Paramilitary Property

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Abstract

Paramilitarism is on the rise in America. In recent years, paramilitaries have mounted violent responses to movements for racial justice, climate emergencies, public health protocols, and migrant border crossings. Militias, white power organizations, and other paramilitary groups often claim their violence is justified as a legitimate defense of property, citing the need to protect rights to land and water, as well as to businesses, ranches, and guns.

This Article demonstrates how property is used as a form of authorization and justification of American paramilitarism—and how paramilitarism, in turn, has shaped property as legal regime and cultural ideal. This complicates the common understanding of militias as outlaws, engaged in violent projects that are both illegal and contrary to American ideals. In fact, paramilitaries have long grounded their ideology and action in both law and notions of property that are central to the American creed. Paramilitaries claim legitimacy and authority via the defense of property as an object of ownership and as a constitutional right. At the same time, they shape property rules and practices by generating new interpretations of property which are then mainstreamed. The intimacy between paramilitarism and property has gone largely untheorized. Yet it is critical to explaining both the development and expansion of paramilitarism and the evolution of property doctrines and practices in America.

The Article first examines property as a fundamental concept for U.S. paramilitarism and paramilitary ideology. It focuses on three illustrative case studies: the armed occupation of the Malheur National Wildlife Refuge in Oregon; armed counterprotests of Black Lives Matter demonstrations in Wisconsin; and militia patrols of the U.S.-Mexico border. Together, these cases illustrate how property has served as an ideological touchstone and source of authority and legitimacy for paramilitarism. The conceptual underpinnings of this relationship lie in paramilitary modes of constitutional interpretation. These modes laid the groundwork for the mainstreaming of paramilitary conceptualizations of property into broader American culture, shaping contemporary debates around public lands, racial justice, and immigration.

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The Article then examines how paramilitarism has shaped property. Paramilitarism is an unacknowledged root of property doctrines as well as American cultural practices related to the acquisition and protection of property rights. It has influenced doctrines and practices concerning the acquisition of property, particularly during the settlement of the American West. It has also shaped rules and cultural practices related to the protection of property, including self-deputization authorized by Stand Your Ground laws, racial exclusion and segregation, and protection of natural resources in moments of environmental crisis.

Recognizing the intimacies between paramilitarism and property yields crucial lessons for the ways we understand and theorize property. By drawing on property's dual role as a form of both private ownership and public power, paramilitaries have shaped the ways property is understood and enacted both as a form of ownership over things and as a claim to power over others. The history of state delegation to private actors of control over both territory and people, as well as enforcement of property rules, in effect incorporated paramilitarism into the basic functions of the state via property. This illustrates the indeterminacy of property, as it opens up the possibility of both democratic order and paramilitary violence simultaneously.

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I. Introduction

In 2016, armed extremists occupied the Malheur National Wildlife Refuge in Oregon for over a month.[1] Their central demand was a transi-

[1] Dave Seminara, Richard Pérez-Peña & Kirk Johnson, *Oregon Standoff Ends as Last Militant Surrenders*, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/us/oregon-standoff.html.

tion to private ownership of federally held public lands.[2] In 2020, a teenager armed with a semiautomatic rifle stood guard over a car dealership in Kenosha, Wisconsin, claiming that he was there to protect property against Black Lives Matter protesters.[3] He would later shoot and kill two protesters, claim self-defense, and be acquitted of all charges.[4] In 2003, armed civilians in fatigues captured and assaulted two Salvadoran migrants on a Texas ranch near the border with Mexico.[5] Invited by the ranch owner to guard his property against migrants, the armed civilians were part of a group called Ranch Rescue that claimed to defend American property rights.[6]

These three events are all examples of paramilitary property. As I lay out in this Article, paramilitary property involves a two-way relationship between property and paramilitarism. Paramilitaries, on the one hand, claim the defense of property as an object of ownership and as a constitutional right, and ground their own authority in this defense. They simultaneously shape property rules and practices, shifting paramilitary interpretations of property into the mainstream.

The modern militia movement has a long history, with roots in earlier paramilitary, white power, and white supremacist groups,[7] and its ranks have expanded and been energized in the context of recent political division, economic struggle, and cultural backlash. The terms "militia," "paramilitary," "white power," and "white supremacist" have their own distinct meanings, which have shifted over time. I use the broadest term, "paramilitary," in this Article to describe the use of military-style combat, weapons, and tactics outside of the police and military.[8] Paramilitarism exists on a spectrum of state

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[2] Jennifer Williams, *The Oregon militia standoff, explained*, Vox (Jan. 26, 2016, 10:30 PM), https://www.vox.com/2016/1/3/10703712/oregon-militia-standoff [https://perma.cc/388D-A2KV].

[3] @RichieMcGinniss, X (formerly Twitter) (Aug. 26, 2020, 12:25 PM), https://x.com/RichieMcGinniss/status/1298657958205820928 [https://perma.cc/R62S-5375]; Kyle Pfister (@phpolicy), X (formerly Twitter) (Aug. 26, 2020, 3:02 AM), https://twitter.com/phpolicy/status/1298516190495727616 [https://perma.cc/JC6C-DAN7].

[4] Shaila Dewan & Mitch Smith, *When it comes to self-defense, the prosecution has a heavier burden*, N.Y. Times (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/rittenhouse-acquittal-self-defense.html.

[5] Glen A. Tobias & Abraham H. Foxman, Border Disputes: Armed Vigilantes in Arizona 8 (2003), https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Border-Disputes-Armed-Vigilantes-in-Arizona.pdf [https://perma.cc/DVH4-ZLDR].

[6] *Id.*; Brooke H. Russ, *Secrets on the Texas-Mexico Border:* Leiva et al. v. Ranch Rescue *and* Rodriguez et al. v. Ranch Rescue *and the Right of Undocumented Aliens to Bring Suit*, 35 U. Miami Inter-Am. L. Rev. 405, 408-11 (2003).

[7] Kathleen Belew's history of the white power movement discusses the historical specificity of white power and militia movements. She describes the characteristics that the white power movement that emerged post-Vietnam shared with earlier white supremacist groups such as the Ku Klux Klan, while noting that while the white power movement is explicitly opposed to the federal government, the Klan in fact claimed to serve the state. Kathleen Belew, Bring the War Home: The White Power Movement and Paramilitary America 3 (2018).

[8] The police themselves are formally a paramilitary organization, in the sense that they are armed, trained, and structured in a similar fashion to the military but are not the military.

authorization, ranging from private violence that is formally authorized by the state (such as in the context of Stand Your Ground laws) to private violence that is explicitly outlawed by the state (such as the organization of private militias).[9] I draw on modes of paramilitarism that exist at different points along this spectrum in order to trace the broad historical contours of these types of organized violence and their relationship to property over time.

Scholars of paramilitarism frequently posit militias as outlaws engaged in violent projects that are both illegal and contrary to American ideals.[10] Yet paramilitaries have long grounded themselves in both the law and the notions of life, liberty, and property that are embedded in the American dream.

This Article argues that paramilitarism in fact both relies upon and shapes property in America. It reveals how U.S. paramilitarism's historical and contemporary incarnations embrace and find legitimacy in notions of property as an American founding ideal.[11] I move beyond the predominant view of modern militias as outlaws to show how property in fact serves to authorize and facilitate paramilitarism—and in turn, how paramilitarism shapes property both as a legal regime and a cultural ideal. This previously

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Some police departments self-identify as paramilitary forces. See, for example, the Philadelphia Police Department's description of itself as a department that "is structured as a para-military organization." *Military Experience*, JoinPhillyPD, https://www.joinphillypd.com/index.php/qualifications/for-veterans [https://perma.cc/T5XQ-GGXM] (last visited Nov. 26, 2024). In order to maintain analytical focus on organized private violence, I do not include formally authorized state security forces such as the police in the definition of paramilitary employed in this Article.

[9] Jacob Charles and Darrell Miller describe certain modes of formal authorization of private violence by the state as "the New Outlawry," arguing that legislatures are increasingly delegating "violence work" to the private sphere. Jacob D. Charles & Darrell A. H. Miller, *The New Outlawry*, 124 Colum. L. Rev. 1195 (2024).

[10] *See, e.g.*, Mary B. McCord, Dispelling the Myth of the Second Amendment (June 2021), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2021/07/McCord-Dispelling-the-Myth-of-the-Second-Amendment.pdf [https://perma.cc/WPB4-AR7Y]. This argument questioned militias' own arguments that they were legitimate citizens' movements and drew authority from popular sovereignty. They also countered arguments that militia members conducting activities like the January 6, 2021, attack on the U.S. Capitol were engaged in "legitimate political discourse." Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse*,*'* N.Y. Times (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html. McCord presented this argument against militias' interpretation of the Second Amendment in a statement before Congress on confronting violent white supremacy: "[T]he Supreme Court has been clear since 1886 that the Second Amendment does *not* protect private militias and that the states must have the power to prohibit them as 'necessary to the public peace, safety, and good order.'" *Confronting Violent White Supremacy (Part V): Examining the Rise of Militia Extremism: Hearing before the H. Comm. on Oversight and Reform Subcomm. on C.R. and C.L.*, 117th Cong. 5 (2021) (statement of Mary B. McCord, Executive Director, Institute for Constitutional Advocacy and Protection, Professor of Law, Georgetown University Law Center) (citing *Presser v. Illinois*, 116 U.S. 252, 268 (1886)).

[11] While this may appear to be a particularly American phenomenon, paramilitaries elsewhere have found a source of authority and legitimacy in property as well. I analyze this in my own work on paramilitarism in Colombia. Meghan L. Morris, *Property in Transition: Legal Fantasies, Land "Reforms," and Contracting Peace in Colombia*, 124 Am. Anthropol. 53 (2022).

unexamined intimacy between paramilitarism and property has deep and abiding legacies, both for the development of paramilitarism and for the evolution of property doctrines and practices.

As scholars increasingly analyze the central role that race has played in the development of property law,[12] I trace how this relationship between race and property has also been crafted via paramilitarism. Legal scholar K-Sue Park has theorized the histories of conquest and slavery as foundational to property law.[13] These histories have been shaped by different historical paramilitary incarnations, from vigilante settler groups that established modes of expropriating land from Native Americans and Mexicans to the Ku Klux Klan and other paramilitary and white supremacist organizations that influenced the forms of property that formerly enslaved people could acquire. An analysis of paramilitarism centers the role of private violence in this history, which has been tied up with white supremacy in particular moments and places but is also distinct from it in ways that scholars of paramilitarism are careful to delineate.[14]

The involvement of paramilitaries in this history did not render the outcomes an aberration. Rather, paramilitaries crafted ways of conceptualizing property and enacting it through legal doctrines and institutions that became mainstreamed in America. Opening up this history is critical to the country's efforts to trace and grapple with histories of oppression of Black Americans, Native Americans, and immigrants—histories that unfold into contemporary debates around public lands, immigration, and racial justice. It is key to understanding our contemporary political juncture, in which paramilitaries continue to claim legitimacy and conduct activities that threaten democracy and justice in the name of property. And it is foundational to understanding the development of forms of acquisition and protection of property in America. Put simply, we cannot understand American paramilitarism without recognizing property as foundational to the paramilitary project, and we cannot understand property in America without acknowledging its paramilitary roots.

The Article proceeds in three Parts. Part I examines property as a fundamental category within U.S. paramilitary ideology. I open this Part with a description of paramilitary origins and variations. I then present three short contemporary case studies. The first examines the armed occupation of the Malheur National Wildlife Refuge in Oregon. The second focuses on counterprotests to Black Lives Matter demonstrations in Wisconsin and the role that the notion of protection of property has played in paramilitaries' public

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[12] *See, e.g.*, K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale L. J. 1062 (2022); Bethany R. Berger, *Race to Property: Racial Distortions of Property Law, 1634 to Today*, 64 Ariz. L. Rev. 619 (2022); Brenna Bhandar, Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership (2018). Along with many other scholars, my thinking in this area is indebted to the pathbreaking work by Cheryl Harris. *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

[13] Park, *supra* note 12.

[14] Belew, *supra* note 7.

opposition to demands for racial justice. The third examines militia activities in U.S.-Mexico border control and enforcement and the role that property and land rights play in legitimating nativist claims to territory. These cases illustrate the ways that property has served as a paramilitary ideological touchstone, a means of recruitment, a source of authority and legitimacy, and a mode of racialization, shaping contemporary debates around public lands, racial justice, and immigration. I then identify the conceptual underpinnings of this relationship in paramilitary modes of constitutional interpretation and discuss the ways they laid the groundwork for the mainstreaming of paramilitary conceptualizations of property into broader American culture.

Part II examines the ways that paramilitarism has, in turn, shaped property. I argue that paramilitarism is an unacknowledged root of property doctrines as well as American cultural practices related to the acquisition and protection of property rights. I first focus on paramilitarism's influence on doctrine and practices around the acquisition of property. I illustrate how a range of types of paramilitary groups shaped the development of property rules during the settlement of the West in the nineteenth century in ways that informed the distribution of property along racial lines as well as the division of public and private land ownership. I then discuss the influence of paramilitarism on rules and cultural practices related to the protection of property. I trace the roots of notions of "looting" related to protection of property to slave patrols, illustrating the ways that paramilitary history has shaped contemporary modes of self-deputization to protect property via unofficial means as well as formal rules such as Stand Your Ground laws. I also discuss the role of paramilitarism in shaping property as a mode of racial exclusion, from the rules developed around land ownership and access during Reconstruction to modes of enforcing residential segregation during Jim Crow. As militias become active participants in disputes over land and natural resources in the context of environmental crises, these forms of exclusion are often exacerbated. In these ways, paramilitaries shape property through both community ideals, and through racialized violence, exclusion, and paranoia, in ways that persist throughout American history.

Part III argues that these intimacies between paramilitarism and property hold important lessons for property theory. Property scholars have theorized property as a delegation of power by the state to private owners, such that property contains elements of both *dominium* over things and *imperium* over other people.[15] The history of paramilitary property teaches us that this delegation of power can be a delegation by the state of the authority to exercise violence. It also illustrates the ways in which paramilitarism lives and takes shape in the gray zone between public and private. For this reason, property becomes a key legal concept for paramilitaries, who can draw on it as a source of authority and legitimacy that emanates directly from state legal regimes or that can be framed as a pre-political right.

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[15] Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L. Q. 8 (1927).

Even as the delegation of power that occurs through property can facilitate paramilitarism, paramilitarism is not simply the destiny of property. Rather, it is the particular way this structure has been enacted in the United States over time that has facilitated the unfolding of a specific relationship between property and paramilitarism, shaping both property rules and practices and the cultural imagination of what property is and what it protects.

II. Property as Paramilitary Foundational Ideal

This Part examines property as a foundational ideal for paramilitaries—an ideal that grounds paramilitaries' claims to legitimacy, focuses their spheres and modes of action, and serves as a mode of recruitment. I first discuss paramilitarism and some of its historical and contemporary variations. I then present three brief case studies: the armed occupation of the Malheur National Wildlife Refuge in Oregon, right-wing counterprotests of Black Lives Matter demonstrations in Wisconsin, and the patrolling of the U.S.-Mexico border by militias. These cases highlight different facets of the relationship between paramilitarism and property, including movements that range from nationalist to antigovernment and cover both rural and urban dynamics. I then discuss paramilitary constitutional interpretation of the right to property as central to paramilitary ideology and to groups' efforts to ground their forms of action in the Constitution.

A. Paramilitary Origins and Variations

In this Article, I use the term "paramilitary" as a broad umbrella term for groups that use military-style weapons, tactics, and training outside of the military, regardless of their articulation of an antigovernment or racist posture. In doing so, I draw together contemporary movements like militia and white power groups with historical groups that used similar strategies and methods to achieve their goals. Some of these historical groups, such as the Ku Klux Klan, were long-lasting and influenced contemporary paramilitaries within the white power movement. Others were more short-lived vigilantes or groups that emerged in particular historical moments and left a political and legal legacy, but fizzled out as organized movements.

Contemporary militias—like the members of the Wolverine Watchmen that allegedly plotted to kidnap Michigan Governor Gretchen Whitmer in 2020, or the Three Percenters who participated in the attack on the U.S. Capitol on January 6, 2021—are the most public face of U.S. paramilitary movements today.[16] These militias use paramilitary weapons and training and are often opposed to the federal government.

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[16] *See generally* Amy Cooter, Nostalgia, Nationalism, and the U.S. Militia Movement (2024).

Some of these groups, though not all, are also associated with white power activism. White power activism, a legacy of the Vietnam era, is characterized by the use of paramilitary weapons and training in the pursuit of the overthrow of the United States and the establishment of a white nation.[17] Both the contemporary militia movement and the white power movement share paramilitary characteristics, as well as a generally antigovernment stance.[18]

While many contemporary examples hew more toward right wing than left wing politics, paramilitarism in America has historically existed across the political spectrum. The Black Panthers, for example, used armed patrols to defend Black homes and communities against the police.[19] These efforts were influenced by earlier attempts to form armed self-defense units to protect civil rights activists from Klan and police violence, such as the Deacons for Defense and Justice in the South.[20] During moments of labor unrest, groups of miners and other workers have armed themselves in protest of working conditions and denial of rights to unionize.[21] Conflicts over settlement of the West in the 19th century featured politically diverse groups of armed settlers, militias, squatters, and elites, as discussed further in section II.A. While this Article's contemporary examples focus largely on militias that might hew more to the right of the political spectrum, given these

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[17] Kathleen Belew's history of the white power movement locates its roots in the return of disaffected veterans from the Vietnam War. She describes the "white power" movement as one that brought together a coalition of groups including militias, neo-Nazis, Klansmen, and diverse proponents of white theology. Belew, *supra* note 7, at ix; *see generally* A Field Guide to White Supremacy (Kathleen Belew & Ramón A. Gutiérrez eds., 2021).

[18] Scholars of extremist movements outline different schemas for understanding the distinctions between different groups. Sam Jackson delineates three primary, overlapping forms of right-wing extremists: antigovernment, racist, and nativist. Sam Jackson, A Schema of Right-Wing Extremism in the United States 2 (2019). The modes of paramilitarism that are active in these three case studies as well as the historical materials presented in Part II illustrate different, overlapping iterations of these forms of extremism. The Southern Poverty Law Center has a list of hate groups that it also differentiates by ideology. *Hate Map by Ideology*, Southern Poverty Law Center, https://www.splcenter.org/hate-map/by-ideology [https://perma.cc/4VUJ-8HWN] (last visited Oct. 6, 2024).

[19] James A. Tyner, *"Defend the Ghetto": Space and the Urban Politics of the Black Panther Party*, 96 Annals Ass'n Am. Geographers 105, 111 (2006).

[20] *See generally* Lance Hill, The Deacons for Defense: Armed Resistance and the Civil Rights Movement (2006). There are also contemporary examples of Black armed self-defense groups. Some of these groups have formed as community security units in the context of movements to abolish the police, such as the Minneapolis Freedom Fighters. *See Who are the Minnesota Freedom Fighters?*, The Daily Mail (Apr. 22, 2021), https://www.dailymail.co.uk/news/fb-9501015/WHO-MINNESOTA-FREEDOM-FIGHTERS.html [https://perma.cc/HZ48-XNCN]. Others identify as Black nationalist militias, such as the Not F**king Around Coalition (NFAC). Graeme Wood, *The Many Lives of Grandmaster Jay*, The Atlantic (Apr. 2, 2021), https://www.theatlantic.com/politics/archive/2021/04/the-many-lives-of-grandmaster-jay/618408/ [https://perma.cc/K3LG-ALFE].

[21] *See, e.g.*, Robert Shogan, The Battle of Blair Mountain: The Story of America's Largest Labor Uprising (2004); Eric L. Clements, *Pragmatic Revolutionaries?: Tactics, Ideologies, and the Western Federation of Miners in the Progressive Era*, 40 W. Hist. Q. 445 (2009); William J. Gaboury, *From Statehouse to Bull Pen: Idaho Populism and the Coeur d'Alene Troubles of the 1890s*, 58 Pac. Nw. Q. 14 (1967).

militias' current active influence on the mainstreaming of paramilitary ideologies around property, neither paramilitarism nor paramilitary property is confined to a particular political stance.

Contemporary militias often articulate themselves as heirs to a historical American tradition of citizen militias in the colonial and revolutionary periods. The Three Percenters, for example, take their name from the idea that it was merely three percent of American colonists who overthrew the British, and similarly, only three percent of today's citizens would be required to overthrow the U.S. government and restore the republic of the Founders.[22] Some paramilitary groups explicitly draw parallels between the tyranny they claim to resist today and that resisted by those fighting in the Revolutionary War. The first public event for the Oath Keepers, for example, took place on Lexington Common outside of Boston, the site of the opening battle of the Revolutionary War, on the battle's 234th anniversary.[23] The group's leader chose this date and site because "we are in much the same position as the patriots were in that time. We are on the eve of conflict with domestic enemies of liberty who are relentless in their pursuit of power over us."[24] This is an explicit alignment of the Oath Keepers with those fighting for independence in the revolutionary period and of the federal government with the British Crown.

Historical militias in the colonial period were composed of local men who organized to protect their communities; often, they included able-bodied men of a certain age and provided their own arms.[25] These militias were called to suppress rebellions and slave uprisings as well as to fight Native Americans on the frontier.[26] Militia units also served during the revolutionary period and fought along with full-time soldiers against the British Army.[27] In

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[22] *Three Percenters*, Southern Poverty Law center, https://www.splcenter.org/fighting-hate/extremist-files/group/three-percenters [https://perma.cc/LK74-SPY3] (last visited July 31, 2022). Similarly, the Posse Comitatus movement—a group that came into being in the 1970s and argued that the county sheriff was the only valid source of legal enforcement—took its name from the term "posse comitatus," which referred to a group of civilians called to arms by a sheriff to pursue outlaws. This term also derives its history from the Posse Comitatus Act of 1878, which was passed in order to limit the use of the U.S. military for civilian law enforcement, particularly in the establishment of Jim Crow in former Confederate states. Jackson, *supra* note 18, at 11.

[23] Sam Jackson, Oath Keepers: Patriotism and the Edge of Violence in a Right-Wing Antigovernment Group 29 (2020).

[24] Stewart Rhodes, *Stewart Rhodes on Oath Keepers' Sixth Anniversary, April 19, 2015*, Ammoland Shooting Sports News (Apr. 20, 2015), https://www.tacticalatlas.com/blogs/tactical-atlas-firearm-blog/stewart-rhodes-on-oath-keepers-sixth-anniversary-april-19-2015 [https://perma.cc/C3AX-T8PR].

[25] Allan R. Millett, Peter Maslowski & William B. Feis, For the Common Defense: A Military History of the United States from 1607 to 2012 3, 5 (3d ed. 2012).

[26] Lawrence Delbert Cress, Citizens in Arms: The Army and Militia in American Society to the War of 1812 5-7 (Sam C. Sarkesian ed., 1982).

[27] Michael D. Doubler & John W. Listman, Jr., The National Guard: An Illustrated History of America's Citizen-Soldiers 11-13 (2d ed. 2007). The Militia Act of 1792 authorized states to form their own militias. *Id.* at 18. By the middle of the nineteenth century, states had largely replaced mandatory militia service with voluntary state militias. *Id.* at

the late eighteenth century, militia membership was limited to men who held property.[28] Contemporary militias often argue that the Second Amendment's mention of a "well regulated Militia" protects paramilitary organizations as heirs of this historical militia tradition, as well as their right to take up arms against what they view as tyranny by the federal government.[29]

Scholars who dispute the idea that the Second Amendment provides this protection argue that contemporary militias' identification with colonial and revolutionary militias is based on an incorrect reading of both law and history.[30] Mary McCord, for example, notes that these historical militias defended, rather than opposed, the state, unlike antigovernment militias today, and that "well regulated Militia" refers to militias subject to government regulation.[31] Following the Supreme Court's 1886 opinion in *Presser v. Illinois*, McCord argues that the Second Amendment does not limit the states' power to outlaw private paramilitary organizations, and that all fifty states have prohibited such groups.[32]

Contemporary militias' use of property bears a resemblance to other historical instances of citizen rebellion against the government in protection of property rights. Shays' Rebellion, for example, involved a group of largely former Revolutionary War soldiers who returned home to poverty and a debt crisis.[33] They staged armed attacks on government properties and courthouses in opposition to state tax and economic policies that had

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22-23. For additional detail on the relationship between these state militias and the development of the National Guard, *see id.* at 23-46.

[28] David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 604 (1991). David Williams observes that "in the 1780's, only male property-holders—in some states only white male property-holders—could be citizens and thereby militia members." He notes that in republican theory about militias, "arms and property constituted the necessary material bases for the autonomous political personality of the citizen, who was dependent for his safety and his livelihood only on the body of his fellow citizens, not on the state apparatus or particular private individuals." *Id.* at 580.

[29] Jackson, *supra* note 23, 17, 72 (2020); McCord, *supra* note 10, at 3.

[30] *See generally* McCord, *supra* note 10.

[31] *Id.* at 3. Modern militias also refer to Madison's mention of armed citizen militias in Federalist No. 46 as establishing the necessity of private militias to oppose tyranny. As with the language of the Second Amendment, scholars of extremism similarly argue here that this language refers to state militias rather than private paramilitary armies. *Id.* at 34.

[32] Presser v. People of State of Ill., 116 U.S. 252, 268 (1886). All fifty states have a prohibition on private paramilitary groups. McCord, *supra* note 10, at 4-5. Recent decisions in cases involving paramilitary groups have also rejected militias' assertions of the Second Amendment's authorization of paramilitary activity. In a lawsuit brought after the 2017 Unite the Right rally in Charlottesville, VA, the court held that "when a group comes as a unit, in uniform, with military or law enforcement weapons, equipment, tactics, and appearance, under a clear chain of command authority, looking like the police or military, and they are neither a part of or subject to the local, state, or federal military or police, and are subject to neither, this is a legitimate concern." City of Charlottesville v. Pa. Light Foot Militia, No. CL 17-560, 2018 WL 4698657, 12 (Va. Cir. Ct. July 7, 2018).

[33] *See generally* Leonard L. Richards, Shays's Rebellion: The American Revolution's Final Battle (2003); David P. Szatmary, Shays' Rebellion: The Making of an Agrarian Insurrection (1984).

pushed people into property foreclosure.[34] The rebellion was put down by government forces as well as a privately funded militia. Similarly, protests in the wake of the Revolutionary War like the Fries Rebellion, which opposed postwar property tax measures, were led by men who had participated in the war and then took up arms against the government.

The identification of contemporary paramilitary groups with colonial militias and early rebellions like these, as well as with the "well regulated Militia" of the Second Amendment, illustrates efforts by paramilitary groups to frame their activities as both legal and legitimate. While rebellions like Shays' or Fries were, in fact, put down by militias authorized by the government, they represent a historical effort to oppose what their participants argued was governmental overreach. This assertion of the legitimacy of violent opposition in the context of perceived governmental overreach mirrors the opposition that today's antigovernment militias mount to things such as environmental regulation, management of public lands, or Covid mitigation measures.

Paramilitaries frequently ground this opposition in the law itself. While scholars have often focused on paramilitaries' claim to Second Amendment protections, I focus here on an understudied, critical element of paramilitary legal ideology: property. Both historical and contemporary paramilitaries have made property a central point of contention as well as a primary justification of the legitimacy of their actions. Paramilitary discourse and action around property has, in turn, shaped property rules as well as abiding cultural mythologies around property in America.[35]

B. Contemporary Case Studies

1. The Malheur National Wildlife Refuge Occupation

The occupation of the Malheur National Wildlife Refuge in Harney County, Oregon began as a protest of the sentencing of ranchers Dwight and Steven Hammond for setting fires on federal lands.[36] Militia members and other protesters from different states gathered in Harney County to

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[34] *See id.*

[35] Stephen Clowney has conducted important research on the relationship between property and violence more broadly, examining key sites in which informal property systems rely on violence for enforcement. *See* Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. Ill. L. Rev. 59 (2015). Here, I examine paramilitarism as a particular form of organized violence that may become involved in the enforcement of property rules in these and other sites, but has a very specific relationship to property, violence, and public power that is not necessarily shared by all those who might enact violence in the name of property.

[36] The ranchers claimed that they had set the fires to control invasive weeds and protect their land and cattle from wildfires, while prosecutors later argued that the fires had been set to cover up evidence of wildlife poaching. James Pogue, Chosen Country: A Rebellion in the West 8 (2018).

protest the sentencing.[37] Some of these armed protesters, led by rancher Ammon Bundy, then seized U.S. Fish and Wildlife Service administrative buildings for the Refuge, taking a stand not only against the sentencing, but also more broadly against what the occupiers of the Refuge deemed to be federal overreach.[38] Toward the end of the standoff, a confrontation between occupiers and law enforcement—including the Oregon State Police and the FBI—ended in the death of one occupier and several arrests.[39] The final holdouts at the refuge later surrendered, ending the forty-one-day standoff.[40]

The Hammonds had argued with the Bureau of Land Management for decades over grazing and water rights, a dispute that resonated with the general argument advanced by Bundy and other antigovernment protesters that the federal government lacked the authority to own or manage public lands in the West.[41] Bundy argued that the occupiers were using the Refuge as a "place for individuals across the United States to come and assist in helping the people of Harney County claim back their lands and resources."[42]

Harney County is located in southeastern Oregon, east of the borderlands area of Oregon and California some locals call the "State of Jefferson."[43] Comprising counties in southern Oregon and northern California, the area has long been home to secessionist impulses, and there was even a formal proposal presented for Congressional consideration of statehood in 1860.[44] While people call the State of Jefferson more "mythical" or a "state of mind" than an actual state, the name is indicative of the region's general orientation toward independence, a pioneer spirit, and suspicion of government.[45]

Given this history, it was perhaps unsurprising that nearby Harney County would become a focus of antigovernment protest. The form that this protest would take, however, was a matter of debate. While militia leaders from across the country adopted the Malheur occupation as a symbolic cause, there were also many county residents—even those sympathetic to

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[37] *Id.*; *Oregon standoff timeline: 41 days of the Malheur refuge occupation and the aftermath*, The Oregonian/OregonLive (Feb. 14, 2017, 11:23 AM), https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da.html [https://perma.cc/7A7H-L9MS].

[38] *Id.*; Tay Wiles, *Malheur occupation, explained*, High Country News (Jan. 4, 2016), https://www.hcn.org/articles/oregon-occupation-at-wildlife-refuge/ [https://perma.cc/R629-Z69G].

[39] The *Oregon standoff timeline*, *supra* note 37.

[40] *Id.*

[41] *Id.*

[42] Wiles, *supra* note 38.

[43] *See generally* Matthew A. Derrick, *The State of Jefferson: Beyond Myth and Mindset, Toward Enhanced Conceptualization of a Region*, 36 Humboldt J. Soc. Rels. 4 (2014).

[44] Jeff LaLande, *"The State of Jefferson": A Disaffected Region's 160-Year Search for Identity*, 118 Or. Hist. Soc'y 14, 18 (2017).

[45] Derrick, *supra* note 43, at 7.

arguments about federal overreach—who opposed the occupation by armed individuals from out of state.[46]

The Bundy family had gained a national profile in 2014 when Ammon Bundy's father, Cliven Bundy, rallied armed supporters to support a standoff with federal agents over back fees for cattle grazing on federally owned land near the Bundy ranch in Nevada.[47] This standoff was followed by other confrontations by armed militia groups with federal agents, including standoffs at Sugar Pine mine in southern Oregon and White Hope mine in Montana over surface rights.[48]

These standoffs, like the Malheur occupation, centered around disputes with federal agencies over rights to land and resources. They tapped into a historical current of activism in the West that questioned federal power over these resources in both violent and non-violent ways. James R. Skillen historically locates the Malheur occupation as a legacy of movements like the Sagebrush Rebellion in the 1970s-80s, which challenged federal authority over public lands in the wake of landmark federal environmental legislation, and the War for the West in the 1990s (or Sagebrush II), which linked debates over property and gun rights to challenges to federal power over land and resources.[49] Skillen argues that the more recent standoffs have increasingly involved a national conservative coalition that has made these issues broader symbols in the culture wars.[50]

The Malheur occupiers drew explicit connections between arguments about property and federal overreach and arguments by militia members and others who were willing to take up arms to assert private—rather than federal—control of land and natural resources in the West. Arizona rancher LaVoy Finicum, who was later killed in a police stop of occupiers near the Refuge, stated that he and other armed occupiers were there "to re-establish the Harney County residents' property rights."[51] To the occupiers, these rights were grounded in the Constitution in particular. One occupier stated to an interviewer that "[i]t says in Article 1, Section 8, Clause 17, that the federal government has no right to own any of these lands. That's it. If we

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[46] Kirk Johnson & Jack Healy, *Armed Group Vows to Continue Occupation at Oregon Refuge*, N.Y. Times (Jan. 3, 2016), https://www.nytimes.com/2016/01/04/us/armed-group-vows-to-hold-federal-wildlife-office-in-oregon-for-years.html.

[47] *Id.*; Jim Urquhart & Christi Turner, *Photos of a standoff*, High Country News (Apr. 14, 2014), https://www.hcn.org/articles/bundy-tresspass-cattle-stand-off-with-blm-feds/ [https://perma.cc/C4S6-BRMR].

[48] Tay Wiles, *Sugar Pine Mine, the other standoff*, High Country News (Feb. 2, 2016), https://www.hcn.org/issues/48-2/showdown-at-sugar-pine-mine/ [https://perma.cc/RZL3-99PB]; Marshall Swearingen, *Dispatch from White Hope Mine dispute in Montana*, High Country News (Aug. 12, 2015), https://www.hcn.org/articles/dispatch-from-oath-keepers-security-op-in-montana/ [https://perma.cc/7WHH-UPAQ].

[49] James R. Skillen, This Land is My Land: Rebellion in the West 1-4 (2020).

[50] *Id.* at 4.

[51] Jerry Headley, *LaVoy Finicum: Profile of A Malheur Occupier*, Or. Pub. Broad. (Jan. 5, 2016, 2:41 PM), https://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/burns-occupier-lavoy-finicum/ [https://perma.cc/PL5J-6C8C].

don't abide by the Constitution, which limits what the federal government can do, then we have no rule of law, we have no country."[52] Ammon Bundy articulated a similar argument, noting to journalists that the ultimate goal was that the ranchers that have been kicked out of the area . . . will come back and reclaim their land, and the wildlife refuge will be shut down forever and the federal government will relinquish such control."[53] The occupation, for Bundy, was therefore "in accordance with the Constitution, which is the supreme law of the land."[54] In this way, occupiers used notions of property as constitutional principle to justify armed resistance to federal control over land and natural resources, while articulating resonances between paramilitary ideology and more mainstream arguments regarding property and federal overreach in the West.

2. Paramilitaries and Black Lives Matter Counterprotests in Kenosha

When Kyle Rittenhouse went to Kenosha, Wisconsin, on August 25, 2020, he joined paramilitaries carrying semiautomatic rifles outside of a car dealership. "Our job is to protect this business," Rittenhouse stated with his gun slung over his shoulder, talking to a journalist.[55] Another journalist interviewed armed men standing guard at a gas station nearby, who confirmed they were there to protect the property.[56] "We appreciate you guys, we really do," a police officer said as he tossed bottles of water to some of the armed men with Rittenhouse.[57] Later that evening, Rittenhouse fatally shot two protesters and injured a third.[58]

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[52] Hal Herring, *Can we make sense of the Malheur mess?*, High Country News (Feb. 12, 2016), https://www.hcn.org/articles/malheur-occupation-oregon-ammon-bundy-public-lands-essay/ [https://perma.cc/E42N-XU4G]. This occupier's reference to the enclave clause is representative of an argument by Bundy and others that the enclave clause limits the federal government's authority to own land to ten square miles from Washington, D.C. Michael C. Blumm & Olivier Jamin, *The Property Clause and its Discontents*, 43 Ecology L. Q. 781 (2016).

[53] Char Miller, *The complicated history of who really 'owns' the occupied land in Oregon*, The Wash. Post (Jan. 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/01/07/the-complicated-history-of-who-really-owns-the-occupied-land-in-oregon/. This article details a longer history of the Malheur National Wildlife Refuge, noting that the land had been taken by the federal government from the Paiute tribe, which was forcibly displaced to southeastern Washington state in the late 19th century. For further history of the Malheur Basin, see Nancy Langston, Where Land and Water Meet: A Western Landscape Transformed (2006).

[54] *Id.*

[55] @RichieMcGinniss, *supra* note 3.

[56] Kristan T. Harris, Facebook [video on file with author].

[57] Kyle Pfister, *supra* note 3.

[58] Rittenhouse faced murder, weapons possession, and other charges. He argued self-defense and was found not guilty on all counts. Julie Bosman, *Kyle Rittenhouse Acquitted on All Counts*, N.Y. Times (Nov. 19, 2021), https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial. His attorney stated that "Kyle and all able-bodied males between the ages of 17 and 45 are part of the unorganized United States Militia . . . [h]e was in Kenosha as part of his right and duty to protect his community . . . [s]pecifically, he was there to protect the people and property of Kenosha from rioters bent on destroying it and burning it to the

A group calling itself the Kenosha Guard had posted a Facebook event for the evening titled "Armed Citizens to Protect our Lives and Property," calling "patriots" to come to Kenosha and take up arms against "evil thugs."[59] Their focus was on Black Lives Matter activists and others who had gathered in Kenosha to protest the police shooting of a Black man named Jacob Blake. Commenters urged violence on the Facebook event page, where one declared that "I fully plan to kill looters and rioters tonight."[60]

Property played multiple roles in this context. It served as a recruitment tactic for event organizers inviting people to join them in taking up arms in defense of property. It was also a justification for paramilitary presence as armed individuals stationed in front of local businesses insisted that they had a right to be there to protect private property. Property also served as a mode of delegitimization of Black Lives Matter protesters, their cause, and their methods. Paramilitaries framed Black Lives Matter protesters as looters, building a narrative that they were dangerous and out to destroy property.[61] This image served to frame paramilitary presence as a legitimate form of protection of people and property.

Some paramilitaries with white supremacist tendencies interpreted these moments of conflict as an opportunity to foster polarization and begin a race war. Known as "accelerationists," these groups welcomed contestation like that in Kenosha because, in their view, it provided an opening for promoting white power and moving quickly toward that inevitable eventual goal.[62] Some arrived armed and ready to incite violence or destroy property, and then frame Black Lives Matter protesters as looters.[63] These groups also

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ground." Safia Samee Ali, *Where Protesters Go, Armed Militias, Vigilantes Likely to Follow with Little to Stop Them*, NBC News (Sept. 1, 2020), https://www.nbcnews.com/news/us-news/where-protesters-go-armed-militias-vigilantes-likely-follow-little-stop-n1238769 [https://perma.cc/848K-UHAC].

[59] Ryan Mac & Craig Silverman, *How Facebook Failed Kenosha*, Buzzfeed News (Sept. 3, 2020, 1:52 PM), https://www.buzzfeednews.com/article/ryanmac/facebook-failed-kenosha [https://perma.cc/FYZ8-HWQC]; Erik Gunn, *A 'call to arms' that filled Kenosha with combat weapons*, Wisconsin Examiner (Aug. 27, 2020), https://wisconsinexaminer.com/2020/08/27/a-call-to-arms-that-filled-kenosha-with-combat-weapons/ [https://perma.cc/N499-TNC7].

[60] Mac & Silverman, *supra* note 59.

[61] Anti-Defamation League & Moonshot, White Supremacy Search Trends in the United States (June 2021), https://149736141.v2.pressablecdn.com/wp-content/uploads/White-Supremacy-Search-Trends-in-the-United-States_Moonshot-and-ADL.pdf [https://perma.cc/Z6YE-7W6R]; Ali, *supra* note 58.

[62] Daniel L. Byman, *Riots, White Supremacy and Accelerationism*, Lawfare (June 1, 2020, 6:38 PM), https://www.lawfareblog.com/riots-white-supremacy-and-accelerationism [https://perma.cc/3GC2-3XQE]; Samantha Walther & Andrew McCoy, *US Extremism on Telegram: Fueling Disinformation, Conspiracy Theories, and Accelerationism*, 15 Persp. on Terrorism 100 (Apr. 2021); Samantha Walther, Am. Counterterrorism Targeting & Resilience Inst. *The Nature of Far-Right Extremism Online Post-2015 in the United States*, (2020), https://americanctri.org/wp-content/uploads/2020/08/ACTRI-Report-The-Nature-of-Far-Right-Extremism-Online-by-Samantha-Walther.pdf [https://perma.cc/XJH5-E482].

[63] In the protests in Minneapolis after the police killing of George Floyd, a person who came to be known as "Umbrella Man" was a clear example of this. Dressed in a black gas mask and an umbrella, he spray-painted "Free Shit for Everyone Zone" on an Auto Zone store door and

attempted to mainstream notions of protesters as looters in order to foster a public understanding of the moment as one of racial conflict.[64]

Kenosha speaks to a broader pattern of paramilitary groups using property to oppose recent calls for racial justice. Members of The Oath Keepers arrived in Ferguson, for example, to oppose racial justice protests after the police killing of Michael Brown, stationing themselves on rooftops in camouflage with assault rifles and declaring they had come to protect private property against looters.[65] These types of counterprotest continued, accelerating with demonstrations for racial justice in 2020, as paramilitaries with white supremacist tendencies took opportunities to enact violence and sow discord.[66]

3. Patrolling the Borderlands

Paramilitaries operating on the U.S.-Mexico border have long used property as a justification of their presence and legitimacy, enforcing forms of border control by exercising racialized vigilante violence against migrants in the name of property ownership. The most well-known of the recent border militias is the Minuteman Project, which deployed armed volunteers across several border states in the 2000s to patrol and report migrants.[67] This project was part of a long history of paramilitary border operations grounded in intertwined notions of protection of both property and American territory

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then used a sledgehammer to break the store windows. This led to people taking items from the store, which in turn led to arson and additional theft. A police affidavit identifying the suspect as a member of a prison gang called the Aryan Cowboys asserted that the individual "wanted to sow discord and racial unrest." Neil MacFarquhar, *Minneapolis Police Link 'Umbrella Man' to White Supremacy Group*, N.Y. Times (July 28, 2020), https://www.nytimes.com/2020/07/28/us/umbrella-man-identified-minneapolis.html.

[64] Scholarship on media bias has demonstrated that these efforts were successful. In one study, authors found that during the 2020 Black Lives Matter protests, headlines noting protester violence and disruption were four times more common than media mentions of police violence, and media descriptions of peaceful demonstrations occupied less than five percent of the coverage of the protests. Danielle Kilgo, *Media Bias Delegitimizes Black-Rights Protesters*, 593 Nature 315 (2021); Byman, *supra* note 62.

[65] The Oath Keepers is largely made up of current and former members of the military and police. John Avlon, *The Oath Keepers Patrol Rooftops in Ferguson—The Facts Behind This 'Mysterious' Militia Group*, The Daily Beast (Nov. 30, 2014), https://www.thedailybeast.com/the-oath-keepers-patrol-rooftops-in-fergusonthe-facts-behind-this-mysterious-militia-group [https://perma.cc/3UR9-PGG3].

[66] Letter from Congresswoman Carolyn Maloney, Congressman Jamie Raskin & Congressman Stephen F. Lynch to Chad Wolf, Acting Secretary, U.S. Dep't of Homeland Sec. (June 15, 2020), https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/2020-06-15.CBM%20JR%20SFL%20to%20Wolf-DHS%20re%20White%20Supremacists%20at%20Protests.pdf [https://perma.cc/FF2Z-4PVD]; Seth G. Jones, Catrina Doxsee, Nicholas Harrington, Grace Hwang & James Suber, *The War Comes Home: The Evolution of Domestic Terrorism in the United States*, Cent. for Strategic & Int. Stud. (Oct. 22, 2020), https://www.csis.org/analysis/war-comes-home-evolution-domestic-terrorism-united-states [https://perma.cc/YEJ6-NZZJ]; Byman, *supra* note 62.

[67] Roxanne Lynn Doty, The Law into Their Own Hands 33-37 (2016).

from migrants. From the Texas Rangers[68] to the Klan Border Watch,[69] paramilitary groups centered their actions around protection of property—particularly white-owned property—in the borderlands.

Ranch Rescue was one of the more prominent recent operations in this vein.[70] Established in the early 2000s in Texas by a former U.S. Army officer,[71] the group's recruitment materials called for people to come "help ranchers on the Arizona/Mexico border cope with the damage to their property caused by thousands of criminal trespassers."[72] Describing itself as a network of volunteers devoted to "defending private property rights for all Americans," Ranch Rescue organized armed, uniformed patrols on private property on the border.[73] They detained and assaulted migrants, arguing that the migrants were trespassing on private land.[74] Ranch Rescue leaders blamed the federal government for failing to do enough to stop migration,

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[68] The Texas Rangers was founded in 1823 as an armed defense force for white settlers. The Rangers battled Native American tribes, pursued enslaved people who ran away, and used violence to facilitate white colonization of Native American and indigenous Mexican land on the border. Kelly Lytle Hernández notes that the Texas Rangers' tactics informed the methods and politics of the U.S. Border Patrol when it was created in 1924; the Border Patrol also incorporated former members of the Texas Rangers. *See generally* Kelly Lytle Hernández, Migra!: A History of the U.S. Border Patrol (2010).

[69] White nationalist Louis Beam established a network of paramilitary training camps and the KKK's "Klan Border Watch" to target migrants at the U.S.-Mexico border. Belew, *supra* note 7, at 33-34. In a case filed by a class of Vietnamese fishermen alleging intimidation by the KKK and its Texas Emergency Reserve, which patrolled the border to protect private property and threaten migrants, a federal district court in Texas enjoined the KKK and the Texas Emergency Reserve from training and organizing as a paramilitary group. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 201-02, 219 (S.D. Tex. 1982).

[70] Tobias & Foxman, *supra* note 5, at 5. Other recent examples of groups exercising paramilitary border control include the Three Percenters, American Border Patrol, and Arizona Border Recon. Doty, *supra* note 67; Vanda Felbab-Brown & Elisa Norio, *What Border Vigilantes Taught US Right-Wing Armed Groups*, Brookings (Mar. 12, 2021), https://www.brookings.edu/articles/what-border-vigilantes-taught-us-right-wing-armed-groups/ [https://perma.cc/U8QC-HLJH]; Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. Va. L. Rev. 1081, 1119 (2015).

[71] Tobias & Foxman, *supra* note 5, at 5. The group was inspired by a rancher and former Deputy Sheriff of Cochise County, Arizona, who patrolled the border heavily armed and dressed in uniforms similar to those worn by the U.S. Border Patrol, making "citizens' arrests" of migrants and holding them until they could be apprehended by the Border Patrol. Felbab-Brown & Norio, *supra* note 70.

[72] Tobias & Foxman, *supra* note 5, at 6. Another Ranch Rescue recruitment brochure states: "Private property owners have been threatened, harassed, intimidated, burglarized, and assaulted." Russ, *supra* note 6, at 408.

[73] Tobias & Foxman, *supra* note 5, at 9.

[74] Joshua J. Kurz & Damon T. Berry, *Normalizing Racism: Vigilantism, Border Security and Neo-Racist Assemblages*, 28 Security J. 150, 159 (2015); Sara A. Martinez, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 The Scholar 95, 107-08 (2004). Vigilante groups on the border have often grounded their authority to detain in citizen's arrest laws. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 Harv. Latino L. Rev. 135, 153 (2007) for an analysis of these laws in border states.

arguing that when "government fails or refuses to act, individual citizens are obligated to act on their own."[75]

In a case filed against Ranch Rescue leaders, two Salvadoran migrants claimed that the group's leaders—wearing fatigues and bearing military-style arms—had captured and assaulted them on a Texas ranch, whose owner had invited Ranch Rescue to guard his property.[76] The plaintiffs obtained judgments against the Ranch Rescue leaders[77] and received the deed to one leader's Arizona ranch, which had been used to conduct paramilitary training for Ranch Rescue members.[78] After the judgments, a member of Ranch Rescue stated that "[t]he illegals are coming over here . . . they are getting the American property. Hell, I'd come over, too. Get some American property, make some money from the gringos."[79]

Like in other contexts, property operated in multiple ways simultaneously for paramilitaries exercising border control. Paramilitaries used private property ownership as a justification of their presence, authority, and legitimacy, acting on their own ranches or by invitation from individuals who held title. It was not immigration laws, but criminal trespass rules that paramilitaries cited to justify detaining and assaulting migrants.[80]

Like paramilitaries opposing Black Lives Matter protests, those conducting border control also used property to justify their presence by framing migrants as thieves at multiple scales. They accused migrants of trespassing on private land to steal from ranchers or damage their property, justifying paramilitary presence as a legitimate mode of protection against theft and destruction. When migrants won judgments against landowners, paramilitaries framed the judgments themselves as an illegitimate appropriation of property held by American citizens. On a larger scale, some paramilitary

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[75] Tobias & Foxman, *supra* note 5, at 6.

[76] Russ, *supra* note 6, at 409-11.

[77] They reached a settlement with the owner of the Texas ranch. Southern Poverty Law Center, *Leiva v. Ranch Rescue*, S. Poverty L. Ctr., https://www.splcenter.org/seeking-justice/case-docket/leiva-v-ranch-rescue [https://perma.cc/26QX-UEAP] (last visited Feb. 7, 2025).

[78] The ranch had a shooting range, armored vehicles, and an observation tower used to detect migrants. Marc Lacey, *Arizona Man Looks to Law in Bid to Retrieve Ranch*, N.Y. Times (May 27, 2011), https://www.nytimes.com/2011/05/28/us/28arizona.html; *Leiva v. Ranch Rescue*, *supra* note 77.

[79] Andrew Pollack, *2 Illegal Immigrants Win Arizona Ranch in Court*, N.Y. Times (Aug. 19, 2005), https://www.nytimes.com/2005/08/19/us/2-illegal-immigrants-winarizona-ranch-in-court.html. Some Arizona voters were incensed that migrants were winning judgments against American citizens and pushed for a constitutional amendment barring immigrants from collecting punitive damages, which was approved in 2006. Lacey, *supra* note 78.

[80] Shane Bauer describes how the Three Percenters aimed to lease land on the border where migrants passed through so that they could build barracks and shooting lanes and "do whatever we want to the property." According to a Three Percenter, they would "[t]hrow up a sign that says, 'No Trespassing' . . . [t]hen we can shoot 'em." Shane Bauer, *I Went Undercover with a Border Militia. Here's What I Saw.*, Mother Jones (Nov./Dec. 2016), https://www.motherjones.com/politics/2016/10/undercover-border-militia-immigration-bauer/ [https://perma.cc/RS4T-TQ6N].

groups claimed that migrants were part of an official scheme by Mexico to take the Southwest back from the United States in a simultaneous theft of private property and national territory.[81]

C. Paramilitary Constitutional Interpretation

Property is central not only in these specific sites of paramilitary intervention but also in paramilitary ideology writ large, as well as in paramilitary efforts to ground themselves and their legitimacy in American legal history. Paramilitaries frequently cite historical moments like the American Revolution as well as documents such as the Declaration of Independence and the Constitution, with a particular emphasis on the Bill of Rights, as historical precedents or justifications for their action.[82] Paramilitary groups' relationship to property is often shaped by specific modes of interpreting the Constitution as a sacred text enumerating natural rights that they argue are properly interpreted by the people. These citational practices and interpretive modes work to mainstream paramilitary ideology by linking paramilitary aims to key documents and language that define American legal history and political culture.

Paramilitary constitutional devotion is at the heart of this project. In groups like the Oath Keepers,[83] the "oath" members uphold refers to the oath that military, law enforcement, and first responders take to support and defend the Constitution of the United States against all enemies.[84] This

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[81] One of the paramilitary groups subscribing to this theory, American Border Patrol, claims that Mexicans are following a secret plan called the Plan de Aztlán to conduct "la reconquista [the takeover]" of the Southwest. *American Border Patrol/American Patrol*, S. Poverty L. Ctr., https://www.splcenter.org/fighting-hate/extremist-files/group/american-border-patrolamerican-patrol [https://perma.cc/2W4Y-G4HB]. Leo Chavez discusses the broader notion of "Latino threat" of which this and other theories about Mexican desire to reconquer land are a part. *See generally* Leo Chavez, The Latino Threat: Constructing Immigrants, Citizens, and the Nation (2013).

[82] *See* Jackson, *supra* note 23, at 67; Darren Mulloy, American Extremism: History, Politics, and the Militia Movement 75-77 (2008). *See generally* John E. Finn, Fracturing the Founding: How the Alt-Right Corrupts the Constitution (2019). See Founding Moments in Constitutionalism (Richard Albert, Menaka Guruswamy & Nishchal Basnyat eds., 2019) for an analysis of the role of founding moments in inspiring power structures and political movements.

[83] Full membership in the Oath Keepers is restricted to current or former military, law enforcement, or first responders who have taken such an oath. Jackson, *supra* note 23, at 31. While other paramilitary groups do not generally have such membership as a requirement, their mission still often includes defense of the Constitution. Bauer, *supra* note 80. *See generally* Justin Crowe, *Political Radicalism and Pocket Constitutionalism*, 10 Am. Pol. Thought 51 (2021). Some militia groups even encourage members to purchase pocket constitutions to have on hand during their activities. Finn, *supra* note 82.

[84] Jackson, *supra* note 23, at 31. The oath states that support and defense of the Constitution will be against "all enemies[,] foreign . . . [and d]omestic." The Southern Poverty Law Center notes how this language was used by paramilitary groups to justify armed opposition of Black Lives Matter protests, with one group posting a statement that "[o]nce these thugs turned to burning, killing and looting, they became domestic enemies." Freddy Cruz, *The Year in Antigovernment Extremism Part 2*, S. Poverty L. Ctr. (Feb. 8, 2021),

constitutional devotion has a long paramilitary legacy; the Ku Klux Klan, for example, established its mission to "uphold and defend the Constitution of the United States as it was handed down by our forefathers in its original purity".[85]

For some paramilitary groups, these constitutional rights have their origins in God.[86] For these groups, the Bill of Rights protects God-given or natural rights by recognizing them in the Constitution, but the rights themselves are understood to be pre-constitutional. In a document written by the founder of the Oath Keepers, titled "The First Fundamental Principle of Constitutional Interpretation: Your Rights Don't Come From Government," the author notes that "[n]or does the Fifth Amendment grant us a right to life, liberty, or property. It merely prohibits the government from depriving us of those pre-existing rights without due process of law, and spells out specific procedural protections for those natural rights . . . [y]our rights are inherently yours by nature and by nature's God."[87]

Because of this relationship to the divine, some paramilitary groups treat the Constitution as a sacred text.[88] While not all paramilitaries subscribe to Christian principles, some form of constitutional fundamentalism is common even in groups that do not.[89] As with different forms of fundamentalism based on sacred texts, paramilitary forms of constitutional fundamentalism frequently emphasize reading the Constitution in a literal fashion, with reverence for the Founders and their original intent as defined by the legitimate arbiters of constitutional meaning—"the people."[90] Some groups have drawn inspiration from Mormon political theorist W. Cleon Skousen, whose book *The Five Thousand Year Leap* argued that the Founders were guided by the

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https://www.splcenter.org/news/2021/02/08/year-antigovernment-extremism-part-2 [https://perma.cc/Y239-XKED].

[85] Jared Goldstein, *The Klan's Constitution*, 9 Ala. C.R. & C.L. L. Rev. 285, 290 (2018); Jared Goldstein, Real Americans: National Identity, Violence, and the Constitution 31 (2022). Other groups have refused reverence for the existing Constitution in favor of drafting their own. *See generally* Robert L. Tsai, America's Forgotten Constitutions (2014).

[86] Finn, *supra* note 82; Crowe, *supra* note 83, at 64; James Pogue, *The Religious Ideology Driving the Bundy Brothers*, Outside (May 17, 2018), https://www.outsideonline.com/outdoor-adventure/environment/religious-ideology-driving-bundy-brothers/ [https://perma.cc/A92K-EQMQ].

[87] Stewart Rhodes, *The First Fundamental Principle of Constitutional Interpretation: Your Rights Don't Come From Government*, Blogspot: Oath Keepers (Mar. 23, 2009), http://oath-keepers.blogspot.com/2009/03/first-fundamental-principle-of.html [https://perma.cc/CVR9-GQF5]. The founder of the Oath Keepers was an Army veteran and 2004 graduate of Yale Law School, and promoted the fact that he had won the YLS Judge William E. Miller Prize for the best paper concerning the Bill of Rights. *Id.*

[88] Finn, *supra* note 82.

[89] *Id.*

[90] James Pogue describes an exchange within the group occupying the Malheur National Wildlife Refuge in which an occupation leader was giving a seminar on the Constitution with a group of occupiers. "Who is the final arbiter of the Constitution?" the leader inquires. "The Supreme Court?" a participant suggests, which leads to boos across the room, at which point the leader notes, "Right… [t]he people interpret it." Pogue, *supra* note 86.

Bible and that the Constitution incorporated divine rights.[91] This approach draws on a broader American tendency toward civil religion or "constitutional faith."[92] This tradition has also influenced groups that are not paramilitaries and have not taken up arms in the defense of the Constitution.[93] And yet its prevalence amongst some paramilitary groups reflects the forms of legitimacy and authorization that these groups draw simultaneously from law and from faith.[94]

Paramilitary groups are generally selective about the constitutional provisions they pledge to defend. Groups often focus on the First Amendment's protection of speech and religion, the Second Amendment's protections of gun rights (and, in their reading, the right to join private militias), and the Fifth Amendment's protection of the right to property.[95] Some groups argue that the property rights enshrined in the Fifth Amendment only hold meaning if there is a corresponding Second Amendment right to take up arms to protect and defend them.[96] The Oath Keepers' "Declaration of Orders We Will Not Obey" cites a quote from George Washington, stating "[t]he time is now near at hand which must probably determine, whether Americans are to be, Freemen, or Slaves; whether they are to have any property they can call their own".[97] The Declaration then notes that "[s]uch a time is near at

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[91] W. Cleon Skousen, The Five Thousand Year Leap (1981). The pocket Constitutions held by the occupiers of the Malheur National Wildlife Refuge were versions with notations by W. Cleon Skousen. Nigel Duara, *Oregon armed protesters invoke the Constitution—annotated by a conspiracy theorist*, L.A. Times (Jan. 21, 2016, 6:27 PM), https://www.latimes.com/nation/la-na-ff-oregon-standoff-constitution-20160121-story.html [https://perma.cc/YQ2Z-2HC2].

[92] *See generally* Sanford Levinson, Constitutional Faith (2011). *See also* Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984); John McNamara, *The Fight to Bear Arms: Challenging the Second Amendment and the U.S. Constitution as Sacred Text*, 12 Eur. J. Am. Studies 1 (2017). Aziz Rana's book, The Constitutional Bind: How Americans Came to Idolize a Document That Fails Them (2024), explores the broad public uptake of constitutional veneration over the course of the twentieth century.

[93] The Tea Party is one such example, arguing that the Founding Fathers had divine inspiration and founding documents like the Constitution were their sacred word. Jill Lepore, The Whites of Their Eyes: The Tea Party's Revolution and the Battle over American History 16 (2011). *See also* Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 Hastings Const. L. Q. 193 (2011).

[94] Aziz Rana argues that modern constitutional reverence has a historical relationship to the emergence of the national security state. Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 Cal. L. Rev. 335 (2015). While Rana discusses the ways in which the resulting public culture of constitutional protection legitimized government power and the growth of the state's security apparatus, this public culture may also partially ground the arguments around constitutional reverence and security advanced by paramilitary groups.

[95] John Finn calls the Constitution to which the alt-right professes devotion the "Alt-constitution." Finn, *supra* note 82.

[96] Francis X. Sullivan discusses this link between the Second and Fifth Amendments in the philosophy of the Sovereign Citizen movement. Francis X. Sullivan, *The Usurping Octopus of Jurisdictional Authority: Theories of the Sovereign Citizen Movement*, 1999 Wis. L. Rev. 785, 800 (1999). The ideology of other groups is also grounded in this coupling. *See, e.g.*, Finn, *supra* note 82, at 119-22; Crowe, *supra* note 83, at 51.

[97] Jackson, *supra* note 23, at app. 2.

hand again."[98] The right to property in this context operates as a motivating force for paramilitary violence, with guns mobilized in order to acquire and protect property.

The occupiers at the Malheur refuge, who called themselves the "Citizens for Constitutional Freedom," anchored their constitutional arguments in the right to "claim, use, and defend" property against ownership and control by federal agencies such as the EPA.[99] One of the leaders noted during the occupation that they were working to oppose the federal government's "unconstitutional land transactions and controls."[100]

Some scholars argue that these modes of paramilitary constitutional interpretation are in fact a misinterpretation of the Constitution and the rights it enshrines.[101] These critics challenge paramilitary constitutional arguments against federal control of land in the West or for the right to join private militias as incorrect interpretations of the protections offered by the Bill of Rights. Michael Blumm and Olivier Jamin call paramilitary interpretations "meritless" and inconsistent with precedent regarding federal power over public lands, particularly the consistent affirmation by the Supreme Court of Congress's authority under the Property Clause to manage public lands and establish federal land policy.[102] John E. Finn distinguishes what he calls the Alt-Right's "Alt-Constitution" from the "real" Constitution, arguing that paramilitaries in the Alt-Right corrupt the true Constitution and replace it with the "antebellum constitution of slavery, states' rights, and nullification."[103] Mary McCord argues against paramilitary interpretations of the Second Amendment, outlining the forms of government (not private) regulation of militias that were anticipated at the time of the founding.[104]

These critiques tend toward a view of the Constitution that finds its democratic and moral compass to be impervious to these paramilitary interpretations. Other constitutional scholars might hold a different view on the Constitution, finding it more open to undemocratic or "amoral"

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[98] *Id*.

[99] Pogue, *supra* note 86; Amir Alexander, *The Estrangement of the American Landscape*, 85 Soc. Rsch. 323 (2018). These constitutional arguments are developed in more detail in Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 Ecology L. Q. 781 (2016).

[100] Tom Boggioni, *WATCH: Bundy Facebook video recruits new militia members to join Oregon federal building takeover*, Raw Story (Jan. 3, 2016), https://www.rawstory.com/2016/01/watch-bundy-facebook-video-recruits-new-militia-members-to-join-oregon-federal-building-takeover/ [https://perma.cc/82VB-RWA2]. *See also* Williams, *supra* note 2.

[101] Blumm & Jamin, *supra* note 99; William G. Robbins, *The Malheur Occupation and the Problem with History*, 117 Or. Hist. Q. 574 (2016); Elizabeth M. Osenbaugh & Nancy K. Stoner, *The County Supremacy Movement*, 28 Urb. Law. 497 (1996); Finn, *supra* note 82; McCord, *supra* note 10.

[102] Blumm & Jamin, *supra* note 99.

[103] Finn, *supra* note 82, at 5-6.

[104] McCord, *supra* note 10.

interpretations.[105] But regardless of one's perspective on the nature of the Constitution itself, what critiques of paramilitary constitutional interpretation often fail to recognize is that it does important political work for paramilitaries whether or not their interpretations are "correct." Paramilitary groups offer lessons in constitutional interpretation as a form of recruitment, community building, and civic education.[106] They interpret the Constitution as a way of grounding their legitimacy and authority, often diminishing that of the government.[107]

Most importantly, however, paramilitary constitutional interpretation works to mainstream paramilitary ideology into broader American culture.[108] The invocation of rights and ideals that are foundational to the idea of what it means to be American—like property—makes paramilitarism appear less extreme. It also links paramilitaries to historical events and documents that provide a common foundation for what it means to be American, offering interpretations of that common foundation that legitimize paramilitary causes and facilitate their reach into the cultural mainstream.[109]

III. Property's Paramilitary Roots

This Part examines how paramilitarism has shaped property as both legal doctrine and cultural ideal. I first explore the ways that paramilitarism shaped property doctrines and practices regarding the acquisition of land during the expansion of settlement into the West in the nineteenth century. I then discuss the influence of paramilitarism on rules and modes of defending or protecting property, including notions of "looting" and their roots in slave patrols, protection of white property postbellum, modes of racial exclusion and segregation during the Jim Crow era, forms of self-deputization as self-defense such as Stand Your Ground laws, and paramilitary defense of property in environmental crises.

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[105] *See, e.g.*, Richard Albert, *America's Amoral Constitution*, 70 Am. U. L. Rev. 773 (2021); Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539 (2022).

[106] *See, e.g.*, Pogue, *supra* note 86; James Pogue, Chosen Country: A Rebellion in the West (2018).

[107] Some scholars of public lands suggest that despite the fact that paramilitaries' legal interpretation regarding public lands is weak, paramilitaries could potentially advance the idea of divestiture of federal land management via elected officials. Blumm & Jamin, *supra* note 99; John W. Ragsdale, Jr., *The American Legacy of Public Land Rebellion*, 48 Urb. Law. 599, 600 (2016).

[108] Jackson, *supra* note 23, at 18-19; Darren Mulloy, *Conversing with the Dead: The Militia Movement and American History*, 38 J. Am. Stud. 439, 440 (2004); Pogue, *supra* note 86; Finn, *supra* note 82, at 130.

[109] The effort by paramilitaries to present themselves as quintessentially American in their behavior and ideals is longstanding. *See, e.g.*, Hiram Wesley Evans, *The Klan's Fight for Americanism*, 223 N. Am. Rev. 33 (1926). *See also* David J. Chalmers, Hooded Americanism: The History of the Ku Klux Klan (1987).

A. Acquisition: Colonizing the Frontier

The Treaty of Guadalupe Hidalgo brought an end to the Mexican-American War in 1848, marking a new era in the settlement of the West.[110] The Treaty marked the boundary of Texas as the Rio Grande and included the cession from Mexico of parts of present-day New Mexico, California, Arizona, Texas, Nevada, Colorado, and Utah.[111] The cession of territory, along with the ambiguities around existing property claims, set the stage for widespread conflicts over land ownership in the West between Native American tribes, Mexican land grant settlers, and Anglo settlers and land speculators.

The agents of paramilitary violence in this phase of settlement of the West went by many different names: mobs, vigilantes, vigilance committees, posses, military companies. While some were more informally organized, others were organized like militias, with military-style weapons and command structures.[112] Some had ties to local governments, though they were officially unauthorized.[113] Many men in these groups had previously served in militias, informal border patrols, or other armed groups in the East, such as slave patrols.[114] The limited role of federal troops on the frontier facilitated an expanded role for these groups, who enacted both federally authorized and unauthorized violence to settle the West.[115]

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[110] Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico (Treaty of Guadalupe Hidalgo), Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

[111] *Id.* Articles VIII and IX of the Treaty protected the property of residents of the ceded areas who would become new U.S. citizens, but Article X (obligating the United States to recognize Mexican and Spanish land grants) was repealed by Congress. Joseph A. Ukockis, Bound by Barbed Wire: The People's Movement of San Miguel County, 1887-1892 (2016) (Master's Thesis, Northern Arizona University) (ProQuest).

[112] For examples of different structures, see Gregory Ablavsky, Laws of War and Peace in Federal Ground: Governing Property and Violence in the First U.S. Territories (2020); Daniel Brendan Lynch, Southern California Chivalry: The Convergence of Southerners and Californios in the Far Southwest, 1846-1866 75 (2015) (Ph.D. dissertation, University of California, Los Angeles) (ProQuest); Jason E. Pierce, Making the White Man's West: Whiteness and the Creation of the American West (2016); Hernández, *supra* note 68.

[113] Some groups made formal requests for arms from the state. *See, e.g.*, Donald Curtis Brown, The Great Gun-Toting Controversy, 1865-1910: The Old West Gun Culture and Public Shootings (1983) (Ph.D. dissertation, Tulane University) (ProQuest). Gregory Ablavsky describes attacks on Native American villages by similar self-organized groups, observing that these groups had "quasi-official status: the participants frequently mustered as militiamen and were usually led by a prominent local leader who assumed the title of 'colonel' or 'general.' Yet despite their military trappings, such expeditions more closely resembled the era's mobs than an army campaign." Ablavsky, *supra* note 112, at 141.

[114] One such "military company" in Southern California, called the Monte Rangers, included armed men from slave states who had served in lynch mobs and slave patrols in the South as well as in the Texas Rangers. Daniel Brendan Lynch, Southern California Chivalry: The Convergence of Southerners and Californios in the Far Southwest, 1846-1866 75, at 85-87 (2015) (Ph.D. dissertation, University of California, Los Angeles).

[115] For further discussion of the often blurry line between authorized and unauthorized violence on the frontier, *see* Ablavsky, *supra* note 112, at 139-68. Some local officials also assembled more formal bodies of citizens called a "posse comitatus" to assist local government. Some

Paramilitary groups participated in enabling the displacement of both Native Americans and Mexicans on the frontier and helped to establish property rules favorable to white settlement.[116] Some squatters adopted natural rights theories of property, in which title passed from God to those who worked the land and put it to use.[117] This theory of the origins of rights facilitated an orientation toward absentee landowners, speculators, Native Americans, thieves, and Mexican grantees as illegitimate owners of property on the frontier. Kelly Lytle Hernández notes that groups like the Texas Rangers "battled indigenous groups for dominance in the region, chased down runaway slaves who struck for freedom deep within Mexico, and settled scores with anyone who challenged the Anglo-American project in Texas. The Rangers proved particularly useful in helping Anglo-American landholders win favorable settlements of land and labor disputes with Texas Mexicans."[118] These activities enabled white settlement and colonial control of the West while pushing Native Americans and Mexican landholders off the land.[119]

Direct paramilitary violence against Mexicans and Native Americans, including murders, lynching, and forced displacement from desired land, was one mode of facilitating white settlement.[120] Paramilitary groups frequently justified this violence by accusing their targets of being cattle "rustlers," horse thieves, or criminals who had committed other property offenses.[121] Cattlemen's associations formed to launch posses against rustlers and establish and enforce rules around land use on the range.[122]

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posse members complained about assignments to recover stolen livestock or locate murderers, arguing that the only honorable reason for organizing a posse comitatus was "the pursuit of Indians and protection of their homes." Larry Ball, *Militia Posses: The Territorial Militia in Civil Law Enforcement in New Mexico Territory, 1877-1883*, 55 N. Mex. Hist. Rev. 47, 58 (2021).

[116] This story is one element of a broader history of white settlement and conflicts over land on the frontier. *See, e.g.*, David A. Chang, The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832-1929, at 175-203 (2010); Paul Frymer, Building an American Empire 129-72 (2017).

[117] Donald J. Pisani, *The Squatter and Natural Law in Nineteenth-Century America*, 81 Agric. Hist. 443, 451 (2007).

[118] Hernández, *supra* note 68, at 20.

[119] *Id.*; Jason E. Pierce, Making the White Man's West: Whiteness and the Creation of the American West 209-46 (2016); Alyssa Garcia Perez, *Texas Rangers Resurrected: Immigration Proposals After September 11th*, 8 St. Mary's L. Rev. 277, 283 (2005).

[120] *See* William D. Carrigan & Clive Webb, Forgotten Dead: Mob Violence against Mexicans in the United States, 1848-1928 (2017); Clark S. Knowlton, *Violence in New Mexico: A Sociological Perspective*, 58 Cal. L. Rev. 1054 (1970); William Wood, *The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 Tulsa L. Rev. 317 (2008); Kathleen P. Chamberlain, In the Shadow of Billy the Kid: Susan McSween and the Lincoln County War (2013).

[121] Carrigan & Webb, *supra* note 120, at 119; Chamberlain, *supra* note 120; Knowlton, *supra* note 120; Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries*, 48 Am. Soc. Rev. 796 (1983).

[122] R. Taylor Dennen, *Cattlemen's Associations and Property Rights in Land in the American West*, 13 Expls. Econ. Hist. 423 (1976); Anthony Robert S. Chiaviello, Narrative, Metaphor,

Some jurisdictions authorized and even passed acts granting private groups the power to detain and enforce laws against thieves.[123] In a reflection of the significant role that paramilitary groups played in law enforcement around theft, Governor Lionel Sheldon of New Mexico wrote the Secretary of the Interior in 1883 and 1884 that approximately thirty militia companies had "rendered most important service in aiding the civil authorities . . . [the] desperado and thieving element has substantially disappeared."[124] While Sheldon was criticized for the dubious legality of his open support for private militias conducting law enforcement, he argued they were necessary to respond to thievery, as "rascals operate outside the law and must be followed into their own chosen field without regard to legal limits or restraints whenever necessary to afford protection to the peaceable and honest population."[125]

Different groups of settlers also used paramilitary tactics to influence rules around how land could be acquired on the frontier, how much could be held, and how it would be taxed. One of the most important legal changes that settlers pushed for was preemption, which would allow settlers to purchase public lands that they had been working, often at a set price. In the early nineteenth century, squatters on public lands in the West were treated as outlaws; early congresses made efforts to limit their rights, even passing an act in 1807 authorizing military removal of settlers deemed to be illegal squatters from public lands.[126] Preemption was important to settlers because it legalized formerly illegal squatting on public lands and provided terms for the direct transfer of public lands to settlers without bidding at public auction. Eduardo Peñalver and Sonia Katyal describe squatters on the frontier as a form of "acquisitive outlaw," whose illegal trespass on public lands

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and Fantasy Themes in Environmental Rhetoric: Critiquing a Livestock-Grazing Conflict in the American West (1998) (Ph.D. dissertation, New Mexico State University) (ProQuest); Ball, *supra* note 115.

[123] *See, e.g.*, *List of Acts and Joint Resolutions: Passed the Indiana Legislature from the Commencement of the Session to the Recess*, INDIANA STATE SENTINEL, Apr. 8, 1852; Thompson Smith, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 32 VAL. UNIV. L. REV. 269, 292 (1997). In New Mexico, Governor Sheldon asked citizen-led militias to protect lives and property against Native Americans and cattle rustlers. One such militia was led by a newspaper editor who published a piece titled "A Fair Warning" in his paper, which stated "[t]here is, and has been for the past two years an organized band of horse and cattle thieves in this county. Some of this band do the stealing, others receive and dispose of the stolen property. The thieves are known, the receivers, some of whom pretend to be honest men—are also known. . . . There are twelve of you; and if room cannot be found for you in the county jail, twelve ropes and twelve cottonwood limbs can be found. You cannot escape the swift retribution of an outraged community. WE WARN YOU TO BEWARE!" Darlis Ann Miller, A Civil War Legacy: Californians in New Mexico 131 (1977) (Ph.D. dissertation, The University of New Mexico) (ProQuest).

[124] Ball, *supra* note 115, at 63.

[125] *Id.* at 56.

[126] Mark T. Kanazawa, *Possession is Nine Points of the Law: The Political Economy of Early Public Land Disposal*, 33 EXPLS. ECON. HIST. 227, 228, 231 (1996).

eventually led to the development of property rules like preemption that worked in their favor.[127]

A subset of settler groups pushing for these rules also took the law into their own hands beyond trespass, organizing as armed vigilantes. Officials such as Kentucky Senator Henry Clay opposed squatters as a "lawless rabble" who not only trespassed in defiance of property rights, but also were "organizing themselves into companies" and squatter protective societies that exercised vigilante violence.[128] Some squatters declared that they were not subject to court decisions in land cases or summonses by the sheriff but rather were "governed by martial law."[129]

Squatters began to exercise political pressure through the organization of claim clubs and other extralegal associations that provided private protection to squatters.[130] Some of these clubs would organize the intimidation of potential purchasers, large landholders, speculators, and local officials at land auctions.[131] When the owners of one of the largest land grants in newly ceded territories, the Maxwell Land Grant,[132] decided to oust a squatter, a group of two hundred men arrived at an auction of the squatter's property armed with Winchester guns, scuttling the auction.[133]

These forms of pressure exercised by squatters—through both violence and legal advocacy with lawmakers—paved the way for the legal recognition of preemption.[134] It also led to changes to tax and other rules that made

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[127] Eduardo M. Peñalver & Sonia Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership 55 (2010).

[128] John R. Van Atta, *"A Lawless Rabble": Henry Clay and the Cultural Politics of Squatters' Rights, 1832-1841*, 28 J. Early Republic 337, 339, 362 (2008).

[129] Donald J. Pisani, *Squatter Law in California, 1850-1858*, 25 W. Hist. Q. 277, 281 (1994). California historian Hubert Howe Bancroft declared that squatterism was "only a phase of mob law." Hubert Howe Bancroft, California inter Pocula 1848-1856, at 402 (1888).

[130] *Baker v. Morton*, 79 U.S. 150 (1871), was a case involving the Omaha Claim Club, which controlled public lands to benefit certain settlers and had threatened other settlers claiming the land with death. The Court ruled that "[w]here a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress." *Id.* at 158.

[131] Kanazawa, *supra* note 126, at 234; Leonard A. Carlson & Mark A. Roberts, *Indian Lands, "Squatterism," and Slavery: Economic Interests and the Passage of the Indian Removal Act of 1830*, 43 Expls. Econ. Hist. 486, 490 (2006); *see also* Howard W. Ottoson, Land Use Policy and Problems in the United States (1963). Donald Pisani discusses other armed squatters who fired into the homes of large landowners. Donald J. Pisani, *Land Monopoly in Nineteenth-Century California*, 65 Agric. Hist. 15, 21 (1991).

[132] Brian Grinder & Dan Cooper, *Wild West Finance: The Maxwell Land Grant*, 132 Fin. Hist. 10 (2020); María E. Montoya, Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900 (2002).

[133] Stanley Crocchiola, *O. P. McMains, Champion of a Lost Cause*, 24 N.M. Hist. Rev. 1, 4-5 (1949).

[134] Peñalver & Katyal, *supra* note 127, at 57-58. Eduardo Peñalver and Sonia Katyal describe how settler associations exercised threats and intimidation against speculators and their agents who aimed to bid on settlers' land. These actions, along with the general flouting of the law by settlers and sympathy by many in the West with the settler cause, led to a number of legal changes on the frontier. First, they led to pro-settler changes in local laws, including raising taxes

absentee landownership by speculators more expensive and easier for squatters to contest.[135] At the federal level, the Preemption Act of 1830 gave settlers who improved surveyed public land a right to purchase 160 acres before auction at a minimum price.[136] Squatters received additional concessions through the Preemption Act of 1841, and eventually the Homestead Act of 1862, which granted 160 acres of public lands to those who worked and improved them as a homestead over five years.[137] States like California passed their own laws on preemption, with California granting preemptioners claiming land within Mexican land grants the right to sue the grantee.[138] Squatters gained significant property rights in this process, as well as political power, with some leaders of squatters' associations eventually becoming local leaders and elected officials, and others gaining significant influence with local governments.[139]

It was not only squatters that formed armed militias to attempt to enforce land rights, but also large landholders and claimants on Mexican grants. On the Maxwell Land Grant, for example, the grant company itself commissioned a privately led militia to settle disturbances and serve eviction notices on settlers.[140] The most well-known of the Mexican claimants' groups, the Gorras Blancas (White Caps), cut fences and burned barns of large New Mexico landholders and speculators who had fenced and privatized areas of land within Mexican grants, as a challenge to these enclosures.[141] They also arrived armed and hooded on horseback to intimidate and evict wealthy ranchers and commercial interests that aimed to fence off areas, accusing them of land grabbing.[142]

In this sense, paramilitarism in this period spanned the political spectrum, emerging through squatters' organizations, groups of large landholders, claimants, cattlemen's associations, and groups of settlers. For each of

on absentee land speculators. Later, the federal government made legal and policy shifts toward preemption for settlers. *Id.* at 58-63.

[135] *Id.* at 60.

[136] Preemption Act of 1830, ch. 208, 4 Stat. 420.

[137] Preemption Act of 1841, ch. 16, 5 Stat. 453 (repealed 1891); Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 175) (repealed 1976).

[138] Pisani, *supra* note 117, at 452. Mexican land grants were areas of land allocated to settlers by Mexico to encourage settlement of the frontier. Some land grants were also made by Spain prior to Mexican independence. The Treaty of Guadalupe Hidalgo stated that the titles to these land grants would be honored after Mexico ceded the territory to the United States.

[139] Pisani, *supra* note 129, at 281, 285; Peñalver & Katyal, *supra* note 127, at 57-63.

[140] Gerald Thompson, *New Mexico History in New Mexico Magazine: An Annotated Bibliography* (pt. 2), 17 J. Sw. 339, 374 (1975); *see also* Robert K. DeArment, Deadly Dozen: Forgotten Gunfighters of the Old West (2012); Ball, *supra* note 115; Paul W. Gates, *California's Embattled Settlers*, 41 Cal. Hist. Soc. Q. 99 (1962).

[141] David Correia, *"Retribution Will Be Their Reward": New Mexico's Las Gorras Blancas and the Fight for the Las Vegas Land Grant Commons*, 108 Radical Hist. Rev. 49 (2010); Knowlton, *supra* note 120, at 1076; Ukockis, *supra* note 111.

[142] Correia, *supra* note 141; Knowlton, *supra* note 120; Ukockis, *supra* note 111.

these groups, property served as a key justification of their activity, while that activity also drove shifts in legal rules around land ownership.

These paramilitary tendencies also extended into growing frontier cities. The earliest examples of this extension were the San Francisco Vigilance Committees of 1851 and 1856. The Vigilance Committees had a significant number of members who were policemen, businessmen, elected officials, and members of the California militia.[143] The Committees conducted "self-protection" through private associations of armed vigilantes not officially sanctioned by the government, though they also cooperated with the police and the courts.[144] Just as rural paramilitaries used accusations of cattle rustling and property crime to justify their actions, property crimes served an important role for the Vigilance Committees as the primary justification of the need for extralegal enforcement.[145] The Committees alleged that the government was unable to control crime, leaving citizens responsible for protecting themselves from thieves. One of the primary targets of the Vigilance Committee was the Hounds, a nativist "mutual defense" group that also operated as a paramilitary organization with officers, uniforms, and military-style discipline and systematically robbed, extorted, and attacked residents of the city, particularly immigrants.[146]

The activities of the Vigilance Committee were aimed at enforcing social hierarchies in the city, providing "mutual protection of life and property" and the "maintenance of the peace and good order of society" where they claimed the government failed to do so.[147] They claimed the right to enter and search any home where they reasoned they might be able to fulfill

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[143] Nancy S. Papin, Vigilante Justice and Civic Development in 1850s San Francisco, at 4 (2006) (Master's thesis, University of Nevada, Las Vegas); Joseph Fraser Hubbard, Fake Tales of San Francisco: History, Legacy and the San Francisco Vigilance Committee of 1851 (2018) (Master's thesis, University of Calgary).

[144] Papin, *supra* note 143, at 4; Hubbard, *supra* note 143.

[145] A proposition for a vigilance committee published in San Francisco's *Alta California* in 1851 reads: "You are very well aware that the engrossing and absorbing topic at present, in this community . . . is the insecurity of our lives and property, owing to our city's being infested with the most desperate and determined and well organized band of villains . . . though the remedies I am about to suggest may not be strictly in accordance with the law, I believe the time has come when it is demonstrated that we must be *a law unto ourselves* . . . [the] remedy I would propose would be to appoint a committee of vigilance, say of twenty men, in each ward, whose duty it shall be to hunt out these hardened villains . . . and give them five days to leave the city, warning them at the same time that after that *a war of extermination* will be commenced against them." Propositions for Public Safety, Alta Cal., June 8, 1851, at A2 (emphasis in original).

[146] Rae Alexandra, *When San Francisco Rose Up to Chase a Racist Gang Out of Town*, KQED Arts & Culture (Mar. 3, 2021), https://www.kqed.org/arts/13893272/when-san-francisco-rose-up-to-chase-a-racist-gang-out-of-town [https://perma.cc/S5MD-PAC7]; Darren A. Raspa, Bloody Bay: Grassroots Policing in Nineteenth-Century San Francisco (2020); Abraham P. Nasatir, *Chileans in California During the Gold Rush Period and the Establishment of the Chilean Consulate*, 53 Cal. Hist. Q. 52 (1974).

[147] Certificate of Membership, Committee of Vigilance of San Francisco Reorganized 15th May 1856 for the Mutual Protection of Life & Property (1856), https://collections.library.yale.edu/catalog/2016445?child_oid=1011337 [https://perma.cc/3MC6-NJF7]; *Organization of the Vigilance Committee*, Daily Alta Cal., June 13, 1851 (vol. 2, no. 185).

the Committee's goals by locating stolen goods or criminals.[148] They conducted arrests as well as public lynchings and executions.[149] They had openly nativist goals and worked to inspect ships in the harbor, vetting immigrants arriving at port and denying landing rights to those they determined might further criminal activity.[150]

Just as the leadership of settler groups made their way into formal politics, members of the Vigilance Committees formed an independent People's Party. The People's Party ticket was endorsed by the Republican Party in the 1856 San Francisco municipal elections and ruled the city for over ten years.[151]

Both the rural and urban iterations of paramilitarism on the frontier established and enforced racialized hierarchies of settlement and of ownership—through violence and its threat against immigrants, Mexicans, and Native Americans, amongst others—that shaped the way property doctrines and practices evolved in the West. They provided a foundation for the arguments around private ownership of public lands that would emerge later, both from subsequent paramilitary organizations and from different political constituencies in the region. Subsequent arguments for more state and local control as well as privatization of public lands that defined the Sagebrush Rebellion of the 1970s-80s, for example, were grounded in this articulation of property rights on the frontier.[152] Similarly, the subsequent Wise Use movement's argument for the expansion of private control over property and land use decisions—as opposed to federal environmental regulation—found some of its roots in this history. The forms of acquisition of property that were facilitated and enforced by paramilitaries thus left a legacy not only within property doctrines around preemption and homesteading, but also within ongoing practices and legal politics around public lands and private ownership.

B. Protection: Defending (White) Property

Paramilitarism, in its embrace of the importance of taking up arms to defend foundational rights to property, has had a deep influence on rules and practices related to the protection and defense of property—often, in both

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[148] Andrew P. Morriss, *Hayek and Cowboys: Customary Law in the American West*, 1 N.Y.U. J. L. & Liberty 35, 56 (2005).

[149] Papin, *supra* note 143.

[150] *Id.*; Morriss, *supra* note 148, at 58-59.

[151] Mary Floyd Williams, History of the San Francisco Committee of Vigilance of 1851 (1921).

[152] Karen R. Merrill, Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them (2002); Ragsdale, *supra* note 107; Blumm & Jamin, *supra* note 99; Anita P. Miller, *The War for the West: At Issue*, 28 Urb. Law. 861 (1996); James Morton Turner, *"The Specter of Environmentalism": Wilderness, Environmental Politics, and the Evolution of the New Right*, 96 J. Am. Hist. 123 (2009); Skillen, *supra* note 49.

implicit and explicit ways, white property.[153] This section explores that influence. The first subsection examines the legacy of slave patrols for the defense of property, from the runaway slave as foundational to notions of looting to the evolution of slave patrols into the Ku Klux Klan and postbellum police departments. The second subsection focuses on the defense of property postbellum and the ways that the Klan and other paramilitary groups shaped land contracts and trespass and game laws during Reconstruction to maintain white property and inhibit Black landownership. The third subsection examines the role of paramilitary organizations like Improvement Leagues and White Leagues in facilitating rules and practices that enforced residential segregation as a mode of protecting white property. Where the law itself protected white property, paramilitaries often operated in tandem, enforcing legal rules and shaping their enactment and legacy. The fourth subsection argues that paramilitary approaches to self-deputization to defend the home, protect property against theft, and conduct citizen's arrests of people accused of theft were mainstreamed via Stand Your Ground laws and other contemporary forms of self-deputization. The final subsection examines paramilitary responses to floods and wildfires, as well as paramilitary arson and property destruction in the West, arguing that these modes of defense of property are often exacerbated in the context of environmental crises.

1. Slave Patrol Legacies

The first slave patrols were established in 1704 in South Carolina, followed by Virginia and North Carolina.[154] By the beginning of the nineteenth century, there was a slave patrol in every slave state.[155] Slave patrols were authorized by state militias and courts to deal with what they saw as the biggest law enforcement problem in the South: the attempted escape of enslaved people, who slaveholders considered to be their most valuable property.[156]

Slave patrols were authorized by the state and were not necessarily themselves paramilitary.[157] But slave patrols were the point of origin of

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[153] Although paramilitary approaches to racialized property defense have frequently centered around white property, there are historical and contemporary examples of paramilitarism as a mode of racialized defense of other types of property. Some of these examples are mentioned above, *supra* notes 20-21.

[154] Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 19, 24-40 (2003).

[155] Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community-An Analysis of Newsprint from January 1, 2015, through December 31, 2015*, 48 J. Black Stud. 551, 553 (2017).

[156] Larry H. Spruill, *Slave Patrols, "Packs of Negro Dogs," and Policing Black Communities*, 53 Phylon 43 (2016).

[157] Despite their official status, Philip Reichel argues that slave patrols were a "transitional police type," somewhere in between more informal policing and modern policing. Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 Am. J. Police 51 (1988).

postbellum paramilitary groups such as the Ku Klux Klan,[158] as well as of paramilitary conceptions and tactics of property defense. This makes them a critical starting point for understanding paramilitary protection and defense of property.

Members of slave patrols were white men of all classes (both slaveholders and non-slaveholders), selected from militia musters or tax rolls, to perform several essential duties to protect property: breaking up gatherings of enslaved people, searching slave quarters and confiscating arms and goods, entering plantations to monitor the activities of enslaved people, putting down uprisings, and patrolling roads for and apprehending fugitives.[159] They had the authority to exact violent punishment on enslaved people accused of breaking the law and could also arrest anyone who was found to be trading with enslaved people.[160]

These forms of deputization and authorization to use force would become central to the ways that the paramilitary successors of slave patrols operated. In her foundational history of slave patrols, Sally Hadden observes that white Southerners saw patrols "as their true instrument of 'law enforcement.'"[161] This was particularly true given the fact that official police forces didn't begin to formalize themselves in many localities until the middle of the 19th century.[162] After the Civil War, slave patrols were reconfigured into the Ku Klux Klan and other white vigilante groups.[163] "The Klan was an extension of slave patrols in the most direct, obvious ways . . . they've changed the names from patrols to Klan, they've put on sheets, but the activities and the purpose remain pretty much the same," Hadden notes.[164] The Klan adopted the practices of slave patrols, such as night riding and racial surveillance, and often justified their use of force against Black people based on allegations of theft and other property crimes.

Political scientist Brandon Terry argues that an early form of "looting" and its political dynamics emerged from slave patrols' pursuit of fugitives. Terry notes that "[o]ne of the earliest forms of American looting is runaway slaves . . . [y]ou are literally stealing your own person and transforming yourself from property into a fuller sense of personhood."[165] The racialization of the term had even earlier beginnings: "looting" was borrowed by the British from the Hindi "lut," which meant the spoils of war, and the British used it during colonial rule of India to justify violence against colonial

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[158] Hadden, *supra* note 154, at 207.

[159] *See id*., at 80; René Hayden, Root of Wrath: Political Culture and the Origins of the First Ku-Klux Klan in North Carolina, 1830 to 1875 (2003) (Ph.D. dissertation, University of California, San Diego) (ProQuest).

[160] Hadden, *supra* note 154, at 59, 79.

[161] *Id.*

[162] Jonathan Obert, The Six-Shooter State 101, 136 (2018).

[163] Hadden, *supra* note 154, at 203-20.

[164] *Slave Catchers, Slave Resisters* (History Channel May 25, 2005).

[165] *See* Ria Modak, *A People's History of Looting*, Harv. Pol. Rev. (Aug. 11, 2020), https://harvardpolitics.com/a-peoples-history-of-looting/ [https://perma.cc/J9Y9-WNQY].

subjects accused of thievery.[166] The term became more commonly used in the United States after Reconstruction, but the modes of racialization and authorization of violence that characterize the way the term "looting" is often used had antebellum roots.[167]

Slave patrols' very reason for existing followed the basic structure of looting: the patrol would decry the purported prevalence of crimes against property (here, the fugitive enslaved person stealing themselves, or other property),[168] then use these alleged crimes against property to justify the use of violence against the purported criminal (here, again, the enslaved person).[169] This structure would then find itself repeated by the paramilitary successors to patrols, from the paramilitary lynching of purported cattle thieves on the frontier to militias defending property after the looting of stores in the wake of natural disaster.[170] This structure was racialized from its British colonial beginnings to its present-day use in the United States.

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[166] A British colonial administrator reportedly replied to an insurgent's proposed surrender suggesting that he lay down his arms and take some land on offer, "but if I hear any more of looting and murder, I'll hang every one of them." The term "looting" has also been used to describe the plunder of historical and cultural artifacts by colonial powers. Amanda Armstrong, *Looting: A Colonial Genealogy of the Contemporary Idea*, 27 Postmodern Culture (2016)*; see also* Ben Zimmer, *'Looting': A Term With Roots in Protest and Conflict*, Wall St. J. (June 4, 2020), https://www.wsj.com/articles/looting-a-term-with-roots-in-protest-and-conflict-11591310530.

[167] *See* Vicky Osterweil, In Defense of Looting: A Riotous History of Uncivil Action (2020).

[168] Fugitives were accused not only of stealing themselves, but also other property held by white Southerners, particularly livestock, game, and crops. Antwain K. Hunter, *"A Nuisance Requiring Correction": Firearm Laws, Black Mobility, and White Property in Antebellum Eastern North Carolina*, 93 N.C. Hist. Rev. 386 (2016).

[169] While the "self-emancipation" and "looting" contexts differ in the ways in which the idea of the criminal and property overlap, they each have a similar racialized structure that paramilitaries have used to justify private violence.

[170] Anna Purna Kambhampaty, *How American Power Dynamics Have Shaped Perceptions of Looting, from the Boston Tea Party to Today*, Time (June 11, 2020, 2:42 PM), https://time.com/5851111/protests-looting/ [https://perma.cc/FTK6-SPHC]. This structure has also been apparent in contemporary paramilitary groups' descriptions of Black Lives Matter protesters as looters in attempts to justify use of force against them as domestic enemies. *See, e.g.*, Freddy Cruz, *The Year in Antigovernment Extremism Part 2*, S. Poverty L. Ctr., (Feb. 8, 2021), https://www.splcenter.org/news/2021/02/08/year-antigovernment-extremism-part-2 [https://perma.cc/2R9P-7VHD] (describing a Facebook statement by a member of the Oath Keepers noting that "[o]nce these thugs turned to burning, killing and looting, they became domestic enemies."). The notion that "[w]hen the looting starts, the shooting starts" draws from a statement by Miami Police Chief Walter Headley, who used this phrase in 1967 to describe the police department's approach to policing in Black neighborhoods. Eric Tscheschlok, *Long Time Coming: Miami's Liberty City Riot of 1968,* 74 Fla. Hist. Q. 440 (1996). The racialization of the notion of looting was particularly clear in the aftermath of Hurricane Katrina, when news outlets covering the hurricane were criticized for captioning a photograph of a young Black man carrying a bag and a case of soda as an example of "looting" and a second photograph of a white couple with bags of food as an example of "finding" necessities after the storm. Colleen Shalby, *What's the Difference Between 'Looting' and 'Finding'? 12 Years After Katrina, Harvey Sparks a New Debate*, L.A. Times (Aug. 29, 2017, 4:05 PM), https://www.latimes.com/nation/la-na-harvey-20170829-story.html [https://perma.cc/6MY9-6GZW]; Sarah Kaufman, *The Criminalization of New Orleanians in Katrina's Wake*, Soc. Sci. Rsch. Council (June 11, 2006), https://items.ssrc.org/understanding-katrina/the-criminalization-of-new-orleanians-in-katrinas-wake/ [https://perma.cc/XE7H-SAQQ].

Above all, slave patrols reinforced the argument that unsupervised Black people were a threat to white property and that the proper response to this was violence. This had a number of immediate legal implications. First, this idea became established in the rules put in place to prevent and punish theft. These included fugitive slave laws[171] and policies authorizing white citizens to "kill and destroy" fugitive slaves allegedly damaging property.[172] They also included firearms laws prohibiting enslaved people, and later free people of color, from using guns without supervision by white people, with the goal of protecting white property.[173]

The notion that Black people were a threat to white property also left a longer legacy. Both paramilitary groups like the KKK and police departments evolved out of slave patrols and considered themselves to be legitimate defenders of property against this perceived threat.[174] This notion thus lived on via both paramilitarism and racialized policing. It also seeped into the cultural mainstream via the concept of looting, which continues to serve to justify racialized violence in the name of property. The role of paramilitaries in reinforcing this idea took shape as groups like the KKK took up the mantle of slave patrols following the Civil War.

2. Property Defense Postbellum

Numerous paramilitary groups were established during the postbellum era, including the Klan, the Knights of the White Camelia, the White League, the Red Shirts, and rifle clubs.[175] These groups differed in terms of their membership, their regions of operation, and other characteristics. But all, to some degree, raised armed opposition to Reconstruction policy,

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[171] Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302, amended by Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[172] North Carolina Justices of the Peace, both slaveholders, reminded white citizens in an announcement in the North Carolina Sentinel that they could "kill and destroy" a fugitive enslaved person who had been killing hogs "by such means as he, she or they, may think fit, without accusation or impeachment of any crime or offence." Hunter, *supra* note 168, at 403 (internal citation omitted).

[173] North Carolina, for example, required white oversight of firearm use by enslaved people, and later free people of color. Colonial rules in North Carolina authorized any white citizen to capture and apprehend an enslaved person in possession of a firearm. In South Carolina, those apprehending an armed enslaved person could take the weapon for their own use. A 1753 South Carolina law further evidenced the preoccupation with the protection of white property: it required slaveholders to post bond to secure a gun permit for an enslaved person; these bonds were used to compensate any white landowner whose property was injured by the enslaved person with the firearm. Hunter, *supra* note 168.

[174] Marlese Durr, *What is the Difference Between Slave Patrols and Modern Day Policing? Institutional Violence in a Community of Color*, 41 Critical Socio. 873, 875 (2015). Marlese Durr writes that slave patrols were the "first publicly funded police departments in the American South." *Id.* at 875.

[175] James G. Dauphine, *The Knights of the White Camelia and the Election of 1868: Louisiana's White Terrorists; A Benighting Legacy*, 30 La. Hist. 173 (1989); Chalmers, *supra* note 109.

including attempts to reconfigure land ownership in the South.[176] As white Southerners calling for "redemption" moved to win state races in the South to maintain white supremacy and roll back the rights of Black people, paramilitaries backed Redeemers, who claimed to be "champions of the property owner against the propertyless."[177]

There is a longstanding debate between historians of this era about the role that violence played in shaping the outcomes of Reconstruction.[178] Were paramilitaries simply the militant armed wing of that era's Democratic party, there to enforce opposition to Reconstruction? Or did they operate more as independent vigilantes with a more indirect influence on Reconstruction? Regardless of one's position in this debate, paramilitary influence on Reconstruction is clear. Paramilitary activities—lynchings, nightriding, surveillance, theft of land and belongings from Black families—were intertwined with modes of inhibiting Black ownership and protecting white property through the law and more broadly of inhibiting the upward mobility of Black Americans.[179] They also demanded attention to the paramilitary proposition that violence was an appropriate mode of defending white

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[176] In addition to the forms of property defense discussed below, the founding documents and oaths of these groups also make clear the centrality of their commitments to the defense of white property. The oath of the Knights of the White Camelia, for example, bound members to "under all circumstances, defend and protect persons of the white race in their lives, rights and property, against all encroachments or invasions from any inferior race, and especially the African." Knights of the White Camelia, The Constitution and the Ritual of the Knights of the White Camelia 23-24 (1904).

[177] C. Vann Woodward, Origins of the New South, 1877-1913: A History of the South 59 (1951).

[178] *See, e.g.*, James M. McPherson, *Redemption or Counterrevolution? The South in the 1870s*, 13 Reviews in Am. Hist. 545, 545 (1985) (reviewing George C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction and Michael Perman, The Road to Redemption: Southern Politics, 1869-1879). *See also* Melinda Meek Hennessey, *Racial Violence during Reconstruction: The 1876 Riots in Charleston and Cainhoy*, 86 S.C. Hist. Mag. 100 (1985).

[179] Prior to the Civil War, both enslaved and free Black people were often either prohibited from purchasing land by statute or their acquisitions of land were subject to strict conditions. Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. Black Stud. 646, 647-49 (2013). This did not inhibit enslaved people from having a significant informal economy in property ownership. Dylan C. Penningroth, The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South 46 (2003). But the obstacles to formal land ownership were widespread. The obstruction of Black land ownership and outright theft of land during Reconstruction were part of a systematic effort to inhibit Black property ownership. The effects of this effort reverberate today in rates of Black land loss, challenges to Black homeownership, and the racial wealth gap. *See, e.g.*, Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505 (2001); Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership (2019); Dorothy A. Brown, The Whiteness of Wealth: How the Tax System Impoverishes Black Americans — And How We Can Fix It (2021).

property, particularly given the frequent acquiescence to these activities by local law enforcement.[180]

Paramilitaries enacted the defense of white property in a number of different modes in this era.[181] They first and foremost attempted to obstruct formerly enslaved people from taking possession of, buying, or even renting land after abolition.[182] In some areas, paramilitary groups arrived at the homes of Black landowners by night, assaulting or threatening them to force them off their land. In Allen Trelease's seminal account of the Klan during Reconstruction, he notes that "some [Black] men were Ku Kluxed to drive them off one man's land and onto the land of someone else; or they were Ku Kluxed for leaving when the landlord wanted them to stay. Some of the first outrages in Noxubee County, in November 1870, were committed against Negro renters of land, presumably on the theory that they should remain wage laborers or sharecroppers."[183]

Historian J.C.A. Stagg argues that it was not only control over the Black vote and Black labor, but also control over land, that was central to the Klan's emergence.[184] Klan violence served as an attempt to intimidate Black renters and sharecroppers, leaving white landowners in control of land; this was directly related to controlling the availability of labor to work on plantations.[185] Stagg notes that during a heavy period of Klan violence in 1870-71,

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[180] Kathleen Blee and Mehr Latif demonstrate this acquiescence to Klan violence by law enforcement and the judiciary in the South, arguing that "the Klan's vigilante violence simply supplemented the racial violence that had long been a practice of southern slave states." Kathleen Blee & Mehr Latif, *Ku Klux Klan: Vigilantism Against Blacks, Immigrants and Other Minorities*, *in* Vigilantism against Migrants and Minorities 39 (Tore Bjørgo & Miroslav Mareš, eds., 2019).

[181] There is significant debate amongst historians about which of these modes predominated or was the primary motivation for paramilitary activity in the postbellum era. *See, e.g.*, J.C.A. Stagg, *The Problem of Klan Violence: The South Carolina Up-Country, 1868-1871*, 8 J. Am. Stud. 303 (1974); Michael W. Fitzgerald, *The Ku Klux Klan: Property Crime and the Plantation System in Reconstruction Alabama*, 71 Agric. Hist. 186 (1997). I do not make an argument here regarding primary motivations, but rather present these modes as different examples of the role of paramilitarism in defending and shaping modes of protecting white property during Reconstruction.

[182] Land had been the most important demand by formerly enslaved people after abolition. William T. Sherman's Special Field Order No. 15 ordered the distribution of 400,000 acres of Florida, Georgia, and South Carolina coastal property to those who had been enslaved. William T. Sherman Special Field Order No. 15 (1865). President Andrew Johnson rescinded this order less than a year later, ordering the return of the majority of this land to its former owners from formerly enslaved people who had begun to settle it. Copeland, *supra* note 179, at 653.

[183] Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 275 (1971).

[184] He argues that theories that the Klan was created simply for political purposes to inhibit the Black Republican vote do not fully account for the distribution of Klan activities. Stagg, *supra* note 181, at 308-09.

[185] *Id.* at 308-16. Historians of Reconstruction also debate the relative roles of control of land versus control of labor for white planters. *See, e.g.*, Woodward, *supra* note 177; Jonathan M. Wiener, Social Origins of the New South: Alabama, 1860-1885 (1978). In his iconic account of Reconstruction, W.E.B. Du Bois argued that race became crucial "in order that property-holders could get the support of the majority of white laborers and make it more possible to exploit Negro labor." W.E.B. Du Bois, Black Reconstruction in America 1860-1880 680

the majority of Black victims testifying to a state committee regarding Klan violence was renters of land; Klan violence against renters occurred in particular at the time when rental contracts were being made for the new year.[186]

Another historical account of the genesis and composition of the Klan during this period emphasizes the relationship of range enclosure to white farmers' fear of theft by Black people. Reconstruction had sparked the closure of the open range, which had previously been unenclosed and open for hunting, fishing, and grazing.[187] This was paired with statutes criminalizing trespass and game laws prohibiting hunting on unenclosed lands with no posted trespass signs.[188] Those counties that established laws closing the range tended to have a larger Black population than open range counties.[189] White plantation owners pushed for this closure, arguing that if those who had been formerly enslaved could hunt and fish freely, they would be less willing to work on plantations and would have greater power when negotiating pay and other terms with plantation owners.[190]

With the closure of the range and the acquisition of arms by formerly enslaved people, historian Michael W. Fitzgerald argues that "[s]mall-scale property crime became a pressing concern, dovetailing with fears about the breakdown of social control."[191] He notes the predominance of small-scale white farmers in the Klan, arguing that these farmers were touched less by labor problems than by theft of livestock and other property and welcomed paramilitaries as a form of patrol and defense against property crimes.[192] He finds that "[w]hen planters defended or excused the Klan in public, they talked about theft. Nightriders operated at the intersection of shared white property interests."[193] This illustrates the widespread sentiment amongst the white community that paramilitary violence against Black people was an appropriate response to the specter of theft of white property.

Paramilitary groups also used violence to reinforce the defense of the position of white people in the social hierarchy, or in Cheryl Harris' apt

(1935). What gave rise to the Klan for Du Bois was "the determination to deprive the Negroes, by force, of any real weapon for economic bargaining." *Id.* For more on the role of the Klan in Black labor repression and discipline in this era, see Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (1988).

[186] Stagg, *supra* note 181, at 314.

[187] *See generally* King J. Crawford, *The Closing of the Southern Range: An Exploratory Study*, 48 J. S. Hist. 53 (1982); Shawn Everett Kantor, *The Economic and Political Determinants of Fence Reform in Postbellum Georgia*, 150 J. Inst. & Theoretical Econ. 486 (1994); Shawn Everett Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. S. Hist. 201 (1993); Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 L. & Hist. Rev. 351 (2015).

[188] Sawers, *supra* note 187, at 361-67.

[189] Sawers, *supra* note 187, at 363-67; Crawford, *supra* note 187, at 64-65.

[190] Sawers, *supra* note 187, at 357.

[191] Fitzgerald, *supra* note 181, at 190.

[192] *Id.* at 193.

[193] *Id*.

terms, whiteness "as a type of status property."[194] This reflected in part the interests of small farmers and poor white Southerners who supported legal segregation after the conclusion of the Civil War in order to maintain white superiority and reinforce social hierarchies based on race.[195]

3. Racial Exclusion in Jim Crow America

As the United States moved into the Jim Crow era, the defense of white property was increasingly carried out via racial segregation in both the North and the South. After emancipation, there was ample support for legal segregation.[196] Segregation came to be enforced through legal means such as racially restrictive covenants and redlining, which supported the underlying notion that protection of white property values depended on the exclusion of nonwhite families from neighborhoods, and from ownership more broadly.[197]

Paramilitary violence facilitated and also served as a form of enforcement of these legal means of racial segregation and defense of white property.[198] Tactics including arson, cross burning, and assaults were adopted not only by the Klan, but also by white residents' organizations intent on enforcing residential and other forms of racial segregation.[199] These violent interventions worked in tandem with and reinforced more mainstream efforts to enforce segregation via legal means.[200]

Groups of white residents in different cities organized themselves into White Leagues and neighborhood improvement leagues to push for

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[194] Harris, *supra* note 12, at 1714.

[195] For an account of this pattern in Texas, see Bruce A. Glasrud, *Jim Crow's Emergence in Texas*, 15 Am. Stud. 47, 51 (1974).

[196] *See generally id.*; Elizabeth A. Herbin-Triant, Threatening Property: Race, Class, and Campaigns to Legislate Jim Crow Neighborhoods (2019).

[197] There is a growing literature on these patterns, and on the decades of segregation and maintenance of racial inequality that they reinforced. *See, e.g.*, Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Taylor, *supra* note 179; Berger, *supra* note 12.

[198] Jeannine Bell's *Hate Thy Neighbor* examines "move-in violence" by white residents against nonwhite families integrating neighborhoods. The violence discussed in this book includes tactics ranging from armed paramilitary violence to tactics that might not be classified as paramilitary but operate in a violent manner to oppose integration, including things such as persistent harassment and other hate crimes. Bell argues that these forms of move-in violence have reinforced and maintained residential racial segregation. Jeannine Bell, Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing (2013). Keeanga-Yamahtta Taylor argues that "[t]he means by which residential segregation was maintained had nothing to do with 'choice' and everything to do with violence and hatred prompted by the racist view that Blacks kept property values down and were physical markers of inferior status." Taylor, *supra* note 179, at 79. Richard Rothstein similarly emphasizes the importance of these forms of violence for maintaining segregation, arguing that given the frequent complicity of the police, this violence was in fact state-sponsored. Rothstein, *supra* note 197, at 139-51.

[199] *See generally* Rothstein, *supra* note 197.

[200] *See generally id.*

segregation not only in neighborhoods, but also in churches, schools, public parks, and recreational spaces.[201] Some leagues called for local ordinances that would mandate racial segregation, such as the Deere Park Improvement League in Dallas, which advocated for and won a municipal racial zoning ordinance.[202] In some cities, these leagues exercised paramilitary violence to enforce segregation.[203] In New Orleans, the White League even battled the city police towards the end of Reconstruction, briefly taking control of the city in an effort "to reestablish a white man's government."[204]

Towards the beginning of the twentieth century, as these leagues and other neighborhood associations sought additional means of enforcing segregation via legal means, cities began to enact zoning ordinances enforcing racial segregation of neighborhoods.[205] When the Supreme Court struck down Louisville's racial zoning ordinance in 1917,[206] segregation was increasingly enforced via racially restrictive covenants on deeds. While the Supreme Court ruled in *Shelley v. Kraemer* in 1948 that the public enforcement of these covenants was unconstitutional,[207] these modes of enforcing racial segregation via property law facilitated the segregation of America's cities and the racial wealth gap in ways that continue to reverberate today.[208]

This story of the creation and maintenance of racial segregation via property law is in this sense simultaneously a story of paramilitary violence. The Klan and other paramilitary organizations carried out firebombings, cross burning, assaults, and murders against Black families living in or attempting to purchase homes in white neighborhoods, explicitly aiming to enforce racial segregation with violence.[209] These tactics were also adopted by groups of residents organized into homeowners associations and improvement leagues that were not necessarily affiliated with white supremacist groups, but mobilized some of the same strategies to maintain segregated neighborhoods.[210] Some of these acts were tolerated or even supported by the police.[211] In these ways, paramilitary activity expanded and

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[201] *See generally* L.E. Neal, Guarding Space and Place: Elit and Klan Counterbalance Communities in Jazz Age Dallas (2015) (Master's thesis, Texas State University); Gilles Vandal, *Albert H. Leonard's Road from the White League to the Republican Party: A Political Enigma*, 36 La. Hist.: J. La. Hist. Ass'n. 55 (1995); Glasrud, *supra* note 195.

[202] *See* Neal, *supra* note 201, at 57.

[203] Multiple sources refer to the White League explicitly as "paramilitary." *See, e.g.*, Vandal, *supra* note 201, at 60; Kevin McQueeney, *More than Recreation: Black Parks and Playgrounds in Jim Crow New Orleans*, 60 La. Hist.: J. La. Hist. Ass'n, 437, 444 (2019).

[204] The Inter Ocean, Chicago, Illinois, July 18, 1874, at 4.

[205] *See generally* Rothstein, *supra* note 197.

[206] Buchanan v. Warley, 245 U.S. 60 (1917).

[207] 334 U.S. 1 (1948).

[208] *See generally* Taylor, *supra* note 179; Brown, *supra* note 179; Rothstein, *supra* note 197.

[209] Blee & Latif, *supra* note 180; Rothstein, *supra* note 197; Bell, *supra* note 198.

[210] Bell, *supra* note 198.

[211] Rothstein, *supra* note 197.

mainstreamed the use of violence to enforce the color line, particularly residential segregation, as a form of protection of white property.[212]

Paramilitaries enforced segregation not only at the neighborhood level, but also across entire "sundown towns." In these towns, violence and its threat—frequently publicized with signs at town or county lines warning Black people not to be found in town at night—kept nonwhite workers and visitors out after dark. Some even passed ordinances prohibiting nonwhite renters or owners of property in the town.[213] The threat of violence frequently maintained sundown towns' all-white status for decades, posing obstacles for nonwhite people to work, live in, or even visit these towns.[214]

In some cases, Black owners in sundown towns were dispossessed of their property by paramilitary groups and violent mobs. Perhaps the most well-known example of this is Forsyth County, Georgia.[215] Over two months in the fall of 1912 in Forsyth County, paramilitaries burned Black homes, churches, and personal possessions, took a Black man from the county jail to lynch him, and forced out over one thousand Black residents (nearly the entire Black population of the county).[216] Some Black owners from Forsyth County sold their properties for far below market value, while the land of others was taken by white neighbors who claimed it over the ensuing years via adverse possession.[217] In this way, Forsyth County, like many other towns and counties across the country, became intentionally white.

Through intimidation, dispossession, and violent attacks, paramilitarism and the threat of paramilitary violence influenced who could rent and live in specific neighborhoods and also entire towns. In this way, paramilitarism shaped property rules and practices, facilitating racial segregation in

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[212] Kathleen Blee discusses the intimate relationship between the "third Klan" of the mid-twentieth century and mainstream white society, arguing that at times they worked in parallel or complementary ways, with the Klan supporting segregationist aims of mainstream society and pro-segregation society in turn supporting Klan activity. Blee & Latif, *supra* note 180.

[213] James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism (2006).

[214] *See generally id*. James W. Loewen's account of the history of sundown towns illustrates how widespread these were, with thousands of sundown towns documented across the United States. *Id.* at 45-133. In Illinois alone, Loewen documented over 450 sundown towns, a number of which continued into the contemporary era. *Id.* at 61.

[215] *Id.* at 175-76. Like Forsyth County, many sundown towns drove out their Black residents, subsequently posting signs prohibiting the presence of nonwhite people after dark. *See generally id.*

[216] Patrick Phillips, Blood at the Root: A Racial Cleansing in America, 63-64 (2016).

[217] *Id.* at 117-19. A plaque in the town of Cumming in Forsyth County, as reported by The New York Times, states "[t]he loss of Black-owned property in order to flee arbitrary mob violence was common during this era, and Forsyth's Black residents left behind their homes and farms to escape, taking with them only what they could carry." Jonathan Weisman, *Racists Once Terrorized This Georgia County. Diversity Made it Prosper*, N.Y. Times (May 19, 2022), https://www.nytimes.com/2022/05/19/us/politics/replacement-theory-georgia.html.

neighborhoods and towns across the country in the name of protecting white property and property values.

4. Self-Deputization as Self-Defense

In the wake of the Civil Rights Movement in the latter half of the 20th century, some of the forms of self-deputization to defend property with violence that had been fostered by paramilitaries expanded into more mainstream spaces, such as neighborhood watches, citizens' arrests by property owners on the border, and Stand Your Ground laws. In these spaces, property owners self-deputized both individually and collectively in ways that had echoes of earlier forms of paramilitary action, particularly in their use of military-style arms and, frequently, their defense of white property. Some groups like neighborhood watches were organized officially and state-sponsored,[218] while others like informal border watchers may have received tacit approval from state officials, but were not officially linked to the state.[219]

Many groups explicitly justified their armed self-deputization with notions of self-defense rooted in the defense of property and the home. This aligned with an expansion of gun rights advocacy that accepted few limits on the right to bear arms and grounded its arguments in self-defense.[220] While the notion of self-defense was not spatially limited, the right was understood to be at its strongest on one's own property, particularly inside the home.[221]

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[218] Neighborhood Watch is a National Sheriffs' Association program established in 1972 to be "the eyes and ears of law enforcement." *See* National Neighborhood Watch: A Division of the Nat'l. Sheriffs' Ass'n., https://www.nnw.org/ [https://perma.cc/H6ZP-MYQ6]. Jacob Charles and Darrell Miller examine this type of explicit delegation of violence to the private sphere as a mode of "new outlawry" that spans different kinds of rules, from the law of self-defense to rules on citizens' arrests. Charles & Miller, *supra* note 9.

[219] Armed civilian border patrols, while not sponsored by the state, have in some instances claimed to work to capture migrants and detain them until the Border Patrol arrives to take them into custody, or transport them to Border Patrol custody. *See, e.g.*, Tobias & Foxman, *supra* note 5; Bauer, *supra* note 80.

[220] *See generally* Caroline E. Light, Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense (2017); Matthew J. Lacombe, Firepower: How the NRA Turned Gun Owners into a Political Force (2021); Patrick J. Charles, Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry (2018); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191 (2008).

[221] The majority in *District of Columbia v. Heller* illustrates this general approach, stating that self-defense is the "core" interest protected by the Second Amendment, and that core interest of "defense of self, family, and property is most acute" in the home. District of Columbia v. Heller, 554 U.S. 570, 628, 630 (2008). For an analysis of the centrality of the home for the Second Amendment, see Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 Duke J. Gender L. & Pol'y 45 (2020); Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, *The Geography of a Constitutional Right: Gun Rights Outside the Home*, 83 L. & Contemp. Probs. i (2020). Despite the central role of the home in the Second Amendment, paramilitary groups have also attempted to claim public space and political power via the assertion of Second Amendment rights through actions like open carry protests. *See generally* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 Nw. U. L. Rev. 139 (2021).

The development of Stand Your Ground laws removing the duty to retreat before using force in self-defense offers a key example of these arguments around self-defense and property.[222] While Stand Your Ground laws have existed since the first one was passed in Florida in 2005,[223] they became a matter of significant public debate with the killing of Trayvon Martin in 2012. Trayvon Martin, an unarmed Black teenager, was walking to his relatives' home in Retreat at Twin Lakes, a gated community in Sanford, Florida, when he was shot and killed by George Zimmerman.[224] At the time, Zimmerman was on patrol for the community's Neighborhood Watch.[225] The watch had been created by the Retreat at Twin Lakes homeowners' association, spearheaded by Zimmerman in the wake of an increase in burglaries in the neighborhood.[226] After the shooting, the Sanford police took Zimmerman to the police station but argued they could not arrest him given his assertion that he had shot Trayvon Martin in self-defense.[227]

While Florida's Stand Your Ground law—like many others—specifically permits the use of force for the defense of property and the home, there is no spatial limit to asserting the right to self-defense.[228] Historically, the "castle doctrine" in English common law made the home an exception to the general duty to retreat before using force, under the theory that a man's home is his castle where he should not be required to retreat.[229] The castle doctrine was expanded in the United States after the Civil War to include any place where a man was legally present; the NRA then advocated for an extension of this exception to vehicles during the 2000s.[230] Florida's 2005 Stand Your Ground law—along with others passed subsequently—goes beyond

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[222] In addition to Stand Your Ground laws, criminal codes and other laws also protect the right to use force—even deadly force—to defend property as a mode of self-defense. The Texas Penal Code, for example, permits the use of force if there is a reasonable belief that force is immediately necessary "to prevent or terminate the other's trespass on the land or unlawful interference with the property" and use deadly force to protect one's property when immediately necessary to prevent imminent acts, such as robbery or theft at night. Tex. Pen. Code Ann. §§ 9.41(a), 9.42 (West 2023).

[223] All Things Considered, *Examining the Foundation of 'Stand Your Ground' Laws*, NPR (July 20, 2013, 3:00 PM) https://www.npr.org/templates/story/story.php?storyId=204013757 [https://perma.cc/KL6T-6RZN].

[224] Dan Barry, Serge F. Kovaleski, Campbell Robertson & Lizette Alvarez, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. Times (Apr. 1, 2012), https://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *See* Fla. Stat. Ann. Ch. 776 (West 2024).

[229] Caroline Light notes that it was white, property-owning men who enjoyed the benefits of this exception, while women, colonized people, and enslaved people did not. *See* Light, *supra* note 220 at 29-48. For more on the differential application of gun rights based on race, see generally Carol Anderson, The Second: Race and Guns in a Fatally Unequal America (2021).

[230] Noel Otu, *Stand Your Ground Law in the United States*, 7 Salus J. 2, 3 (2019).

application of the exception to spaces where those claiming self-defense have a legitimate property interest and extends it to public spaces, where it permits the use of deadly force with no duty to retreat.[231] Stand Your Ground laws applying the exception to all public places are now on the books in at least thirty states.[232] Patricia Williams writes that Stand Your Ground has extended the use of deadly force far beyond its original purview, noting that now "the 'ground' in 'Stand Your Ground' means any place a white person is nervous."[233]

The expansion of Stand Your Ground laws has come along with a host of other examples of citizen self-deputization via notions of self-defense linked to property, including property owners on the border protecting ranches and Kyle Rittenhouse protecting businesses.[234] Together, these illustrate the ways that a core concept in the paramilitary canon—that lethal violence is justified in defense of property, particularly white property—has increasingly moved into the mainstream. This mainstreaming is particularly clear in the context of environmental crisis.

5. Environmental Crisis

The use of violence by paramilitaries to defend property has been exacerbated in the context of increasing environmental crisis. Droughts, floods,

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[231] *See id.*

[232] Eight other states have eliminated the duty to retreat in public via judicial decisions and/or jury instructions. *Stand Your Ground,* Giffords Law Center, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/ [https://perma.cc/H2DP-29L2]. After the Florida Stand Your Ground law was passed, the American Legislative Exchange Council ("ALEC") worked with the NRA to develop model legislation based on the Florida law that was introduced in other states. *See* John Nichols, *How ALEC Took Florida's 'License to Kill' Law National*, The Nation (Mar. 22, 2012), https://www.thenation.com/article/archive/how-alec-took-floridas-license-kill-law-national/ [https://perma.cc/9SWV-LW3K]. Some have critiqued the bills introduced in other states as even "more extreme" than the original Florida law, citing bills permitting the use of force if someone is defacing property and has a "dangerous instrument" and others permitting defendants to sue prosecutors if the defendant is able to prove they acted in self-defense. Hannah Knowles & Emmanuel Felton, *'Stand Your Ground' Laws Spread — and Grow 'More Extreme' — 10 Years After Trayvon Martin's Death*, Wash. Post (Feb. 25, 2022), https://www.washingtonpost.com/nation/2022/02/25/stand-your-ground-trayvon-martin/.

[233] Patricia J. Williams, *The 'Ground' in 'Stand Your Ground' Means Any Place a White Person is Nervous*, The Nation (Aug. 15, 2016), https://www.thenation.com/article/archive/the-ground-in-stand-your-ground-means-any-place-a-white-person-is-nervous/ [https://perma.cc/C225-A2XP].

[234] The deputization of citizens is also expanding in other contexts not directly linked to property, such as Texas law S.B. 8 deputizing individuals to enforce abortion restrictions, as well as other types of private enforcement. Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 Va. L. Rev. 1483, 1486 (2022). Some have compared this strategy to Jim Crow era empowerment of political parties to determine voter qualifications, which deputized private actors to discriminate against Black voters. Orville Vernon Burton & Armand Derfner, *Texas's New Attempt to Circumvent the Constitution Resurrects an Old Tactic*, Wash. Post (Jan. 11, 2022), https://www.washingtonpost.com/outlook/2022/01/11/texas-new-attempt-circumvent-constitution-resurrects-an-old-tactic/.

wildfires, and other environmental disasters, made both more frequent and more intense by climate change, have provided opportunities for paramilitary groups to position themselves as defenders of property—and more broadly, of law and order—in the context of emergency. Paramilitaries have framed legal regimes designed to mitigate or combat environmental crisis, such as regulations protecting endangered species and rules distributing water access, as an effort to control people and resources in violation of individual property rights. These moves have served as a powerful mode of mainstreaming paramilitary notions of property and the idea that private violence is not only appropriate but also necessary to protect and defend property.[235]

The role that paramilitaries have taken in these increasingly frequent crises has led some to call the trend an "era of disaster militiaism."[236] Accounts of disaster militiaism describe how paramilitary groups have created emergency response teams, community preparedness teams, and neighborhood watch groups in areas affected by wildfire risks in an effort to mainstream themselves and build a support base.[237] The perceived legitimacy of this approach, and its appeal to the broader public, relies on what Lisa Grow Sun has called "disaster mythology": the notion that natural disasters inevitably bring out human behaviors such as violence and looting.[238] Grow Sun observes that the consequence of this mythology is the militarization of law enforcement in disaster against the imagined threat of looting, rather than its mobilization toward humanitarian ends.[239] But this emphasis on law enforcement in disaster has extended not only to the police and military, but also to the paramilitary groups that increasingly operate both in tandem with those forces and in their absence in environmental disaster.

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[235] Environmental crisis has also facilitated a different form of paramilitarism devoted to property destruction. Groups such as the Earth Liberation Front and the Animal Liberation Front have carried out violent acts and targeted destruction of property to sabotage industries they identify as contributors to environmental damage and climate change. *See, e.g.*, Jennifer Carson, Laura Dugan & Gary LaFree, *Terrorist and Non-Terrorist Criminal Attacks by Radical Environmental and Animal Rights Groups in the United States,* 24 Terrorism & Pol. Violence 1970, 298 (2012); Michael Loadenthal, *Eco-Terrorism? Countering Dominant Narratives of Securitisation: A Critical, Quantitative History of the Earth Liberation Front*, 8 Perspectives on Terrorism 1996, 16 (2014); Jean-Marc Flükiger, *The Radical Animal Liberation Movement: Some Reflections on Its Future*, 2 J. Stud. Radicalism, 111, 111-32 (2009); Gary A. Ackerman, *Beyond Arson? A Threat Assessment of the Earth Liberation Front*, 15 Terrorism & Pol. Violence, 143, 143-70 (2003); Matthew Wolfe, *The Rise and Fall of America's Environmentalist Underground*, N.Y. Times (July 13, 2022), https://www.nytimes.com/2022/05/26/magazine/earth-liberation-front-joseph-mahmoud-dibee.html; Stefan H. Leader & Peter Probst, *The Earth Liberation Front and Environmental Terrorism*, 15 Terrorism & Pol. Violence, 37, 3758 (2003).

[236] Melissa Gira Grant, *Era of Disaster Militiaism in America*, The New Republic (Sept. 15, 2020), https://newrepublic.com/article/159362/oregon-fires-militias-disaster-capitalism [https://perma.cc/U6KV-45F5].

[237] *Id.*

[238] Lisa Grow Sun, *Disaster Mythology and the Law*, 96 Cornell L. Rev. 1131, 1131 (2011).

[239] *Id.*

Perhaps the most cited example of disaster mythology in action is the aftermath of Hurricane Katrina. Grow Sun begins her account of disaster mythology by describing the narratives of Katrina that dominated mainstream media after the storm, depicting New Orleans as a lawless city rife with murder, rape, looting, and violent crime.[240] Black residents of the city were more likely to be characterized in these reports as "looting" and to be associated with violence and crime.[241] The media and the public celebrated the arrival of the National Guard to what was widely perceived to be something akin to a war zone.[242] Although many outlets later retracted false or overstated reporting on violence, Grow Sun argues that they were initially quick to believe and report on accounts of violence and looting because of the perception that these behaviors are natural human responses to disaster.[243]

The media was largely silent, however, on the organization of some white residents of New Orleans into militias who used the idea that Black residents were looting in the wake of the storm to justify racialized violence.[244] The few media reports on this phenomenon at the time largely described it in a positive light, with one calling a white militia in the neighborhood of Algiers Point "the ultimate neighborhood watch."[245] Algiers Point became a node for militia organizing after the storm, with a group of fifteen to thirty white residents (mostly men) forming to target thieves and outlaws.[246] Reporting in The Nation features interviews with some members of this group, who "paint themselves as righteous defenders of property, a paramilitary formation protecting their neighborhood from opportunistic thieves."[247] The ferry landing in Algiers Point had been designated an evacuation zone, and armed men in the neighborhood patrolled the area and chased down Black city residents attempting to evacuate.[248] Several Black men were shot by armed men yelling racial profanities, and residents of the neighborhood described coming across their bodies on the street.[249]

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[240] *Id.* at 1132-33.

[241] Samuel R. Sommers, Evan P. Apfelbaum, Kristin N. Dukes, Negin Toosi & Elsie J. Wang, *Race and Media Coverage of Hurricane Katrina: Analysis, Implications, and Future Research Questions*, 6 Analyses Soc. Issues & Pub. Pol'y, 39, 39-55 (2006).

[242] Grow Sun, *supra* note 238, at 1133.

[243] *Id*. at 1134

[244] *See* A.C. Thompson, *Katrina's Hidden Race War*, The Nation (Dec. 17, 2008), https://www.thenation.com/article/archive/katrinas-hidden-race-war/ [https://perma.cc/RVA2-FYTR]; *See* Michael Niman, *Katrina's America: Failure, Racism, and Profiteering*, Am. Humanist Ass'n, 12-13 (2005).

[245] Thompson, *supra* note 244.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Thompson, *supra* note 244. The reporter covering this story three years after the storm observed that at that point, nobody had been arrested and there was no investigation into these shootings, despite the detailed information available about at least eleven shooting victims and the circumstances of their injuries and deaths.

Men who took up arms in Algiers Point after the storm pointed to the need to defend against looting and theft as the motivating force behind their actions, identifying Black residents of New Orleans as looters and justifying violence against them.[250] They were so confident in the widespread public support for this viewpoint that they openly discussed their violent activities on video, claiming that "no jury would convict."[251] Some claimed that they had the support of the police in defending property with arms, asserting that "[t]he police said, If they're breaking in your property do what you gotta do and leave them [the bodies] on the side of the road."[252]

Support for this approach to property defense in environmental crisis was pushed even further into the mainstream with the introduction of the Florida Stand Your Ground law. Following the damage caused in Florida by Hurricane Ivan in 2004, Florida State Representative Dennis Baxley helped write the Stand Your Ground bill, observing that there were "a lot of properties in disarray. We had a number of people trying to prevent their property from being looted, and also just nowhere to go."[253] Environmental crisis helped facilitate the movement of paramilitary property ideology into the mainstream in this way, as fears and myths of looting proliferated in the uncertainties of the aftermath of storms and lawmakers turned to Stand Your Ground laws to authorize the private use of deadly force.

These patterns also took shape during wildfires in the West, as both existing and new paramilitary groups became active in patrolling towns and neighborhoods affected by fire. In Oregon, residents of towns affected by wildfires set up armed civilian checkpoints and patrols.[254] Some groups dressed in camouflage and positioned themselves at armed roadblocks,

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[250] The use of the notion of looting to justify violence against Black people is evident in a documentary made soon after the storm by Danish filmmakers titled "Welcome to New Orleans," in which white New Orleans residents openly discuss shooting "looters" after the storm and one likens these shootings to "pheasant season in South Dakota." Rasmusholmfilm, *Welcome to New Orleans*, YouTube (2012), https://www.youtube.com/watch?v=V__lSdR1KZg&ab_channel=rasmusholmfilm [https://perma.cc/PU39-EGAY]. A family member of one of the Algiers Point men observed that he joined the militia because he was "excited that it was a free-for-all—white against black—that he could participate in." Thompson, *supra* note 244.

[251] Thompson, *supra* note 244.

[252] *Id.*

[253] The case that Baxley cited as inspiration for the 2005 law was of an elderly man and his wife, who were living in a FEMA trailer parked in their driveway after the hurricane as they waited for their home to be repaired. The man shot and killed a burglar who attempted to enter the empty house and the trailer. *See* All Things Considered, *supra* note 223.

[254] *Wildfires Are Among 4 Recent Disasters Costing at Least $1 Billion*, N.Y. Times, https://www.nytimes.com/2020/09/17/us/wildfires-live-updates.html (last updated Sept. 18, 2020); Jason Wilson, *Armed Civilian Roadblocks in Oregon Town Fuel Fears over Vigilantism,* The Guardian (Sept. 16, 2020, 4:33 PM), https://www.theguardian.com/us-news/2020/sep/16/oregon-fires-armed-civilian-roadblocks-police [https://perma.cc/SHJ4-F3P7]; Scottie Andrew & Hollie Silverman, *Oregon Residents Are Illegally Stopping Drivers at Gunpoint During Wildfire Evacuations, Sheriff Says*, CNN (Sept. 14, 2020, 9:59 PM), https://www.cnn.com/2020/09/14/us/oregon-armed-checkpoints-wildfires-looting-trnd/index.html [https://perma.cc/PY4J-PU3Z].

stopping traffic to question people.[255] Like in the context of flooding in New Orleans and Florida, those participating in these activities frequently raised the specter of property destruction to justify their actions, arguing that they were defending their property against potential arsonists and looters.[256] Reports and photographs from wildfire sites indicate hand-lettered signs warning looters to keep out or be shot.[257]

This approach to paramilitary property defense in wildfires, as in the context of flooding, illustrated the shift of paramilitary interpretations of property and its defense into the mainstream in the context of emergency. Paramilitaries gained the support of some police officers and departments, with some investigative reports noting that police visited with apparent approval the roadblocks and events where paramilitaries were organizing.[258] In some towns and counties, paramilitary involvement in the aftermath of wildfires led local officials to vote to use paramilitary groups such as the Oath Keepers and Three Percenters for their own private security.[259]

The ways that paramilitary groups have expanded in the wake of environmental crisis cannot be understood as simply a different iteration of disaster mythology's notion of violence as a natural human response to disaster. Rather, it is an opportunistic and contingent phenomenon, product of a particular cultural, legal, and historical conjuncture in which environmental regulation and environmental crisis are often cast as forces that threaten property rights and, by extension, the broader constitutional order of which they are a part. This produces a context ripe for the framing of paramilitary interpretations of property and its defense as a legitimate mode of law and order.

IV. Property as Private and Public Power

How might these intimacies between paramilitarism and property in America inform the ways we understand and theorize property? One approach would be to call paramilitarism a violent extreme. This approach might understand paramilitarism as a streak in American life running alongside but separately from other, more democratic forms of interpretation of constitutional protections of property rights or more fringe than the many ways in which the law itself has reinforced dispossessory acquisition or

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[255] Several reports of these traffic stops observed that they frequently had racial undertones. *See, e.g.*, Wilson, *supra* note 254; Grant, *supra* note 236.

[256] *See* Wilson, *supra* note 254; N.Y. Times, *supra* note 254; Andrew & Silverman, *supra* note 254.

[257] Andrew & Silverman, *supra* note 254; Grant, *supra* note 236.

[258] Wilson, *supra* note 254. This investigative report includes a social media post from a resident of a town facing wildfires in Oregon, stating that "Residents are guarding at the bottom of Louden on their own with the blessing of police. . . . Police said to do what you must. I thank these residents for being our watchdog."

[259] Grant, *supra* note 236.

discriminatory defense of property. Recent scholarship has recognized the critical importance of the ways people have long mobilized the law to dispossessory and discriminatory ends and the structural violence that this has implied, even when physical violence was minimal or absent.[260]

And yet treating paramilitarism as a violent extreme—as outside the law, rather than intertwined with it—obscures the very nature of paramilitarism and its relationship both to property and to law more generally. Paramilitaries, by definition, mimic the state. They do so not only by dressing in camouflage, conducting military-style training, and carrying assault weapons, but also by mobilizing, enforcing, and shaping the law. During the colonization of the West, preemption laws facilitated the acquisition of land by white settlers; militias both backed the settlers as they pushed for legislation and facilitated white settlement of land held by Native American tribes and Mexican grantees.[261] In the wake of the Civil War, state statutory provisions made it difficult for formerly enslaved people to purchase or secure fair contracts to rent land; the Klan both shaped and enforced those obstacles. As people attempted to craft rules expanding the concept of self-defense, paramilitaries actualized this expanded concept on the ground and pushed it into the mainstream. Paramilitaries support legislative initiatives, conduct enforcement, suppress opposition to legal change, and facilitate the shifting of violent interpretations of legal rights into the cultural and legal mainstream. Paramilitarism lives in the ways we frame property as an American ideal—from how we understand property's constitutional resonance and meaning, to the rules and practices we build around it, to our enactment of its protection—informing how we live with one another. The forms of physical violence paramilitaries exercise and the structural violence that is enacted through property law are, in this sense, inseparable.

These intimacies between property and paramilitary violence are rooted in property's dual role as a form of both public and private power. In his theory of property and sovereignty, Morris Cohen argued that through its delegation of sovereign power to private owners, property is simultaneously *dominium* and *imperium*.[262] In this sense, it determines not only what people may acquire but also their power over others. Cohen focused on owners of capital, for whom property became a mode of acquisition of goods, land, and machinery, and at the same time a form of control over workers, tenants, and consumers.[263] But Cohen's theory also speaks to the

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[260] *See, e.g.*, Mitchell, *supra* note 179; Taylor, *supra* note 179; Brown, *supra* note 179; Park, *supra* note 12; Berger, *supra* note 12; Rothstein, *supra* note 197.

[261] In a contemporary context, Lua K. Yuille emphasizes the importance of understanding American street gangs' primary function as corporate institutions aimed toward creating property interests that are central to identity. Lua Kamál Yuille, *Dignity Takings in Gangland's Suburban Frontier*, 92 Chi.-Kent L. Rev. 793 (2018); Lua Kamál Yuille, *Blood In, Buyout: A Property & Econ. Approach to Street Gangs*, 2015 Wis. L. Rev. 1049 (2015).

[262] Cohen, *supra* note 15.

[263] *See generally id.*

relationship between property and paramilitarism by underscoring how the structure of property itself—through its explicit delegation of state power to private actors—facilitates control over both the things of the world and other human beings. This is not only a delegation of power, but can also involve an implicit or explicit ceding of any assumed state monopoly on the legitimate use of violence, such that private actors in certain contexts can take up arms to protect property with the blessing or the forbearance of the state.

For Cohen, however, it is only property itself that straddles public and private, *dominium* and *imperium*, not the actors who mobilize property. Cohen's theory assumes a neat distinction between the state and private actors, government and industry.[264] But it is in the expansive gray zone straddling public and private where paramilitarism lives and flourishes. Varied iterations of paramilitarism take shape through different combinations of public and private power in this zone. Paramilitarism can emerge through the explicit state authorization of private violence to protect property, as in Stand Your Ground laws and authorization of settler violence against Native Americans on the 19th century frontier. It can live in the willingness of the state to look away as private actors exercise violence in the name of property, as with paramilitary counterprotests in Kenosha or militia violence against migrants on the border. It can also take shape in explicit opposition to the state and state legal regimes, as with paramilitary opposition to federal land policy in the West. Paramilitarism may be more or less against the rules and more or less aligned with the state in different places and times. But it always lives in this gray zone between public and private, taking its power from the ambiguities of authorization and legitimacy that characterize this zone.

Property also straddles public and private, rendering it an ideal concept for paramilitarism. The fact that it is a legal concept through which power is explicitly delegated by the state to private actors facilitates its use as a key source of authorization for paramilitary activity. Property can be framed as a source of authority for private action in situations where the state is framed as having too little presence or capacity to act. It can also be understood as a right that is pre-political, a form of self-authorization and legitimacy that does not depend on the state or its laws at all.

It is no accident, then, that paramilitaries have made explicit claims not only to land and water, but also to public power, through attempts to overtake the seat of government. Armed militia members invaded the Michigan Capitol in 2020, claiming violations of their constitutional rights and demanding the reopening of businesses in the wake of Governor Gretchen Whitmer's Covid-19 shutdown orders. Claims to interference by the shutdown orders with the rights to property and to guns merged with claims to public power, as those invading the Michigan Capitol building chanted that

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[264] *See generally id.*

they were there to occupy "our house."[265] Similar invasions of state capitols by paramilitary groups protesting shutdown orders took place in Idaho and Oregon. These statehouse takeovers served as precursors to the January 6, 2021, invasion of the U.S. Capitol, where armed protesters attempting to disrupt the certification of the 2020 election results claimed to be occupying a space that properly belonged to them.[266]

While the structure of property's allocation of power facilitates paramilitary claims to both private property and public authority, paramilitary articulations of property are not simply property's prewritten destiny. Property itself is not, always and everywhere, paramilitary. Rather, it is the specific history of the way property is enacted and interpreted in a particular time and place that determines its relationship to paramilitarism. In the United States, this history includes the substantial delegation of territorial expansion on the frontier to settlers, both informally and via federal land policy, as well as the delegation of control over enslaved people to those who claimed to own them.[267] This, along with the decentralization of enforcement of property rules, effectively incorporated paramilitarism into the basic functions of the American state. The proliferation of the availability of guns to the public served to amply arm private individuals conducting this decentralized enforcement, from the frontier to the neighborhood watch.

In this sense, it was not necessarily the structure of property itself that was inherently paramilitary, but the particular way this structure was enacted in the United States over time that facilitated the unfolding of a specific relationship between property and paramilitarism. This was not simply about the exercise of violence in regimes of informal private ordering outside the state—though that, too, is a critical element of the history of property in the United States.[268] Rather, it was about the taking up of military-style arms

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[265] Joseph Blocher and Reva Siegel describe the invasion of the Michigan legislature as one in which guns were used to threaten not just individual injury, but the public sphere itself. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under Heller*, 116 Nw. U. L. Rev. 139 (2021).

[266] Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. Times (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html; Zolan Kanno-Youngs, Sabrina Tavernise, & Emily Cochrane, *As House Was Breached, a Fear 'We'd Have to Fight' to Get Out*, N.Y. Times, https://www.nytimes.com/2021/01/06/us/politics/capitol-breach-trump-protests.html [https://perma.cc/2SUR-3BFS] (last updated Jan. 17, 2021). These claims relate to the so-called "insurrectionary" theory of the Second Amendment, which understands the constitutional protection of the right to bear arms as rooted in the necessity of arming individuals to check governmental power—or, as many participants in these takeovers described it, the "tyranny" of specific elected officials. Militia groups espousing this theory have also described it as a right to protect against government interference with rights to property and the bearing of arms. Charles J. Dunlap Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 Tenn. L. Rev. 643, 644 (1995).

[267] Frymer, *supra* note 116. Frymer discusses how the structuring of westward expansion in America was by no means a foregone conclusion, but was rather the product of a series of settlement policy choices by the federal government that were oriented toward the construction of a predominantly white settler nation.

[268] Clowney, *supra* note 35.

and tactics in the acquisition or defense of property, often with authority either explicitly or implicitly delegated by the state, or with an aspiration to public power. Over time, paramilitarism came to manifest itself both in property rules and practices and in the cultural imagination of what property is and what it protects.

Paramilitary property is neither a fringe interpretation of property, nor its only possible interpretation. It is an interpretation made available by its structure—one that can manifest when the conditions are ripe. This means that property is fundamentally indeterminate, holding the possibility of both democratic, emancipatory projects and paramilitary violence at the same time.

In *Two Faces of American Freedom*, Aziz Rana argues that in American history, democratic ideals of freedom and subordination of people framed as outsiders are two sides of the same coin.[269] Rana notes that "[r]ather than separate currents flowing into the well of American values, the democratic ideals themselves gained strength and meaning through frameworks of exclusion. Projects of territorial expansion and judgments about who properly counted as social insiders helped to generate and sustain the very accounts of liberty."[270] This is perhaps clearer in property than in any other field.[271] Paramilitaries draw on and mobilize property as a founding ideal, interpreting constitutional protections of property as a license to exercise violence in the name of its defense. In doing so, they reinforce the foundational importance of property, while also shaping what property means both in the law and in our cultural imagination.

Paramilitaries have been inspired by and shaped property through both democratic ideals and through violence, exclusion, and paranoia, in ways that persist throughout American history and reach into the legal and cultural mainstream. By drawing on property's dual role as a form of both *dominium* and *imperium*, paramilitaries have shaped the ways property is understood and enacted both as a form of private ownership and as a claim to public power.

V. Conclusion

As paramilitary violence expands further into American political and social life, it is critical to understand how paramilitaries frame their sources

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[269] Aziz Rana, The Two Faces of American Freedom (2014). In Ugly Freedoms, Elisabeth Anker similarly argues that practices of American freedom have taken shape both as individual liberty and as the power to subjugate. Freedom is ugly, she argues, "not only when it legitimates mass harm but also when its practitioners and tenets disregard these harms to uphold freedom as an always celebrated virtue." Elisabeth R. Anker, Ugly Freedoms 6 (2022).

[270] Rana, *supra* note 269, at 7.

[271] This is particularly true for property over land. Jedediah Purdy illustrates how land has long been both a source of unity and division in America, facilitating both common endeavors and modes of exclusion. Jedediah Purdy, This Land Is Our Land: The Struggle for a New Commonwealth (2019).

of authority and legitimacy and the ways that their ideology moves into the mainstream. Property—as both an American founding ideal and an everyday legal and cultural manifestation of that ideal—both facilitates and is shaped by paramilitarism. Property serves as a central node of paramilitary legitimacy and influence in ways that are both historically grounded and hold contemporary relevance. These intimacies between paramilitary violence and property are rooted both in property's dual role as a form of both public and private power and in the ways that this role has unfolded through decentralized enactment and enforcement of property rules over the course of American history.