Race, Reconstruction, and the RICO Act: Using the Racketeer Influenced and Corrupt Organizations (RICO) Act in Prosecutions Against White Supremacist Organizations in America

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RACE, RECONSTRUCTION, AND THE RICO ACT: USING THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT IN PROSECUTIONS AGAINST WHITE SUPREMACIST ORGANIZATIONS IN AMERICA

CHERIE L. DEOGRACIAS

Dating back to the practice of slavery in the United States, white supremacy is an ideology that is deeply and painfully woven into the fabric of American history. Though slavery was abolished over one hundred and fifty years ago, the underlying problems of racial discrimination, violence, and tension between white and Black Americans have transcended the formal abolition of the practice of slavery after the Civil War. Because racial discrimination is so entrenched in the foundations of American law, culture, politics, and institutions, many of the battles of racial discrimination stemming from slavery and the Civil War are still issues we face today. In recent history, racially motivated public shootings in Charleston, South Carolina; Pittsburgh, Pennsylvania; San Diego, California; and El Paso, Texas, have brought the issue of white supremacy to the forefront of public discourse.

Racially motivated public shooters are referred to as “lone wolves” by law enforcement and media. The term “lone wolf” suggests
that white supremacist shooters work alone and for their individual actions can be directly prosecuted for the racially motivated murders of innocent lives.\(^8\) However, many of them, through manifestos and other online content, act on a reinforced ideology of members within an online network of white supremacists.\(^9\) Moreover, while some white supremacists only engage in First Amendment protected activities, other members of white supremacist groups work within a highly structured, hierarchical organization to commit crimes designed to sustain and

ideological affinity with the broader radical Islamic terrorist movement.” \(^{Id.\ at\ 1614,\ 1650.}\) However, the term “lone wolf” has also become associated with terrorism acts committed by individuals who share an ideological affinity to white supremacy by media and law enforcement agencies such as the Federal Bureau of Investigations. \(^{Operation\ Lone\ Wolf,\ FED.\ BUREAU\ OF\ INVESTIGATION,\ SAN\ DIEGO\ DIVISION,\ (1998),\ https://archives.fbi.gov/archives/sandiego/about-us/history/operation-lone-wolf\ (outlining\ an\ extensive\ investigation\ of\ federal\ civil\ rights\ and\ domestic\ terrorism\ related\ violations\ and\ incidents\ targeting\ a\ white\ supremacist,\ Alex\ Curtis,\ and\ his\ lone\ wolf\ activism).\} Further, racially motivated public shootings in Charleston, South Carolina; Pittsburgh, Pennsylvania; San Diego, California; and El Paso, Texas, occurring after the article was published, have further cast light on the serious issue of lone wolf shootings in America. \(^{See\ infra\ Section\ \textit{II.A.}\} Lastly, although no single or clear motivating factor was found as the driving factor of lone wolf Stephen Paddock, he carried out the “deadliest mass shooting in modern history” killing 58 people and injuring nearly 1,000 others. \(^{Khaled\ A.\ Beydoun,\ \textit{Lone\ Wolf\ Terrorism:\ Types,\ Stripes,\ and\ Double\ Standards},\ 112\ N.W.\ L.\ REV.\ 1213,\ 1215\ (2012)\ \textit{(citing\ Bill\ Chappell\ &\ Doreen\ McCallister,\ Las\ Vegas\ Shooting\ Update:\ At\ Least\ 59\ People\ Are\ Dead\ After\ Gunman\ Attacks\ Concert,\ NPR\ (Oct.\ 2,\ 2017,\ 3:15\ AM),\ https://www.npr.org/sections/thetwo-way/2017/10/02/554976369/section-of-las-vegas-strip-is-closed-after-music-festival-shooting\ \textit{(reporting\ the\ death\ toll\ of\ the\ Las\ Vegas\ public\ shooting\ at\ 59\ and\ the\ number\ of\ injured\ individuals\ at\ 500);\ but\ see\ Vanessa\ Romo, FBI\ Finds\ No\ Motive\ In\ Las\ Vegas\ Shooting.\ Closes\ Investigation,\ NPR\ (Jan.\ 29,\ 2019,\ 9:44\ AM),\ https://www.npr.org/2019/01/29/689821599/fbi-finds-no-motive-in-las-vegas-shooting-closes-investigation\ \textit{(citing\ the\ FBI\ found\ no\ motive\ for\ the\ shooting\ and\ estimates\ the\ total\ number\ of\ injuries\ near\ 1000\ people))};\ see\ also\ Dr.\ Joan\ Donovan, El\ Paso\ Shooter\ wasn’t\ a\ ‘lone\ wolf’ –\ and\ his\ so-called\ online\ ‘manifesto’\ proves\ why,\ NBC\ NEWS\ (Aug.\ 5,\ 2019,\ 11:05\ AM),\ https://www.nbcnews.com/think/opinion/el-paso-shooter-wasn-t-lone-wolf-his-so-called-nca1039201;\ Daniel\ L.\ Byman, How to hunt a lone wolf: Countering terrorist who act on their own, BROOKINGS INSTITUTE (Feb. 14, 2017), https://www.brookings.edu/opinions/how-to-hunt-a-lone-wolf-countering-terrorists-who-act-on-their-own/;\ Reuters\ Staff, Lone\ Wolf\ attackers\ inspire\ each\ other, NATO\ chief\ says,\ \textit{REUTERS}\ (Aug.\ 5,\ 2019),\ https://www.reuters.com/article/us-newzealand-shooting-nato/lone-wolf-attackers-inspire-each-other-nato-chief-says-idUSKCN1U0V0FB;\ Janet\ Reitman, U.S.\ Law\ Enforcement\ Failed\ to\ See\ the\ Threat\ of\ White\ Nationalism.\ Now\ They\ Don’t\ Know\ How\ To\ Stop\ It.,\ \textit{N.Y.\ TIMES\ MAGAZINE}\ (Nov.\ 3,\ 2018),\ https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html\ \textit{(recalling\ the\ former\ Secretary\ of\ Homeland\ Security,\ Janet\ Napolitano’s,\ concern\ of\ a\ ‘rise\ in\ lone-wolf\ ‘right\ wing\ extremism’\ a\ term\ commonly\ used\ in\ the\ counterterrorism\ world\ to\ refer\ to\ the\ radical\ belief\ of\ fringe\ players\ on\ the\ right\ of\ political\ spectrum.’).\} \(^8\) See\ Kendall\ Coffey, The\ Lone\ Wolf—Solo\ Terrorism\ and\ the\ Challenge\ of\ Preventative\ Prosecution, 7\ \textit{FLA.\ INT’L\ U.\ L.\ REV.}\ 1, 7–11\ (2011).\ This\ law\ review\ article\ also\ outlines\ the\ difficulty\ of\ prosecuting\ lone\ wolf\ terrorism. \(^{Id.}\) \(^9\) Donovan, \textit{supra} note 7.
promote the organization’s shared antipathy toward non-white Americans.10

Though the spread of white supremacist ideologies manifest themselves in an array of violent and illegal actions across the nation, as evidenced in the rising number of reported hate crimes to law enforcement agencies, the current federal administration is not effectively working to counter violent white supremacy extremism.11 While white supremacist hate speech is constitutionally protected by the First Amendment, crimes covered under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, such as hate crimes, murders, drug trafficking, and other crimes committed by their organizations, are not legally protected.12 This comment argues that the RICO Act, which has previously been used to target whole organized crime enterprises such as New York’s organized crime families and street gangs,13 could

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10 See infra Section III.

11 Confronting White Supremacy (Part I): The Consequences of Inaction: Hearing Before the Subcomm. on Civil Rts. and Civil Liberties, 116th Cong. 3–4 (2019) (statement of Jamie Raskin, Chairman) (stating that hate crimes are sharply on the rise, while federal agencies are actively dismantling resources, such as grants, internal agencies, and teams, meant to counter violent domestic extremism) “[T]he data still shows us that hate crimes are sharply on the rise. Last year, the FBI reported over 7,000 hate crime incidents in 2017, a [seventeen] percent increase from the prior year and a [thirty-one] percent increase over 2014. During those same four years, hate crimes against African Americans rose by [twenty] percent. They rose- anti-Semitic hate crimes rose by [thirty-five] percent, anti-Latino hate crimes rose by [forty-three] percent, and anti-Muslim hate crimes rose by [forty-four] percent. The Trump administration is not correctly naming the problem and it is not aggressively addressing it either.” Id.; see also FBI Releases 2017 Hate Crime Statistics, FED. BUREAU OF INVESTIGATION, FBI NAT’L PRESS OFF., (Nov. 13, 2018), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2017-hate-crime-statistics (stating 59.6% of incident reports submitted by law enforcement agencies involving 7,175 criminal incidents and 8,437 related offenses were motivated by race in 2017); Peter Beinart, Trump Shut Programs to Counter Violent Extremism, THE ATLANTIC (Oct. 29, 2018), https://www.theatlantic.com/ideas/archive/2018/10/trump-shut-countering-violent-extremism-program/574237/; Christopher Mathias, When Native Americans Are Told To ‘Go Back’ To Where They Came From, HUFFPOST (Dec. 23, 2019), https://www.huffpost.com/entry/native-american-hate-crimes-go-back_n_5df3d3d2e4b0843d35fc0835; Anti-Defamation League, White Supremacists’ Anti-Semitic and Anti-Immigrant Sentiments Often Intersect, ADL (Oct. 27, 2018), https://www.adl.org/blog/white-supremacists-anti-semitic-and-anti-immigrant-sentiments-often-intersect (stating that modern white supremacy is centered on the idea that whites must fight against the extinction of the white race at the growing numbers of non-whites).

12 See infra Section III.

13 See United States v. Persico, 832 F.2d 705, 718 (2d Cir. 1987) (affirming the lower court’s judgements of RICO conspiracy convictions for members of New York’s Colombo crime family); United States v. Langella, 804 F.2d 185, 186–90 (2d Cir. 1986) (affirming the lower court’s holding stating that the nine individuals that conspired to participate and participated in the affairs of an enterprise called “the Commission of La Cosa Nostra” in violation of the Racketeer Influenced and Corrupt Organizations Act cannot dismissed their case on double jeopardy grounds); Nine Alleged MS-13 Members Charged in Violent Racketeering
also be used to prosecute white nationalist organizations that engage in illegal activities.

Part I sets forth the historical events of the post-Civil War Reconstruction period that sought to reverse the context in which white supremacist violence embedded itself into the fabric of the United States. Part II details the current state of white supremacist organizations in America. Part III outlines the RICO Act and how prosecutors can use the statute to prosecute white nationalist enterprises. This essay concludes that the RICO Act is a viable remedy to target white supremacist organizations in law enforcement investigations and provides a method of prosecution for United States attorneys.

I. THE HISTORY OF WHITE NATIONALISM IN AMERICA

White nationalism in the United States has deep-seated roots in the practice of slavery, the Civil War, and the years through and following the Reconstruction. The Civil War was one of the most damaging wars in our nation’s history, undeniably hard fought over the survival or demise of the institution of slavery. After more than two centuries of legalized slavery in the United States, the long-standing view that enslaved Africans who were not given opportunities to gain United States citizenship, were inferior to whites continued to dominate


14 See infra Section I.
15 See infra Section II.
16 See infra Section III.
17 See infra Section III-IV.
social views and norms of the era. The Three Fifths Compromise and Fugitive Slave Act underscored that slavery was embedded in constitutional and federal law, and through such legislation, the practice of discrimination against Black Americans was memorialized in the legal and legislative axioms in the United States.

A. Dred Scott v. Sandford

Just prior to the beginning of the Civil War, in the landmark case Dred Scott v. Sandford, the Supreme Court held that Africans and their descendants brought to the United States through slavery were not American citizens, and thus possessed no civil rights and could not sue for their freedom. The Dred Scott Court explained that enslaved Africans and their descendants are a separate, subordinate class of citizens, “altogether unfit to associate with the white race” and so inferior that “they had no rights which the white man was bound to respect.” Additionally, the Dred Scott Court held that based on the language in the Declaration of Independence, “foreigners” and their descendants were not meant to be protected under the Constitution and were not part of the American political community.

Moreover, in Dred Scott, the Supreme Court provided legal justification and framework for continuing the practice of slavery in the United States by codifying the status of Black Americans’ racial


22 U.S. CONST. art. I, § 2, cl. 3. Apportionment of states representation in the House of Representatives is based on each state’s population. See Howard A. Oehl, Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States, 28 WILLIAM AND MARY Q. 563, 563–84 (1971). Southern slaveholding states wanted to include the entire population of slaves to strategically increase the number of members of Congress. Id. Northern states wanted to only count free persons. Id. The compromise between the North and South was that slaves would count as three fifths a person for apportionment. Id.

23 Fugitive Slave Act of 1850, ch. 60, §§ 6–7, 9 Stat. 462, 463–64 (1850) (allowing for owners to reclaim their fugitive slaves and punishing individuals who helped or harbored fugitive slaves) (repealed 1864).


25 60 U.S. 393 (1857).

26 Id. at 404.

27 Id. at 407.

28 Id.

29 See id. at 419–20.
inferiority. The case declared that because Black Americans were "beings of an inferior order" they deserved to be subjugated to inferior treatment from a more dominant race, and thus could lawfully be "reduced to slavery for [their] own benefit." The Dred Scott language reflected the racist, anti-Black sentiments held at that time by the dominantly white political community of the United States. Further, the Supreme Court’s decision stymied the furtherance of civil rights for enslaved Black people and their descendants by concluding that Congress was powerless to abolish slavery.

However, in spite of the holding in the Dred Scott case, Congress would abolish slavery through the Thirteenth Amendment, constitutional “Wartime Amendments,” and the very first civil rights statute designed to protect previously enslaved Black people and their descendants over the next decade. The abolishment of slavery, adoption of the Fourteenth Amendment, and ratification of laws that conferred citizenship and civil rights for previously enslaved Black Americans indicated that Congress, in fact, had the power to enact federal legislation that ensured equal rights for all Americans, regardless of their race.

B. Congressional Response to the Abolition of Slavery after the Civil War: The Wartime Amendments and Civil Rights Act of 1866

The Reconstruction (1863-1877) was a period after the abolishment of slavery which marked a radical departure in American civic life following the Civil War. Because those previously enslaved were now free, America needed to define the race relations and rights of Black people in America. The United States Congress and judiciary attempted to address the political, social, and economic injustices

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31 Dred Scott, 60 U.S. at 404–05.
32 Id. at 407; See also Kinoy, supra note 30.
33 Kinoy, supra note 30, at 392.
34 Dred Scott, 60 U.S. at 404.
35 Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War, 92 AM. HIST. REV. 45 (1987).
36 Foner, supra note 24, at 1586.
38 Id.
stemming from slavery by implementing full freedoms and civil rights for emancipated Black Americans and their descendants.39

Eight years after the Dred Scott decision, Congress passed the Thirteenth Amendment and ratified the abolition of slavery in the United States into law.40 The Thirteenth Amendment provides that, “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”41 Such immediate and uncompensated emancipation was a great win for Republicans fighting for the civil rights of previously enslaved Black Americans.42 However, it raised the question of what the abolishment of slavery would mean for those who were previously enslaved and their descendants.43 Despite the Dred Scott decision, were previously enslaved Black people brought to America through the practice of slavery citizens of the United States?44 If so, what rights would they be conferred?45 After passing the Thirteenth Amendment and ending the practice of slavery,46 the logical next steps were another constitutional amendment to confer citizenship and the first piece of legislation aimed at protecting Black Americans’ civil rights.47

Through the Fourteenth Amendment and the ratification of the Civil Rights Act of 1866, African Americans were conferred citizenship and ensured the preservation of their civil rights.48 The Civil Rights Act of 186649 was designed to protect Black Americans’ civil rights by defining citizenship and affirming equal protections of the law for all

41 U.S. CONST. amend. XIII; Foner, supra note 24.
42 Foner, supra note 24, at 1587.
43 Foner, supra note 24, at 1585–86.
44 Foner, supra note 24, at 1585–86.
45 Foner, supra note 24, at 1585–86.
46 U.S. CONST. amend. XIII; Foner, supra note 22.
47 Foner, supra note 24. The faction of Republicans that pushed for permanent eradication of slavery without compromise before the Thirteenth Amendment was passed, called Radical Republicans, believed that the federal government had a duty to help shape a multiracial society, especially in the postwar South where race relations were especially tense. Radical Republicans believed that formerly enslaved people deserved equality, civil rights, and voting rights. Id. at 1589–90. See Hans L. Trefousse, Historical Dictionary of Reconstruction 175–76 (1991).
48 Kaczorowski, supra note 35.
49 The Civil Rights Act of 1866, 14 Stat. 27 (1866).
citizens. President Andrew Johnson, a staunch advocate for states’ sovereignty and whites’ rights, vetoed the bill. However, by an overwhelming vote of 122 to 41, Congress overrode President Johnson’s veto and passed the Civil Rights Act of 1866 to enact legislation designed to protect the civil rights of Black Americans.

The Civil Rights Act of 1866 declared that all people born in the United States are citizens and conferred the right to property ownership to formerly enslaved people. Black men were also given the right to vote in the South in 1867. The Fifteenth Amendment passed a few years later in 1870, allowing for national Black male suffrage.

The Wartime Amendments (the thirteenth, fourteenth, and fifteenth Amendments) were rights created by national force. They were ratified by national powers. Thus, the branches of the national government maintain the right and duty to protect these Amendments because it is the national duty to preserve the rights of citizens. Black Americans, through these Amendments, were freed from the shackles of slavery, granted citizenship, and conferred the same rights given to every white citizen. However, many white Americans opposed such a drastic change in the power structure in America, fearing the amount of control Black Americans were quickly gaining.

Many white Americans were threatened by people of color “replacing them” in the political power structure, especially in the

51 Foner, supra note 39.
52 The Civil Rights Act of 1866, 14 Stat. 27 (1866). The Civil Rights Act was reported to the Senate on January 12, 1866 and passed on March 15, 1866. See Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 44–45 tbl.4.1 (1990).
54 The Civil Rights Act of 1866, 14 Stat. 27 (1866). The Civil Rights Act of 1866 excluded untaxed Native Americans. Id.
56 Foner, supra note 24, at 1586.
57 U.S. Const. amend. XV.
58 Kinoy, supra note 30, at 394.
59 Kinoy, supra note 30, at 394.
60 Kinoy, supra note 30, at 394.
61 Kinoy, supra note 30, at 394.
62 Foner, supra note 39.
American South. Black Americans made up a significant portion of the population in many Southern states, so if Black Americans were allowed to vote, the composition and power of the legislature and civil life would drastically change for white Americans. Black American votes would ensure majority control for Black communities in many counties and localities, which threatened white power throughout the South.

As a result of such fear, racist sentiments against Black Americans ran rampant through the South. White supremacists, or those that believed that white people are superior to people of other races, formed political and social groups, such as the Ku Klux Klan (KKK), Knights of the White Camellia, White League, and the Red Shirts formed in the South. These white supremacist organizations used violence to terrorize Black Americans to try to prevent them from exercising their newly minted civil rights. White supremacist organizations attacked all forms of Black power to prevent Black Americans in the South from gaining any political power.

C. White Supremacists in the South: Violence and Lynchings During the Reconstruction

Though the Civil War ended the practices of slavery in America, problems stemming from slavery and its racist practices only intensified targeted acts of violence against Black Americans. Former Confederates held on to the philosophy of state sovereignty and took violent action against Black Americans and their white Republican allies in the South. White supremacists continued to treat freedmen as

63 Foner, supra note 39.
65 Id. at 387.
67 Id.
68 Id.
69 Pope, supra note 64, at 387.
70 Kaczorowski, supra note 35, at 51.
71 Kaczorowski, supra note 35, at 51.
if they were enslaved despite the abolishment of slavery through the ratification of the Thirteenth Amendment.\textsuperscript{72}

Black Americans who justly asserted their civil rights were met with violence by white supremacists.\textsuperscript{73} Between 1865 and 1866, the Freedman’s Bureau\textsuperscript{74} registered over a thousand murders, often documenting the action that elicited the violence and the outcome.\textsuperscript{75} In some cases, whites assaulted Black men and women for failing to show proper respect (such as “failing to remove their hat”) or defying a white person’s commands, even though they were no longer enslaved.\textsuperscript{76} In other cases, whites’ violence occurred completely unprovoked.\textsuperscript{77} Overwhelmingly, law enforcement failed to arrest, charge, or convict the white assailants.\textsuperscript{78} Moreover, Republican political leaders in the South that sympathized with Black Americans were met with harsh treatment.\textsuperscript{79}

Driven by their racist beliefs, white supremacists during the Reconstruction often targeted leaders in the Black community, such as ministers, property owners, and political leaders for lynchings\textsuperscript{80} and

\textsuperscript{72} Kaczorowski, supra note 35, at 51.
\textsuperscript{73} Kaczorowski, supra note 35, at 51.
\textsuperscript{74} The Freedman’s Bureau, HISTORY (Oct. 3, 2018), https://www.history.com/topics/black-history/freedmens-bureau. The Freedman’s Bureau was a program established by Congress to help millions of former Black slaves and poor whites in the South after the Civil War. Id.
\textsuperscript{76} American Experience, Southern Violence During the Reconstruction, https://www.pbs.org/wgbh/amex/reconstruction/features/reconstruction-southern-violence-during-reconstruction/ (last visited Oct. 30, 2019) (quoting Eric Foner, historian). “Violence is endemic in the South, from the end of the Civil War onwards. There's sporadic local violence in 1865–65: contract disputes, disputes over etiquette. A [B]lack guy doesn't tip his hat to a white and suddenly people are shooting each other. People refuse to get off the sidewalk to let someone else pass. All sorts of local incidents produce amazing outbreaks of violence. The Freedman's Bureau in Texas has a register of murders with over a thousand in 1865–66 – and they try to give the reason, you know. ‘Black man didn't tip his hat so I shot him.’ Things like that.” Id.; see also Kaczorowski, supra note 35, at 51.
\textsuperscript{77} Pope, supra note 64, at 398.
\textsuperscript{78} See generally FREEDMAN’S BUREAU, supra note 74.
\textsuperscript{79} Kaczorowski, supra note 35, at 51.
other public acts of violence to destroy Black power leadership and terrorize Black Americans.\textsuperscript{81} Lynching was meant to send a message: “Do not register to vote. Do not apply for a white man’s job.”\textsuperscript{82} White supremacists used lynching as a way to suppress votes and discourage Black Americans from taking positions of power to keep Black Americans in a subordinate position within society.\textsuperscript{83} The majority of the white supremacist murderers responsible for the lynchings of Black Americans were never punished for their heinous crimes.\textsuperscript{84} The thousands of people, including families with children, who attended and watched (and many times celebrated) the lynchings,\textsuperscript{85} perpetuated the generational furtherance of white supremacist thought and the continuance of white nationalist ideology in America.

\textit{D. The Enforcement Act of 1870 and Ku Klux Klan Acts}

In efforts to address the violence against Black Americans for their political participation in the South, Congress passed additional bills to protect Black Americans’ voting rights conferred from the Fifteenth Amendment.\textsuperscript{86} The Enforcement Act of 1870,\textsuperscript{87} or the First Enforcement Act, was legislation passed by Congress designed to allow federal enforcement and prosecutions against white supremacist groups and state officials that conspired and acted to deny African Americans their suffrage rights.\textsuperscript{88}

Following the Enforcement Act of 1870, two more pieces of legislation, called Second Force and Third Force Acts (or Ku Klux Klan Acts) were passed to enforce the Fourteenth Amendment and Civil Rights Act of 1866.\textsuperscript{89} These laws were originally aimed at destroying the Ku Klux Klan (KKK) and minimizing political intimidation and other forms of unconstitutional election activity.\textsuperscript{90} The Second Force Act allowed federal judges and United States marshals to supervise

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\textsuperscript{81} Blake, \textit{supra} note 55.
\textsuperscript{82} Blake, \textit{supra} note 55 (citing Dr. David Pilgrim, \textit{The Brute Caricature}, FERRIS STATE U. (Nov. 2000), https://www.ferris.edu/jimcrow/brute/).
\textsuperscript{83} Blake, \textit{supra} note 55.
\textsuperscript{84} Lartey, \textit{supra} note 80.
\textsuperscript{85} Lartey, \textit{supra} note 80.
\textsuperscript{87} Enforcement Act of 1870, 41st Cong., Ch. 114, 16 Stat. 141 (1870).
\textsuperscript{89} \textit{Id}.
\textsuperscript{90} Cresswell, \textit{supra} note 86, at 422.
\end{flushleft}
polling places to ensure Black Americans were able to exercise their voting rights.\(^91\) Moreover, it codified election officials’ duty to register voters and receive lawful votes.\(^92\)

The Third Force Act authorized the President to deploy United States military forces to polling places in the South to directly confront and combat both white supremacists and state governments that colluded to deny Black Americans their right to vote.\(^93\) The Enforcement Acts gave the President, prosecutors, and marshals a statutory framework to try to minimize political intimidation, as outlined in the following section, and provided the first systematic “take-down” of white terrorist organizations.\(^94\)

**E. Judicial Response to Violence During and After the Reconstruction**

The Enforcement Acts provided a framework in which prosecutors could indict and convict white supremacists for their murders and violent actions aimed at intimidating Black voters from exercising their right to vote.\(^95\) The Justice Department, federal prosecutors, and marshals became the driving force behind enforcing the Enforcement Acts.\(^96\) In enforcing the Enforcement Acts, federal prosecutors and marshals collectively “sought indictments, made arrests, summoned jurors and witnesses, and prosecuted cases.”\(^97\) The United States Army regularly supplemented the marshals’ efforts by providing infantry escorts to carry out warrants.\(^98\)

Private citizens who, by threats or force, obstructed any citizen from voting or registering to vote faced penalty.\(^99\) The Enforcement

\(^{91}\) United States Senate, *supra* note 88.

\(^{92}\) Cresswell, *supra* note 86, at 422.

\(^{93}\) Cresswell, *supra* note 86, at 422.

\(^{94}\) United States Senate, *supra* note 88.

\(^{95}\) United States Senate, *supra* note 88.

\(^{96}\) Cresswell, *supra* note 86, at 424.

\(^{97}\) Cresswell, *supra* note 86, at 424.

\(^{98}\) Cresswell, *supra* note 86, at 425. “In their correspondence with the attorney general in the early 1870s the U.S. attorneys and marshals constantly pushed for continued military support. In an early Ku Klux case in May 1871 Marshal James H. Pierce wrote the attorney general that he had warrants for twenty Klansmen who lived in an isolated town . . . Pierce worried that he would not be able to effect the arrests since the suspects ‘live in a community of Ku Klux,’ and he requested a military escort. Attorney General Amos T. Akerman passed the Pierce’s request on to the secretary of war, who granted it. Akerman assured Pierce that troops would always be supplied in sufficient force ‘to aid and protect you in the execution of your duty.’ And indeed troops were regularly supplied to the marshal throughout the early 1870s.” Cresswell, *supra* note 86, at 425.

Acts defined such crimes as misdemeanors, and offenders faced minimum fines of $500 or one to twelve months of imprisonment, or both.\textsuperscript{100} The Acts also made it a felony to “band or conspire together, or go in disguise upon the public highway, or on the premises of another, with intent to . . . injure, oppress, threat, or intimidate any citizen . . .” from any constitutionally protected right.\textsuperscript{101} From the 1871-1884 Enforcement Acts Cases, federal prosecutors convicted 1,529 individuals.\textsuperscript{102} In 1872, more than twelve hundred Enforcement Acts cases were pending in South Carolina alone.\textsuperscript{103} In Northern Mississippi, fifty-five percent of election cases brought against offenders resulted in conviction, as a result of aggressive United States attorneys and marshals.\textsuperscript{104}

Federal court judges upheld many of the prosecutions brought by prosecutors.\textsuperscript{105} Circuit court judges did not require allegations of state action or inaction or require a showing of racial motivation.\textsuperscript{106} Instead, federal court judges yielded to Congress, “echoing \textit{McCulloch v. Maryland},”\textsuperscript{107} explaining “[i]f the act be within the scope of the amendment, and in the line of its purpose, [C]ongress is the sole judge of its appropriateness.”\textsuperscript{108} Though judges faced difficult and oftentimes seemingly conflicting issues of states’ rights and national rights, judges upheld indictments made by prosecutors under the Enforcement Acts, deferring to congressional enforcement.\textsuperscript{109}

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\bibitem{100} Cresswell, \textit{supra} note 86, at 422.
\bibitem{101} Cresswell, \textit{supra} note 86, at 422.
\bibitem{102} Cresswell, \textit{supra} note 86, at 423.
\bibitem{103} Cresswell, \textit{supra} note 86, at 423.
\bibitem{104} Cresswell, \textit{supra} note 86, at 423. Northern Mississippi enjoyed an unprecedented higher conviction rate. The national average of conviction rates for election cases was twenty-eight percent. Cresswell, \textit{supra} note 86, at 423.
\bibitem{105} Pope, \textit{supra} note 64, at 402.
\bibitem{106} Pope, \textit{supra} note 64, at 403–04.
\bibitem{107} 17 U.S. 316 (1819). This case asserts that the national government trumps state action in areas of constitutionally granted authority. \textit{Id.}
\bibitem{108} Pope, \textit{supra} note 64, at 403–04.
\bibitem{109} ROBERT KACZOROWSKI, \textit{THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876, 94–95 (1985). The Enforcement Acts prosecution presented issues to federal judges regarding national and state jurisdiction. One case in particular – the murder of Alexander Page of Mississippi – outlines the issue. \textit{Id.} “Twenty-eight men were indicted under sections 6 and 7 of the Enforcement Act of 1870. \textit{Id.} They were charged with conspiracy to deprive the deceased of his life and liberty with the intent to deny him rights secured by the Constitution and laws of the United States under section 6 of the statute. \textit{Id.} They were also charged under section 7 with murder as the means by which they deprived the deceased of his rights to life and liberty. \textit{Id.} The defendants petitioned the court for their release under a writ of habeas corpus. ROBERT KACZOROWSKI, \textit{THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-}
The first judicial decision to apply the Enforcement Acts was *United States v. Hall,*\(^{110}\) where the Circuit Court upheld the indictments of KKK members for violating the rights of four Black Americans and their right to freedom of speech and assembly. That same year, in *United States v. Crosby,* another circuit court upheld the indictments of KKK members that interfered with the right of a Black man to vote.\(^{111}\) The first case challenging the constitutionality of the Enforcement Acts to reach the Supreme Court was *United States v. Avery,*\(^ {112}\) where a group of South Carolina KKK members robbed and killed a Black man in his home based on his race and political ideology.\(^ {113}\) The United States Attorney handling the case, David T. Corbin, charged the defendants with murder under the Enforcement Act.\(^ {114}\) When consulted regarding the *Avery* case, Attorney General Akerman told United States Attorney Corbin that though there were concerns about conflicts with the right to bear arms, “I think that under the Fourteenth and Fifteenth Amendments, you will be able to sustain counts for a violation of the right of free political action.”\(^ {115}\) Federal prosecutors and Attorney General Akerman truly believed that the Wartime Amendments were a denunciation of slavery and fought valiantly throughout the South, using the Enforcement Acts to fight white supremacy and uphold the promises of racial equality for Black Americans made through the Wartime Amendments.\(^ {116}\)

Federal court judges, prosecutors, and marshals, in over 1,400 cases from 1870 and 1871, used the Enforcement Acts to combat white
supremacy in the South and enforce the voting rights of Black Americans in the United States.\footnote{KACZOROWSKI, supra note 109, at 70. By the end of 1870, 271 prosecutions were pending in the federal courts. KACZOROWSKI, supra note 109, at 65. In 1871, 1,193 cases were brought. KACZOROWSKI, supra note 109, at 65.} The valiant efforts of federal court judges, prosecutors, and marshals working in the South to enforce the Enforcement Acts, however, ended by way of a Supreme Court decision, United States v. Cruikshank.\footnote{Martha T. McClusky, Facing the Ghost of Cruikshank in Constitutional Law, 65 J. LEGAL Ed. 278, 280 (2015). (citing Pope, supra note 64, at 392 (noting that the Jim Crow laws of Plessy and Brown might not have existed if Cruikshank had upheld the convictions); Pope, supra note 64 at 445–47 (discussing the monumental historical impact of the case)). “By impeding federal prosecutions, the Cruikshank decisions cleared the way for violent restoration of a white supremacist legal order that replaced Reconstruction with the Jim Crow system of segregation, inequality, and racial violence that reigned largely unchecked by the Court for nearly a century.” Pope, supra note 64 at 445–47.} Cruikshank marked the beginning of the decline in the fight for civil rights for Black Americans post-Reconstruction.\footnote{Rolling Back Civil Rights, U.S. HOUSE OF REPRESENTATIVES: HISTORY ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Fifteenth-Amendment/Roll-Back/ (last visited Jan. 24, 2021).}

\section*{F. United States v. Cruikshank and the End of the Reconstruction}

The 1876 Supreme Court decision in United States v. Cruikshank\footnote{92 U.S. 542 (1876). Cruikshank grew out of an election dispute between Black Republicans and white supremacist Democrats over 1872 election results in a majority Black community—Grant Parish, Louisiana. Pope, supra note 64, at 387 (citing Charles Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction 96–103, 266 (2008)). Democrats were able to rig the elections in their favor, infuriating Republicans. Id. Armed Black Republicans, who occupied the Colfax courthouse, and white supremacist Democrats battled. Id. The Democrats won the battle and took the Black Republicans captive. Id. They eventually murdered almost all of the prisoners. This event was later named the “Colfax Massacre.” Id.; see also KACZOROWSKI, supra note 109, at 142.} marked a detrimental and unfortunate decline of federal power in enforcing Constitutional rights for Black Americans. Cruikshank barred federal prosecutors and marshals from using the Enforcement Acts to prosecute white supremacist terrorism aimed at suppressing post-Civil War Black American political engagement.\footnote{McClusky, supra note 118.} In Cruikshank, the Supreme Court held that the constitutional rights granted by the First Amendment\footnote{U.S. CONST. amend. I. The First Amendment grants the right to free speech. Id.} and Second Amendment\footnote{U.S. CONST. amend. II. The Second Amendment grants the right to bear arms. Id.} were rights that state governments — rather than the federal government —
were entitled to give.\textsuperscript{124} Thus, federal prosecution was not proper and overturned the convictions of the white defendants in the case.\textsuperscript{125} 

\textit{Cruikshank} ended the federal protection practices enacted by the Enforcement Acts, holding that the plaintiffs in the case must rely on state courts and law enforcement for protection.\textsuperscript{126} Justice Bradley’s dissenting opinion in \textit{Cruikshank} marked the first clear sign that the Supreme Court would adopt a highly critical attitude toward laws enforcing the Wartime Amendments.\textsuperscript{127}

The Court’s decision in \textit{Cruikshank} delivered a crippling blow to progress for civil rights for African Americans in the South.\textsuperscript{128} For Black Americans in the South, reliance on state protection meant little to no protection at all because state governments were “\textit{de facto} supporters of ‘private’ racism such as the KKK and lynch mobs.”\textsuperscript{129} The decision left Black Americans in the South at the mercy of increasingly racist state governments controlled by white Democratic legislatures that allowed white supremacist groups, like the KKK, to continue to terrorize Black Americans in efforts to suppress Black voting.\textsuperscript{130}

Two years later, an informal, unwritten deal between the Republican Party and moderate Southern Democrats, called the Compromise of 1877, settled a hotly contested presidential election.\textsuperscript{131} However, the Compromise of 1877 resulted in the withdrawal of the federal troops placed in the region to protect the voting rights of Black Americans, formally ending the Reconstruction Era.\textsuperscript{132} Moreover, it embodied an unfortunate decision by politicians to forsake the concept of national responsibility to enforce the rights conferred to Black Americans stemming from the Wartime Amendments.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{124} United States v. Cruikshank, 92 U.S. 542, 552–54 (1876).
\item \textsuperscript{126} Cruikshank, 92 U.S. at 553–54.
\item \textsuperscript{127} KACZOROWSKI, supra note 109, at 143; Pope, supra note 64, at 408.
\item \textsuperscript{128} Pope, supra note 64, at 412 (citing KACZOROWSKI, supra note 109, at 155). The violence against Black Americans continued almost immediately after the \textit{Cruikshank} decision. Pope, supra note 64, at 412. In Colfax, whites celebrated by holding a large meeting and riding out in the streets. Pope, supra note 64, at 412. Eventually, the group slit the throat of a Black man who happened to be walking on the street. Pope, supra note 64, at 412.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Compromise of 1877}, HISTORY (Nov. 27, 2019), https://www.history.com/topics/us-presidents/compromise-of-1877.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} Kinoy, supra note 30, at 396.
\end{itemize}
G. The Resurgence of White Nationalism in the United States
After the Reconstruction Era

Following the controversial 1876 election of President Rutherford B. Hayes, Republicans faced an uphill battle in ensuring racial equality and protection of the civil rights of Black Americans.\textsuperscript{134} During this time, prosecutors and law enforcement were poorly equipped to prosecute violent white supremacists.\textsuperscript{135} Reports from the Department of Justice revealed that white supremacist organizations like the KKK were highly organized “paramilitary” groups, which the Department of Justice and the federal judiciary could not combat due to the lack of resources available.\textsuperscript{136}

In 1883, the Supreme Court delivered another deafening blow in the \textit{Civil Rights Cases}.\textsuperscript{137} Furthermore, the white supremacist movement had the support of prominent, highly educated Americans who used their stature and network to further propagate their racist, white nationalist views.\textsuperscript{138} The lack of national solutions to combat white supremacist organizations, coupled with the support of white nationalist ideology by prominent leaders in society, laid a foundation for the resurgence of violent white supremacist activity we are still at war with today.

H. The Civil Rights Cases

The \textit{Civil Rights Cases}\textsuperscript{139} were a group of five consolidated cases in which the Supreme Court held that the Thirteenth and Fourteenth Amendments did not outlaw racial discrimination by individuals,\textsuperscript{140} further emboldening white supremacists and weakening the powers of a Republican Congress to enact legislation in efforts to remedy racial discrimination.\textsuperscript{141} Although the Wartime Amendments conferred rights to Black Americans, Associate Justice Joseph Bradley struck down the Civil Rights Act of 1866 by holding that the Thirteenth Amendment “merely abolishe[d] slavery,” and Congress could not

\begin{footnotesize}
\begin{enumerate}
\item \textit{id.} at 159.
\item \textit{id.}
\item See infra Section I.H.
\item See infra Section I.I.
\item 109 U.S. 3 (1883).
\item \textit{id.} at 20–25.
\end{enumerate}
\end{footnotesize}
outlaw private acts of racial discrimination using the Fourteenth Amendment.\textsuperscript{142} Despite the national government’s responsibility to uphold and defend the citizenship rights of all Americans, the decision in the \textit{Civil Rights Cases} marked a repudiation in the responsibility of the branches of government to do so, while affirming white supremacist ideology rooted in Black American degradation and inferiority.\textsuperscript{143}

The \textit{Civil Rights Cases} marked a return to strengthening the tenets of white supremacy in mirroring the language in the \textit{Dred Scott} opinion and affirming the legal axiom of racial inferiority of Black Americans by asserting that the whole population of Black American citizens did not possess citizenship rights that were meant to be respected.\textsuperscript{144} However, Justice Harlan in his dissenting opinion argued that the Wartime Amendments disavowed the idea of Black racial inferiority.\textsuperscript{145} In stark response to the opinion in \textit{Dred Scott}, Justice Harlan argues the Wartime Amendments renounced the idea of Black inferiority and codified the idea of Black equality into law.\textsuperscript{146} Further, Black Americans were meant to be included in the “people of the United States,” and were given equal rights conferred to white Americans through the Wartime Amendments.\textsuperscript{147} Black Americans, Justice Harlan argued, “were entitled to all the privileges, rights, and immunities which hitherto only white ‘people of the United States’ enjoyed.”\textsuperscript{148}

The \textit{Civil Rights Cases} continued the judicial ideological thought incepted by the \textit{Dred Scott} opinion. The ideals of white supremacy rang from the highest Court in the land to the grass-tops of society through the vanguard of sociological thought and academic thinking of the day, enjoying support from politicians, intellectuals, and business leaders of the time.\textsuperscript{149}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{142} The \textit{Civil Rights Cases}, 109 U.S. at 25.
\item \textsuperscript{143} The \textit{Civil Rights Cases}, OYEZ (Last viewed: Jan. 7, 2021) https://www.oyez.org/cases/1850-1900/109us3 (stating acts of racial discrimination are private wrongs that the national government is powerless to correct by means of civil legislation); Melvin I. Urofsky, \textit{Civil Rights Cases, ENCY. BRITANNICA} (Oct. 8, 2019), https://www.britannica.com/topic/Civil-Rights-Cases (stating that this case allowed states to legally allow private discrimination by not federally addressing the issue and simply “looking the other way, which they did”).
\item \textsuperscript{144} Kinoy, \textit{supra} note 30, at 393.
\item \textsuperscript{145} The \textit{Civil Rights Cases}, 109 U.S. at 30–36 (Harlan, J., dissenting); Kinoy, \textit{supra} note 30, at 393.
\item \textsuperscript{146} Kinoy, \textit{supra} note 30.
\item \textsuperscript{147} Kinoy, \textit{supra} note 30.
\item \textsuperscript{148} Kinoy, \textit{supra} note 30.
\item \textsuperscript{149} See \textit{supra} Section I.I.
\end{itemize}
\end{footnotesize}
I. Educated, Rich, and Powerful Supporters

The white nationalist movement could not thrive in popular American culture throughout society without the help of intellectuals, lawmakers, and a powerful faction of well-connected, wealthy, and accomplished white men. Some of the most influential lawyers, presidents, scientists, and businessmen of the time endorsed the idea of race purity, the doctrine that would further embed the foundations of white supremacy to take hold in mainstream society.151

Through their prominence in society, a powerful faction of well-known white men were able to start a second white supremacist movement, using tactics such as fear mongering and the manipulation of a pseudo-science, eugenics. President Woodrow Wilson helped revive the KKK by praising “The Birth of a Nation,” a movie depicting the KKK as heroes. Alexander Graham Bell and John D. Rockefeller, Jr., were outspoken supporters of eugenics, the racist pseudoscience determined to eliminate non-Nordic human beings from the genetic pool through segregation of non-white people, marriage restrictions, and sterilization because they were deemed “unfit” to reproduce. Moreover, Madison Grant, alumnus of Yale University and Columbia Law School, was able to “spread the doctrine of race purity all over the globe” through his societal status, social connections with other powerful white men, and book, The Passing of the Great Race. Among his supporters were Presidents Theodore Roosevelt, Warren Harding, and Calvin Coolidge, who lauded and lavishly praised Grant for his ideas about the scourge of interracial marriage, and how “infection” of inferior races through interracial birthing meant the obliteration of the white race.

These well-connected men, through an exercise in their power and influence, were able to affect legislation and popular thought of the

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151 Id.
152 Id.
153 Blake, supra note 55.
156 Serwer, supra note 150.
157 Serwer, supra note 150.
time through racist literature, media, and legislation. Such influential figures served as the driving force behind the furtherance of white supremacist ideology between the Reconstruction and present day.

II. WHITE SUPREMACISTS GROUPS TODAY (1990-2019)

White supremacist organizations have enjoyed a resurgence in membership over the past thirty years, ranging from neo-Nazi skinheads to paramilitary militia groups, with certain goals in mind, such as an antigovernment agenda and achieving the utopian vision of a white male power structure. As a result of the growing diversity in America, many contemporary white supremacist organizations have broadened their scope to include all non-white Americans because of the diversity in American populations resulting from waves of immigration in the United States. Like white supremacist organizations birthed during the Reconstruction, modern white supremacist organizations, are unified in the idea that America needs to be saved from the influence of non-white, non-Christian people, and their revulsion for Black American civil rights. Rooted in the same ideology as their forefathers post-Civil War, contemporary white supremacist organizations are growing as a result of change in the political structure stemming from social movements for racial equality.

With a resurgence and growth of white nationalist groups in recent years and increased number of racially motivated public shootings on the rise, law enforcement and prosecutors are struggling

158 Serwer, supra note 150.
160 See Anti-Defamation League, White Supremacists’ Anti-Semitic and Anti-Immigrant Sentiments Often Intersect, ADL (Oct. 27, 2018), https://www.adl.org/blog/white-supremacists-anti-semitic-and-anti-immigrant-sentiments-often-intersect. (stating that modern white supremacy is centered on the idea that whites must fight against the extinction of the white race at the growing numbers of non-whites).
162 Ferber, supra note 159.
163 SOUTHERN POVERTY LAW CENTER, THE YEAR IN HATE AND EXTREMISM REPORT 2019 (2019), https://www.splcenter.org/news/2020/03/18/year-hate-and-extremism-2019. “In 2019, the third year of the Trump presidency, data gathered by the Intelligence Project of the SPLC documents a continued and rising threat to inclusive democracy: a surging white nationalist movement that has been linked to a series of racist and antisemitic terror attacks and has
to find a way to address the issue of white supremacist terrorism in an effective and meaningful way. First Amendment free speech issues arise as an obstacle to prosecuting white supremacists, because hate speech is constitutionally protected. Moreover, while United States Attorneys can individually prosecute white nationalist public shooters on their crimes committed during the public shootings, each of these horrific instances are extreme and need to be circumvented by law enforcement in order to save American lives. Government officers can possibly thwart domestic terrorist activity by conducting earlier investigations and intervention of larger white supremacist organizations.

Furthermore, white supremacist organizations engage in a wide variety of illegal criminal activities to bolster their organization, such as racketeering, hate crimes, terrorist plots, and drug trafficking. While United States Attorneys cannot prosecute white supremacist organizations for protected First Amendment free speech issues, they can prosecute such groups for the traditional and organized crime in which they engage using the Racketeer Influenced and Corrupt Organizations (RICO) Act. The RICO Act, a federal statute designed to combat organized crime in the United States, provides for coincided with an increase in hate crime. Id. In 2019, there were 940 hate groups in the United States and a 55% increase in white national hate groups since 2017. Id. 


165 R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (holding that the First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed, such as sentiments that are anti-Semitic in nature); Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949) (holding that a priest’s anti-Semitic speech was protected by the First Amendment). To note, there is an extremely limited exception to the First Amendment, called the “fighting words” doctrine, which applies only to intimidating speech directed at a specific individual in a face-to-face confrontation that is likely to provoke a violent reaction. American Civil Liberties Union, Speech On Campus (2021), https://www.aclu.org/other/speech-campus. However, the Supreme Court hasn’t found the “fighting words” doctrine applicable in any of the cases that have come before it in the past 50 years, because the circumstances did not meet the narrow criteria. Id.; Mettler, supra note 13.

166 Coffey, supra note 8.

167 See infra notes 174–77.

168 See generally Mettler, supra note 13 (citing retired law professor and author of the RICO statute, G Robert Blakey’s, statement that 17 previous lone wolf gunmen should have been investigated by federal agencies to see if they were truly acting alone).


170 Mettler, supra note 13.

extended criminal penalties and civil causes of actions for acts performed as a part of an ongoing criminal organization. Previously used to take down similar organizations like New York’s Organized Crime Families and street gangs, such as MS-13, federal authorities can leverage the power of the statute to conduct investigations and prosecute white supremacist organizations for possible wrongdoing, in efforts to circumvent their terrorist activity.

A. Racially Motivated Shootings in America

As a result of the diversity in modern day America, white supremacist organizations no longer solely target Black Americans, and have broadened their scope to include all non-white Americans. The public shootings in Charleston, South Carolina; Pittsburgh, Pennsylvania; and other locations have highlighted the increasing frequency of racially motivated violence in the United States.

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173 See United States v. Persico, 832 F.2d 705, 718 (2d Cir. 1987) (affirming the lower court’s judgements of RICO conspiracy convictions for members of New York’s Colombo crime family); United States v. Langella, 804 F.2d 185, 186–190 (2d Cir. 1986) (affirming the lower court’s holding stating that the nine individuals that conspired to participate and participated in the affairs of an enterprise called “the Commission of La Cosa Nostra” in violation of the Racketeer Influenced and Corrupt Organizations Act cannot dismissed their case on double jeopardy grounds); Nine Alleged MS-13 Members Charged in Violent Racketeering Conspiracy., DEP’T OF JUST., OFF. OF PUB. AFF., (Dec. 19, 2018), https://www.justice.gov/opa/pr/nine-alleged-ms-13-members-charged-violent-racketeering-conspiracy (charging nine men, as members and associates of MS-13, with engaging in a racketeering conspiracy under RICO); see also Mettler, supra note 13.

174 On June 17, 2015, Dylann Roof entered Emanuel African Methodist Episcopal Church, a historically Black church in Charleston, South Carolina. After sitting in a bible study group for an hour, he opened fire. He was found guilty on 33 counts of federal hate crimes for murdering nine people and attempting to kill three others. Roof cited that he felt that white people were “second class citizens” and that he was inspired after he searched on Google for the phrase “black on white crime.” See Rebecca Hersher, Jury Finds Dylann Roof Guilty In S.C. Church Shooting, NPR (Dec. 15, 2016), https://www.npr.org/sections/thetwo-way/2016/12/15/505723552/jury-finds-dylann-roof-guilty-in-s-c-church-shooting.
Pennsylvania;\textsuperscript{175} San Diego, California;\textsuperscript{176} and El Paso, Texas,\textsuperscript{177} were racially motivated by mindless violence against an array of non-white people in America. In these attacks, the suspect cited racist, anti-Semitic, or anti-immigrant sentiment as a motivation for their senseless killing.\textsuperscript{178} While in some cases, it is still unknown if the shooters were part of white supremacist organizations, many have utilized the internet to join online communities that enforce their racist ideas.\textsuperscript{179}

More Americans now experience the fear of being murdered at random in public based on their cultural, religious, or ethnic background, similar to the fear that Black Americans felt during the Reconstruction era.\textsuperscript{180} Historian Carol Anderson, who wrote a book titled \textit{White Rage}\textsuperscript{181} about the lynching era, told CNN, “White men who are driving the surge in white supremacist violence . . . today are sending the same message to non-white Americans that their counterparts did in the lynching era: ‘You will never be safe wherever


\textsuperscript{177} On August 3, 2019, 22 people died, and 26 others were wounded, after a public shooting in a Wal-Mart located in El Paso, TX. Patrick Crusius was stopped by law enforcement at an intersection shortly after the shooting and told the officers he was the shooter. After waiving his Miranda Rights, Crusius told the officers that he drove from Dallas, TX to El Paso, TX specifically to target Mexicans. See Tara Law & Josiah Bates, \textit{El Paso Shooting Suspect Told Police He Was Targeting "Mexicans". Here’s What to Know About the Case}, \textit{TIME} (Aug. 9, 2019, 4:15 PM), https://time.com/5643110/el-paso-texas-mall-shooting/. \textit{See also Texas Man Charged with Federal Hate Crimes and Firearm Offenses related to August 3, 2019, Mass Shooting in El Paso}, \textit{DEP’T OF JUST., OFF. OF PUB. AFF.}, (Feb. 6, 2020), https://www.justice.gov/opa/pr/texas-man-charged-federal-hate-crimes-and-firearm-offenses-related-august-3-2019-mass. Crusius uploaded a document online entitled “The Inconvenient Truth” which states his attack was “response to the Hispanic invasion of Texas,” and that he was “simply defending my country from cultural and ethnic replacement brought on by the invasion.” \textit{Id.}

\textsuperscript{178} See supra notes 174–77.

\textsuperscript{179} See supra note 174; supra note 177; Donovan, supra note 7.

\textsuperscript{180} Blake, supra note 55.

\textsuperscript{181} \textit{CAROL ANDERSON, WHITE RAGE} (Bloomsbury USA, 1st ed. 2016).
Like lynchings in the Reconstruction era, the purpose of the random acts of violence is to intimidate nonwhites in America and discourage them from taking any power from whites in American society. Modern day white supremacists are also voicing fears about being replaced. In the 2017 marches in Charlottesville, white supremacists collectively chanted, “You will not replace us,” in a public display of their anti-immigrant sentiment. In the 2019 Texas Walmart mass shooting, the shooter wrote in his manifesto that he posted online that he was, “defending his country from cultural and ethnic replacement.” The rhetoric and violent action taken against non-whites are meant to intimidate non-white Americans, and such action is reminiscent of the sentiments made by white supremacists who lynched Black Americans during and following the Reconstruction.

B. First Amendment Protected Speech and Activity

In dealing with white supremacist organizations that champion hate speech against nonwhite Americans, the federal government has to balance their mission to address white extremism with safeguarding constitutionally protected First Amendment free speech rights. The First Amendment protects the right to freedom of speech or press and the right of people to peaceably assemble. The Supreme Court has upheld that there is no exception to the Free Speech Clause of the First Amendment that bans hateful or offensive speech. Thus, the racist, hateful speech that white nationalists espouse is constitutionally protected speech.

\[182\] Blake, supra note 55.
\[183\] Blake, supra note 55.
\[184\] Blake, supra note 55.
\[186\] Blake, supra note 55.
\[187\] Mettler, supra note 13.
\[188\] U.S. CONST. amend. I.
\[189\] See Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (holding that a federal law provision that prohibited the registration of trademarks that may disparage a living or deceased person violated the Free Speech Clause because the First Amendment fundamentally prohibits the banning of speech on the ground that it expresses offensive ideas).
protected. However, the First Amendment does not protect against crimes or illegal acts committed in pursuance of a group’s beliefs.

It is important to understand the depth of the reach of hate speech and its constitutionality. To illustrate this issue, we can look to the internet, which has been used by white supremacists not only as a tool to intimidate and harass people because of their race, but as a way of connecting with one another through online communities and spreading the reach of their message across the globe. White extremist groups draw in new audiences through the internet and use the internet as a tool to increase the reach of those who seek to spread white nationalism through terrorist acts. Hundreds of white supremacist websites operate on the World Wide Web to distribute information and propaganda, recruit new members, and drive traffic onto other white supremacy groups’ websites by featuring linked URLs to their

190 Cf. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (holding that the First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed, such as sentiments that are anti-Semitic in nature); Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949) (holding that a priest’s anti-Semitic speech was protected by the First Amendment).

191 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (holding that while the First Amendment protects the freedom of speech, it does not protect violence); Mettler, supra note 13.

192 Victoria L. Killion, CONG. RSCH. SERV., R45713, Terrorism, Violent Extremism, and the Internet: Free Speech Considerations (2019) (citing Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Comm. on the Judiciary, 116th Cong. 2 (2019) (statement of Kristen Clarke, President and Executive Director, Lawyers’ Committee for Civil Rights Under Law) (stating, “[T]he actions of online white supremacists are new in form but not substance. By directing hateful threats, intimidation, and harassment online at African Americans, Latinos, immigrants, Muslims, Jews, and other historically marginalized communities, they follow the same script as generations of white supremacists that assaulted civil rights activists at lunch counters, defaced houses of worship, and berated children on their way to school.”); Id. at 12 (statement of Eileen Hershonov, Senior Vice President, Policy, Anti-Defamation League) (positing that anonymous ‘‘imageboards,’ a type of online discussion forum originally created to share images,” have contributed to the “toxicity on social media,” and linking these forums to “targeted [online] harassment campaign[s]”); see also Rachel Hatzipanagos, How Online Hate Turns Into Real-Life Violence, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/ (reporting that “[s]everal incidents in recent years have shown that when online hate goes offline, it can be deadly”); Janet Reitman, U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How To Stop It., N.Y. TIMES MAGAZINE (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html (citing the renaissance in militant far right extremism, crediting the internet).


194 Donovan, supra note 7.
This implies an affiliation between the organizations, where a personal connection between the groups’ leaders could exist or simply to promote the other organization’s common value structure. White supremacists create robust communities on the internet through online discussion forums, such as 4chan, 8chan, and Reddit, which play a critical role in disseminating the extremist content. Unfortunately, without explicit intentions to commit violence, propaganda and content in support of white supremacy on the internet is constitutionally protected speech.

However, an individual is not constitutionally protected by the First Amendment when illegal actions are committed, stemming from hate speech. While hate speech itself is not a crime, a criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity is a criminal offense. Thus, any illegal actions taken by white supremacists acting on their racist beliefs is punishable by law. Further, white supremacist organizations engage in other illegal activity, that could serve as predicate offenses to use RICO to systematically investigate and prosecute their organizations without violating First Amendment rights.

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196 Id.
199 Cf. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (holding that the First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed, such as sentiments that are anti-Semitic in nature); Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949) (holding that a priest’s anti-Semitic statements were protected by the First Amendment); see also Victoria L. Killion, CONG. R.SCH. SERV., R45713, Terrorism, Violent Extremism, and the Internet: Free Speech Considerations (2019), (citing Kim R. Holmes, Commentary, The Origins of “Hate Speech”, THE HERITAGE FOUNDATION (Oct. 22, 2018), https://www.heritage.org/civil-society/commentary/the-origins-of-hate-speech (stating, “There are very serious problems with the concept of hate speech. For one thing, it fails to distinguish between legitimate political content, which is protected by the Constitution, and explicit intentions to commit violence, which are not.”)).
200 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (holding that while the First Amendment protects the freedom of speech, it does not protect violence); Mettler, supra note 13.
202 See id.
203 Mettler, supra note 13.
III. USING THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) ACT AS A METHOD OF PROSECUTING WHITE SUPREMACIST GROUPS

Without violating First Amendment rights, federal prosecutors should use the Racketeer Influenced and Corrupt Organizations Act (RICO) to systematically investigate and prosecute white supremacist organizations. RICO is a federal statute enacted in 1970 that is designed to combat organized crime in the United States and provides for extended criminal penalties and civil causes of action for acts performed as a part of an ongoing criminal organization.204 The federal statute allows prosecutors a larger degree of flexibility to hold anyone that takes part in the criminal enterprise responsible for its acts.205

Historically, RICO has been used in lawsuits and criminal prosecutions to target street and biker gangs.206 RICO is applicable when weeding out a deep, organizational pattern of racketeering.207 Since becoming federal law and being adopted in state statutes, “RICO has been used in lawsuits and criminal prosecutions to target New York’s five organized crime families, sex abuse in the Catholic church, corporate executives accused of contributing to the opioid epidemic, and street gangs such as MS-13 and the Bloods and the Crips.”208


205 Zraick, supra note 172.

206 Mettler, supra note 13; Nine Alleged MS-13 Members Charged in Violent Racketeering Conspiracy, DEP’T OF JUST., OFF. OF PUB. AFF., (Dec. 19, 2018), https://www.justice.gov/opa/pr/nine-alleged-ms-13-members-charged-violent-racketeering-conspiracy (Nine men, as members and associates of MS-13, were charged with engaging in a racketeering conspiracy under RICO).


To convict a defendant under RICO, the government must prove that: (a) the defendant engaged in two or more instances of racketeering activity; and (b) that the defendant participated, invested, or maintained an interest in a criminal enterprise affecting interstate or foreign commerce.

To convict a defendant, a prosecutor must allege the commission of at least two predicate offenses in the span of ten years of one another to establish a pattern of racketeering activity. RICO defines “racketeering activity” by the enumeration of state and federal criminal offenses, which includes any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.

An “enterprise” as defined in 18 U.S.C. § 1961(4) states that an organization is an enterprise if, a “group of individuals associated in fact[,] although not a legal entity,” which was engaged in, and the activities of which affected, interstate and foreign commerce. The general definition and language of enterprise in the RICO statute allows prosecutors to apply RICO broadly.


210 Id. § 1962.

211 Id. § 1961(5). Although RICO requires two acts of racketeering activity, the Supreme Court has suggested that more than two acts may be required. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237–39 (1989).

212 Id. § 1961(1) (racketeering activities include violent crimes such as murder, arson, and kidnapping; crimes involving illicit goods and services, such as narcotics and counterfeiting, and crimes involving payments and commercial fraud).


214 Id. § 1961(4).

215 See David M. Ludwick, Restricting RICO: Narrowing the Scope of Enterprise, 2 CORNELL J.L. & PUB. POL. 381, 381 (1993) (arguing that the scope of RICO’s definition of “enterprise” is too broad and needs to be narrowed to not include loosely-affiliated criminal groups called “associations in fact”).
free speech protections . . . ”216 Blakely further explains, “RICO is a theory of investigation, it’s a theory of trial and it’s a theory of sentence.”217 When it was first enacted, RICO gave law enforcement broad investigative powers to infiltrate potentially criminal enterprises.218 Today, it could prove to be a powerful tool in addressing the issue of white supremacist terrorist activity.

While some white supremacist organizations only engage in First Amendment protected activities, others have been known to engage in illegal activities that are not protected by the Constitution, such as those outlined in United States v. Yarborough.219 As outlined in previous sections, white supremacists incited acts of public violence and lynchings during the Reconstruction.220 More recently, according to an Anti-Defamation League report, white supremacists accounted for fifty-four percent of domestic extremist-related murders in the past ten years.221 Forty-three people linked to a Georgia white supremacist street gang, called the “Ghostface Gangsters,” were charged with firearm and drug trafficking crimes such as possession with intent to distribute methamphetamine,222 while thirty-nine others from two Florida white supremacists street gangs, called “Unforgiven” and “United Aryan Brotherhood,” were involved in drug trafficking meth and fentanyl and possessed 110 illegal weapons.223 Instead of only prosecuting individuals involved in the previously described crimes, RICO would allow for the prosecution of all involved in the illegal activities carried out by the organization including top leadership, making it a powerful tool for law enforcement and prosecutors to use against structured crime organizations, such as white supremacist groups.224

216 Mettler, supra note 13.
217 Mettler, supra note 13.
218 Mettler, supra note 13.
219 See infra Section III.A.
220 See supra Section I.C.
A. Using RICO Against White Supremacist Organizations: United States v. Yarbrough

In 1988 a case, United States v. Yarbrough, the United States Ninth Circuit Court of Appeals affirmed RICO convictions for a white supremacist group, called the “Order” or “Bruders Schweigen (Silent Brothers),” for conspiring to violate and violating RICO. In order to fund their activities, defendants robbed armored cars and certain businesses, and committed two murders. The group was formed in 1983 by Robert Matthews and other antisemitic, like-minded individuals to overthrow the United States government because they “perceived the government to be dominated by Jews.” The members of the group were known to have ties to other various radical right-wing groups, such as the KKK, National Alliance (neo-Nazi organization), and the Christian Identity (a Christian organization with radically racist and anti-Semitic views).

The Order engaged in illegal activities to raise funds for their organization by attempting to rob a store, counterfeiting money, and robbing armored cars. The group also murdered two people in May and June of 1984. The first person was Richard West, a prospective member of the group who was believed to be a government agent. The second person was Alan Berg, a Jewish Denver radio talk show host. Berg was critical of right-wing white nationalist groups like the Order on his radio show. Berg was brutally machine-gunned down in the driveway in front of his home.

In November 1984, federal and state law enforcement agencies started to make arrests of members from the Order. The government
indicted 23 defendants, twelve of whom pled guilty before the trial.\textsuperscript{239} The jury found all of the appellants guilty of the substantive RICO count and the conspiracy RICO count.\textsuperscript{240} One of the defendants alleged that his conviction on the RICO conspiracy count violated his first amendment rights of political advocacy and association.\textsuperscript{241} Under 18 U.S.C. \textsection{} 1962(c) and (d), Congress has made association with an enterprise one element of a RICO offense.\textsuperscript{242} This element does not unconstitutionally punish associational status. The courts have recognized that RICO proscribes conduct and not status or belief.\textsuperscript{243} Thus, because RICO does not use associational status or belief to prosecute, and instead uses prerequisite crimes committed by a racketeering organization involved in interstate commerce, it would not infringe on constitutionally protected First Amendment issues.\textsuperscript{244}

\textit{B. Arkansas Case that Indicts Fifty-Four in Investigation Targeting Arkansas Based White Supremacy Group Using RICO.}\textsuperscript{245}

A case in Arkansas\textsuperscript{246} is using RICO to prosecute the white supremacist group, New Aryan Empire (NAE).\textsuperscript{247} The indictment of fifty-four NAE members can serve as an outline for the key elements that a law enforcement agency or prosecutor could factor in to use RICO to systematically prosecute white supremacist organizations. Under 18 U.S.C. \textsection{} 1962(d), the fifty-four NAE members were charged with conspiracy to violate RICO.\textsuperscript{248} “Assistant Attorney General Brian A. Benckowski of the Justice Department’s Criminal Division, U.S.

\textsuperscript{239} Yarbrough, 852 F.2d at 1527.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.} at 1528.
\textsuperscript{242} \textit{Id.} at 1540–41 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)); United States v. Rubio, 727 F.2d 786, 792 (9th Cir. 1984)).
\textsuperscript{243} Rubio, 727 F.2d at 792.
\textsuperscript{244} See \textit{id.}
\textsuperscript{245} At the time of publishing in the Spring of 2021, this case was in pre-trial. Due to the COVID-19 pandemic that swept across the world in 2020, this case was delayed, citing the public health concerns associated with the spread of COVID-19 while properly conducting a jury trial. See USA v. Loadholt et al, Docket No. 4:17-cr-00293 (E.D. Ark. Oct 03, 2017), Court Docket: Report for Status Conference on January 4, 2021.
\textsuperscript{246} USA v. Loadholt et al, Docket No. 4:17-cr-00293.
Attorney Cody Hiland for the Eastern District of Arkansas,” and the lead agents from the Federal Bureau of Investigation, the U.S. Drug Enforcement Administration (DEA) and Little Rock District Office and Acting Resident Agent in Charge Warren Newman of the Bureau of Alcohol, Tobacco, Firearms, & Explosives (ATF) Little Rock District Office made the announcement that they will be using RICO to prosecute dozens of members from NAE.249

The NAE organization constituted an “enterprise” as defined in 18 U.S.C. § 1961(4), stating that an organization is an enterprise if “a group of individuals associated in fact, although not a legal entity, which was engaged in, and the activities of which affected, interstate and foreign commerce.”250 The NAE is being charged with murder, kidnapping, maiming individuals for cooperating with law enforcement, and conspiracy to distribute methamphetamine.251

The indictment outlines the hierarchical structure of the organization, the code of conduct, the responsibilities of the members, the collaboration of groups for criminal objectives, collecting dues, communication between members including code names and words, branding using slogans and symbols, the criminal purposes of the enterprise, the means and methods of the organization, and the acts and the means used for conspiracy.252 NAE’s hierarchical structure and organization is much like the crime organizations RICO is designed to combat against. Factors used in the NAE indictment could be used to help outline an indictment under RICO.253

IV. CONCLUSION

As we work to find solutions to correct the injustices in our law, culture, politics, and institutions wrongfully bestowed upon Black and non-white Americans, as a country, we must face the truth: the ghosts of slavery and the Civil War still haunt us today.254 In order to move forward, we must understand our past. White supremacy is a problem

250 Indictment, supra note 248, at 3.
251 Indictment, supra note 248, at 3, 13–21.
252 Indictment, supra note 248, at 5–10.
253 Indictment, supra note 248, at 5–10.
deeply rooted in our nation’s history. During the Civil War and Reconstruction, heroic efforts from legislators, prosecutors, and law enforcement made great strides for Black American civil rights. However, we as a nation still bear the scars of post-Reconstruction battles for Black equality lost. Though it has been over a hundred years since the Reconstruction, apparitions rooted in the ideology of *Dred Scott* and white supremacist terrorism are still issues we, as a nation, have yet to solve.

Like white supremacists in the South during the Reconstruction, white supremacists today are driven by their racism and concern that their power within the political structure is dwindling. In recent years, after the election of America’s first Black president and the country’s diversity only growing, we have seen a dramatic revival in white supremacy. Like their counterparts during the Reconstruction, white supremacists have taken to violent action to display their intolerance in attempts of intimidating non-white Americans. Racially motivated public shootings in recent history have shown what pain those motivated by ignorance and hate can cause.

However, the RICO Act can provide United States Attorneys and law enforcement officers a way of investigating and prosecuting white supremacist organizations, while respecting First Amendment rights, by allowing to hold anyone that takes part in the criminal enterprise responsible for its actions. It allows for further investigations of illegal activity within the organization. The RICO Act is a powerful way for prosecutors and law enforcement officers to, while balancing constitutionally protected free speech rights, address the issue of white supremacy by allowing for the systematic prosecution of any crime-committing bad actors within the organization.

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255 See *supra* Section I.D.–Section I.E.
256 See *supra* Section II.
257 Devega, *supra* note 254.
258 ADL Center on Extremism, *supra* note 222; see also Southern Poverty Law Center, 2018 *Hate Map*, SOUTHERN POVERTY LAW CENTER (2018), https://www.splcenter.org/hate-map. In 2018, the Southern Poverty Law Center documented 590 white nationalist, racist skinhead, neo-Nazi, neo-Confederate, KKK, radical Catholicism, anti-immigrant, anti-Muslim, and anti-LGBT hate organizations. *Id.*
259 See *supra* Section II.A.
260 See *supra* Section II.A.
261 See *supra* Section III.