand. He also grew up in the South during the Jim Crow years. If Hooded Justice was like most African Americans, he witnessed injustice daily.The City of Tulsa's participation in, failure to protect African Americans from, and failure to punish the white participants involved in the Tulsa Race Massacre combined with the daily injustices the Jim Crow South imparted gave Hooded Justice the right to rebel against the City of Tulsa, the State of Oklahoma, and the federal government. Once he rebelled against the governments, the governments had no legal authority in the areas featuring the governments' tyranny. Hooded Justice was then free to create his own justice system. Thus, when he killed the white supremacists, he was justified.

Similarly, when the grandfather hung the chief of police, he was justified. The grandfather had the right to rebel because the city government, including the police chief, was criminally corrupt and, thus, a threat to the lives of African Americans. Kalvary members also inhabited positions in state government. Assuming no available recourse in the federal government, the grandfather, as a last resort, was justified in hanging the police chief in direct rebellion against the city government.

The father's actions in *A Time to Kill* illustrate the Ninth Amendment right to justice and equal justice. Carl Lee killed his daughter's rapist because he anticipated the justice system would not prosecute and punish them. A

year earlier, the state had exonerated four whites for raping a "little black girl."[386] Carl Lee consults his Attorney to confirm this. If, as the film suggests, Mississippi had a justice system that chronically failed to protect and redeem Black victims from white assailants, the state was in perpetual violation of the Ninth Amendment equal justice guarantee. In violating African Americans' right to equal justice, Mississippi created a void where the natural law of cause and effect ceased to exist. As a result, natural law stripped Mississippi of its legal authority over Carl Lee and other affected African Americans to remove the void. Thus, Carl Lee, as the standing representative of natural law, was authorized to exact justice in the local, state, and federal governments' places.

A Time To Kill also illustrates a circumstance implicating the Ninth and Fourteenth Amendment right to equal impunity. The prosecutor makes illuminating comments about the criminal justice system leading up to the father's trial for killing the racist rapists. The prosecutor prognosticates that the father's lawyer will file for a change of venue because the host venue is seventy to seventy-four percent white while the surrounding Mississippi counties have more substantial black populations.[387] He explains to his law clerk, "blacks are more sympathetic to other blacks." What he does not explain is whites are more sympathetic to whites and historically hostile to black defendants. He continues, "[i]f he gets it moved, he has a greater chance of color in the jury box….but if the trial stays here, it's an all-white jury for sure."[388] Another prosecutor translates, "[h]e means without blacks on the jury, Haley hadn't got a chance in hell."[389] He then asked his assistant to reach out to the state legislature to call the judge and convince the judge not to move the case.[390]

The conversation demonstrates several instances of unequal rights to justice. First, all-white juries are notorious, even now, for over-convicting black defendants.[391] Furthermore, a court's discretion over requests for changes of venues allows a judge's native biases to control. If a judge is biased against black defendants, the judge's discretion will work to deny a defendant's best chance of justice. In the case of Carl Lee, a racially biased court would be unlikely to grant the defense's change of venue request.

The good-ole-boy network adds a layer of injustice. The dominant group, the dominant groups' control over the criminal justice system, and the political apparatus routinely conspired to deprive African Americans of

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386 A TIME TO KILL, 12:32 (Warner Bros. 1996).

387 *Id.* at 26:19.

388 *Id.*

389 *Id.*

390 *Id.*

391 GAYLORD ET AL., *supra* note 176, at 220.

justice and equal justice. The predominately white jury, political system, and criminal justice system naturally distributed uneven justice. The interworkings of these systems perpetually violated black defendants' Nineteenth Amendment rights to justice and equal justice.

The criminal justice system has always violated African Americans' rights to justice and equal justice because the system is primarily populated by dominant group members who do not believe African Americans have a right to equal justice. Therefore, the criminal justice system, in locales predominated by the dominant group, represents a systemic violation of the Nineteenth Amendment. The upshot is that since the criminal justice system systematically denies African Americans justice and equal justice, the Nineteenth Amendment provides a cure: equal impunity. Thus, when the father kills the rapists, he is guilty of committing murder, but he has a right to equal impunity. This right would preclude his conviction for the murder of the rapists. Otherwise, African Americans would always receive unequal justice.

VII. CONCLUSION

When the government cannot protect citizens from a home invader or an assailant, are citizens expected to be invaded or assailed, or does the Constitution allow them to protect their own interest? In some instances, what government deems vigilante justice may be the only justice available "when the sanctions of society prove insufficient to restrain the violence of oppression." When the government is unavailable to rescue a homeowner from a burglary or a citizen from an imminent attack, the Second Amendment and all state governments provide a solution, self-defense. Similarly, when the government is unavailable to or disinterested in protecting its citizens' liberty and justice interests, should not the citizens be allowed to protect their own interests?

The Fourteenth Amendment provides a basis for a right to vigilante-style justice when there is a breakdown in constitutional order. This breakdown presupposes a state's deliberate indifference to the rights of its citizens and the federal government's breach of its duty to protect.

The Second Amendment and the Ninth Amendment strengthen the argument for redistributive force. The Second Amendment contains a right to rebel, redeemed by the Second Amendment political necessity defense. The right to rebel authorizes citizens to rebel against acts of government tyranny and suppression. When a state facilitates private tyranny, citizens

have the right to terminate the state's power to regulate the area in which it has allowed private citizens to run amok. Having terminated the government's authority, the citizen then has the prerogative to reestablish order in the government's place, including redistributive force. If the state arrests and prosecutes the citizen-rebel for using redistributive force, the Second Amendment allows a defense. This defense, a political necessity defense, enables the citizen-rebel to contest the charges in state court and appeal up to the Supreme Court, if the state disallows the citizen to present the defense to the jury.

The Ninth Amendment confirms the right to redistributive force. The Ninth Amendment contains natural rights unenumerated in the Constitution. Two of these rights are the right to equal justice and the right to justice. When a state denies a citizen's fundamental right to justice or equal justice, the federal government's job is to step in and salvage the right. Suppose the federal government fails to protect the citizen. In that case, the Ninth Amendment right to justice authorizes the citizen to use redistributive force against the private assailant to redeem the citizen's own liberty and justice interests. Similarly, when state and local governments facilitate unequal convictions or punishments based on race or other protected classifications, members of the protected class have a right to equal impunity. That is, defendants from unevenly convicted groups have a right to file writs of habeas corpus in federal courts to achieve their freedom. The rationale is that the state of conviction routinely convicted or punished similarly situated minority defendants while failing to prosecute or exculpating similarly situated white defendants.

The right to justice, the right to equal justice, and the Fourteenth Amendment right to Equal Protection also apply to entire groups of citizens if the group shares a common history of government deprivations of liberty and justice interests. In this case, the groups are authorized to organize vigilance committees, posses, and the like to enforce group rights.