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Cherie L. Deogracias

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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.¹ 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.² 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;³ Pittsburgh, Pennsylvania;⁴ San Diego, California;⁵ and El Paso, Texas,⁶ 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.⁷ The term “lone wolf” suggests

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* JD Candidate 2021, University of Maryland Francis King Carey School of Law. The author would like to acknowledge, with gratitude, the editors of the *Maryland Journal of Race, Religion, Gender, and Class* for their thoughtful feedback and contributions to this Comment. Many thanks to Sydney Goetz and Kevin Kidwell for their steady support and meticulous editing throughout the publishing process. The author would like to thank her mother, Cecile Deogracias, father, Francis Deogracias, and brother Charlie Deogracias, who worked to raise her and taught her through hard work and determination, anything is possible. Finally, the author would like to thank Alex Miller, for his patience, support, love, and encouragement throughout law school.

¹ See *infra* Section III.

² See *infra* Section II; see also Devega, *infra* note 254.

³ See *infra* note 174.

⁴ See *infra* note 175.

⁵ See *infra* note 176.

⁶ See *infra* note 177.

⁷ Beau D. Barnes, *Confronting the One-Man Wolf Pack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism*, 92 BOSTON L. REV. 1613, 1614 (2012). To note, the author in this 2012 law review article argues that lone wolves do not pose a significant threat to the United States and that the “contemporary lone wolf . . . shares only an

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 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, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 N.W. L. REV. 1213, 1215 (2012) (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>) (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>) (citing the FBI found no motive for the shooting and estimates the total number of injuries at nearly 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-ncna1039201>; 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*, REUTERS (Aug. 5, 2019), <https://www.reuters.com/article/us-newzealand-shooting-nato/lone-wolf-attackers-inspire-each-other-nato-chief-says-idUSKCN1UV0FB>; 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> (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 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, *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

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 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-counteracting-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_5dfd34d2e4b0843d35fc0835; 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.¹⁴ Part II details the current state of white supremacist organizations in America.¹⁵ Part III outlines the RICO Act and how prosecutors can use the statute to prosecute white nationalist enterprises.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ After more than two centuries of legalized slavery²⁰ 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

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 Katie Mettler, *Why Free Speech Makes it Difficult to Prosecute White Supremacy in America*, WASH. POST (Aug. 8, 2019, 9:00 AM), <https://www.washingtonpost.com/national-security/2019/08/08/why-free-speech-makes-it-difficult-prosecute-white-supremacy-america/>.

¹⁴ See *infra* Section I.

¹⁵ See *infra* Section II.

¹⁶ See *infra* Section III.

¹⁷ See *infra* Section III-IV.

¹⁸ Adam Serwer, *White Nationalism's Deep American Roots*, THE ATLANTIC (April 2019), <https://www.theatlantic.com/magazine/archive/2019/04/adam-serwer-madison-grant-white-nationalism/583258/>.

¹⁹ Daniel Nasaw, *Who, What, Why: How many soldiers died in the U.S. Civil War?*, BBC MAGAZINE (Apr. 4, 2012), <https://www.bbc.com/news/magazine-17604991>.

²⁰ The practice of slavery began in 1619 in America when 20 African slaves were brought ashore in a British colony in Virginia. See History.com, *Slavery in American*, History (Aug. 18, 2019), <https://www.history.com/topics/black-history/thirteenth-amendment>. On December 6, 1865, the nation ratified the 13th Amendment to officially end the practice of slavery in the United States. See U.S. Nat'l Archives, *America's Historical Documents, 13th Amendment to the U.S. Constitution: Abolition of Slavery* (Sept. 8, 2016), <https://www.archives.gov/historical-docs/13th-amendment>.

social views and norms of the era.²¹ The Three Fifths Compromise²² and Fugitive Slave Act²³ underscored that slavery was embedded in constitutional and federal law,²⁴ 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*,²⁵ 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.²⁶ 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”²⁷ and so inferior that “they had no rights which the white man was bound to respect.”²⁸ 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.²⁹

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

²¹ See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857); Michael E. Ruane, *A Brief History of the Enduring Phony Science that Perpetuates White Supremacy*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/local/a-brief-history-of-the-enduring-phony-science-that-perpetuates-white-supremacy/2019/04/29/20e6aef0-5aeb-11e9-a00e-050dc7b82693_story.html.

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. Ohline, *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).

²⁴ Eric Foner, *The Supreme Court and the History of the Reconstruction-And Vice Versa*, 112 COLUM. L. REV. 1585, 1586 (2012).

²⁵ 60 U.S. 393 (1857).

²⁶ *Id.* at 404.

²⁷ *Id.* at 407.

²⁸ *Id.*

²⁹ See *id.* at 419–20.

inferiority.³⁰ The case declared that because Black Americans were “beings of an inferior order”³¹ 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.”³² The *Dred Scott* language reflected the racist, anti-Black sentiments held at that time by the dominantly white political community of the United States.³³ 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.³⁴

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.³⁵ 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.³⁶

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)³⁷ 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.³⁸ The United States Congress and judiciary attempted to address the political, social, and economic injustices

³⁰ Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUT. L. REV. 387, 391 (1967).

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.

³⁷ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 582 (1988).

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 abolishment 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

³⁹ Eric Foner, *Reconstruction*, ENCYC. BRITANNICA (Sept. 10, 2020), <https://www.britannica.com/event/Reconstruction-United-States-history>.

⁴⁰ U.S. CONST. amend. XIII. The Thirteenth Amendment of the Constitution was passed by Congress on January 31, 1865 and ratified on December 6, 1865 to end the practice of slavery in the United States of America. See NAT’L CONST. CTR., *Interactive Constitution, 13th Amendment: Abolition of Slavery*, <https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiii> (last visited October 30, 2019); *13th Amendment, HISTORY* (May 16, 2019), <https://www.history.com/topics/black-history/thirteenth-amendment>.

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.⁵⁰ President Andrew Johnson, a staunch advocate for states' sovereignty and whites' rights, vetoed the bill.⁵¹ However, by an overwhelming vote of 122 to 41, Congress overrode President Johnson's veto and passed the Civil Rights Act of 1866⁵² to enact legislation designed to protect the civil rights of Black Americans.⁵³ The Civil Rights Act of 1866 declared that all people born in the United States are citizens⁵⁴ and conferred the right to property ownership to formerly enslaved people.⁵⁵ Black men were also given the right to vote in the South in 1867.⁵⁶ The Fifteenth Amendment passed a few years later in 1870, allowing for national Black male suffrage.⁵⁷

The Wartime Amendments (the thirteenth, fourteenth, and fifteenth Amendments) were rights created by national force.⁵⁸ They were ratified by national powers.⁵⁹ Thus, the branches of the national government maintain the right and duty to protect these Amendments⁶⁰ 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.⁶¹ 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.⁶²

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

⁵⁰ DEBORAH WHITE, FREEDOM ON MY MIND 391 (2012).

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).

⁵³ History, Art, & Archives, *The Civil Rights Bill of 1866*, UNITED STATES HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited Oct 30, 2019). The Civil Rights Act was the first significant piece of legislation in American history that was enacted despite presidential veto. See Foner, *supra* note 24.

⁵⁴ The Civil Rights Act of 1866, 14 Stat. 27 (1866). The Civil Rights Act of 1866 excluded untaxed Native Americans. *Id.*

⁵⁵ *Id.*; see also John Blake, *Why El Paso and Other Recent Attacks in the US are Modern-day Lynchings*, <https://www.cnn.com/2019/08/17/us/lynchings-racism-new-era-blake/index.html> (last visited Aug. 19, 2019).

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.⁶³ Black Americans made up a significant portion of the population in many Southern states,⁶⁴ 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,⁶⁵ which threatened white power throughout the South.

As a result of such fear, racist sentiments against Black Americans ran rampant through the South.⁶⁶ 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.⁶⁷ These white supremacist organizations used violence to terrorize Black Americans to try to prevent them from exercising their newly minted civil rights.⁶⁸ White supremacist organizations attacked all forms of Black power to prevent Black Americans in the South from gaining any political power.⁶⁹

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.⁷⁰ 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.⁷¹ White supremacists continued to treat freedmen as

⁶³ Foner, *supra* note 39.

⁶⁴ James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. CIV. RTS. CIV. LIB. L. REV. 385, 386 (2014) (citing U.S. CENSUS BUREAU, TABLE A-18. RACE FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES 1870 (2002)), available at, <http://www.census.gov/population/www/documentation/twps0056/tabA-18.pdf> (last visited Nov. 25, 2019)). “African Americans made up a majority of the population in Mississippi, South Carolina, and Louisiana; more than 40% in Alabama, Florida, Georgia, and Virginia; and more than a quarter in Arkansas, North Carolina, Tennessee, and Texas.” *Id.*

⁶⁵ *Id.* at 387.

⁶⁶ *Slavery by Another Name, White Supremacy and Terrorism*, <https://www.pbs.org/tpt/slavery-by-another-name/themes/white-supremacy/> (last visited: Jan. 7, 2021).

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.⁷²

Black Americans who justly asserted their civil rights were met with violence by white supremacists.⁷³ Between 1865 and 1866, the Freedman's Bureau⁷⁴ registered over a thousand murders, often documenting the action that elicited the violence and the outcome.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.⁷⁶ In other cases, whites' violence occurred completely unprovoked.⁷⁷ Overwhelmingly, law enforcement failed to arrest, charge, or convict the white assaulters.⁷⁸ Moreover, Republican political leaders in the South that sympathized with Black Americans were met with harsh treatment.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 lynchings⁸⁰ and

⁷² Kaczorowski, *supra* note 35, at 51.

⁷³ Kaczorowski, *supra* note 35, at 51.

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.*

⁷⁵ American Experience, *Southern Violence During the Reconstruction*, <https://www.pbs.org/wgbh/americanexperience/features/reconstruction-southern-violence-during-reconstruction/> (last visited Oct. 30, 2019); see generally Freedman's Bureau Online, *Freedmen's Bureau Records Relating to Murders and Outrages*, <https://www.freedmensbureau.com/outrages.htm> (last visited Oct. 30, 2019).

⁷⁶ American Experience, *Southern Violence During the Reconstruction*, <https://www.pbs.org/wgbh/americanexperience/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.

⁷⁷ Pope, *supra* note 64, at 398.

⁷⁸ See generally FREEDMAN'S BUREAU, *supra* note 74.

⁷⁹ Kaczorowski, *supra* note 35, at 51.

⁸⁰ Lynchings are defined as the mob action of killing someone without legal authority. See Lynch, *DICTIONARY.COM*, <https://www.dictionary.com/browse/lynching> (last visited Oct. 30, 2019). A typical lynching would begin with accusations of wrongdoing against a Black person, followed by the assembly of a lynch mob, then unimaginable physical torture of the accused, usually ending with dismemberment of the body, being hung from a tree, and set on fire. Jamiles Lartey & Sam Morris, *How White Americans Used Lynchings to Terrorize and Control Black People*, THE GUARDIAN (Apr. 26, 2018, 2:00 PM), <https://www.theguardian.com/us-news/2018/apr/26/lynchings-memorial-us-south-montgomery-alabama>.

other public acts of violence to destroy Black power leadership and terrorize Black Americans.⁸¹ Lynching was meant to send a message: “Do not register to vote. Do not apply for a white man’s job.”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.⁸³ The majority of the white supremacist murderers responsible for the lynchings of Black Americans were never punished for their heinous crimes.⁸⁴ The thousands of people, including families with children, who attended and watched (and many times celebrated) the lynchings,⁸⁵ perpetuated the generational furtherance of white supremacist thought and the continuance of white nationalist ideology in America.

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.⁸⁶ The Enforcement Act of 1870,⁸⁷ 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.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 1866.⁸⁹ These laws were originally aimed at destroying the Ku Klux Klan (KKK) and minimizing political intimidation and other forms of unconstitutional election activity.⁹⁰ The Second Force Act allowed federal judges and United States marshals to supervise

⁸¹ Blake, *supra* note 55.

⁸² Blake, *supra* note 55 (citing Dr. David Pilgrim, *The Brute Caricature*, FERRIS STATE U. (Nov. 2000), <https://www.ferris.edu/jimcrow/brute/>).

⁸³ Blake, *supra* note 55.

⁸⁴ Lartey, *supra* note 80.

⁸⁵ Lartey, *supra* note 80.

⁸⁶ Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421, 421–22 (1987).

⁸⁷ Enforcement Act of 1870, 41st Cong., Ch. 114, 16 Stat. 141 (1870).

⁸⁸ United States Senate, *The Enforcement Acts of 1870 and 1871*, SENATE.GOV, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Jan. 6, 2021).

⁸⁹ *Id.*

⁹⁰ Cresswell, *supra* note 86, at 422.

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.

⁹⁹ 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.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, threaten, or intimidate any citizen . . .” from any constitutionally protected right.¹⁰¹ From the 1871-1884 Enforcement Acts Cases, federal prosecutors convicted 1,529 individuals.¹⁰² In 1872, more than twelve hundred Enforcement Acts cases were pending in South Carolina alone.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.¹⁰⁴

Federal court judges upheld many of the prosecutions brought by prosecutors.¹⁰⁵ Circuit court judges did not require allegations of state action or inaction or require a showing of racial motivation.¹⁰⁶ Instead, federal court judges yielded to Congress, “echoing *McCulloch v. Maryland*,”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.”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.¹⁰⁹

¹⁰⁰ Cresswell, *supra* note 86, at 422.

¹⁰¹ Cresswell, *supra* note 86, at 422.

¹⁰² Cresswell, *supra* note 86, at 423.

¹⁰³ Cresswell, *supra* note 86, at 423.

¹⁰⁴ Cresswell, *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, *supra* note 86, at 423.

¹⁰⁵ Pope, *supra* note 64, at 402.

¹⁰⁶ Pope, *supra* note 64, at 403–04.

¹⁰⁷ 17 U.S. 316 (1819). This case asserts that the national government trumps state action in areas of constitutionally granted authority. *Id.*

¹⁰⁸ Pope, *supra* note 64, at 403–04.

¹⁰⁹ ROBERT KACZOROWSKI, *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. *Id.* “Twenty-eight men were indicted under sections 6 and 7 of the Enforcement Act of 1870. *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. *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. *Id.* The defendants petitioned the court for their release under a writ of habeas corpus. ROBERT KACZOROWSKI, *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

1876, 94–95 (1985). The petition claimed that they were being held illegally since the crimes with which they were charged did not constitute offenses against the Constitution and the laws of the United States. *Id.* The basis of their claim was that the rights to life and liberty were not nationally enforceable rights of United States citizenship. *Id.* Hence, the violations of these rights as charged in the indictment were offenses against the laws of the state of Mississippi that were cognizable only in the courts of that state. *Id.* Judge Hill was troubled about how to handle the questions presented in the defendants’ habeas petition. *Id.* He expressed his anxiety in a letter to Attorney General Akerman.” ROBERT KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876, 94–95* (1985).

¹¹⁰ Pope, *supra* note 64, at 403 (citing *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282)).

¹¹¹ Pope, *supra* note 64, at 403 (citing *United States v. Crosby*, 25 F. Cas. 701, 704–05 (C.C.S.C. 1871) (No. 14,893)).

¹¹² 80 U.S. 251 (1872).

¹¹³ KACZOROWSKI, *supra* note 109, at 98.

¹¹⁴ LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1971-1872*, at 55 (2004); KACZOROWSKI, *supra* note 109, at 98.

¹¹⁵ KACZOROWSKI, *supra* note 109, at 98 (citing *United States v. Avery*, 80 U.S. (13 Wall.) 251 (1871)); Letter from Amos T. Akerman, U.S. Att’y Gen., to D.T. Corbin, U.S. Att’y, (Nov. 13 and 17, 1871), available at <https://whitmanarchive.org/manuscripts/scribal/tei/nar.02159.html>.

¹¹⁶ KACZOROWSKI, *supra* note 109, at 93–99.

supremacy in the South and enforce the voting rights of Black Americans in the United States.¹¹⁷ 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*.¹¹⁸ *Cruikshank* marked the beginning of the decline in the fight for civil rights for Black Americans post-Reconstruction.¹¹⁹

F. United States v. Cruikshank and the End of the Reconstruction

The 1876 Supreme Court decision in *United States v. Cruikshank*¹²⁰ 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.¹²¹ In *Cruikshank*, the Supreme Court held that the constitutional rights granted by the First Amendment¹²² and Second Amendment¹²³ were rights that state governments — rather than the federal government —

¹¹⁷ 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.

¹¹⁸ 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.

¹¹⁹ *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).

¹²⁰ 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.

¹²¹ McClusky, *supra* note 118.

¹²² U.S. CONST. amend. I. The First Amendment grants the right to free speech. *Id.*

¹²³ U.S. CONST. amend. II. The Second Amendment grants the right to bear arms. *Id.*

were entitled to give.¹²⁴ Thus, federal prosecution was not proper and overturned the convictions of the white defendants in the case.¹²⁵ *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.¹²⁶ Justice Bradley's dissenting opinion in *Cruikshank* marked the first clear sign that the Supreme Court would adopt a highly critical attitude toward laws enforcing the Wartime Amendments.¹²⁷

The Court's decision in *Cruikshank* delivered a crippling blow to progress for civil rights for African Americans in the South.¹²⁸ For Black Americans in the South, reliance on state protection meant little to no protection at all because state governments were “*de facto* supporters of ‘private’ racism such as the KKK and lynch mobs.”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.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.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.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.¹³³

¹²⁴ United States v. Cruikshank, 92 U.S. 542, 552–54 (1876).

¹²⁵ *Id.* at 552–53; See also Encyclopedia.com, *U.S. v. Cruikshank: 1875* (2020), <https://www.encyclopedia.com/law/law-magazines/us-v-cruikshank-1875>.

¹²⁶ Cruikshank, 92 U.S. at 553–54.

¹²⁷ KACZOROWSKI, *supra* note 109, at 143; Pope, *supra* note 64, at 408.

¹²⁸ Pope, *supra* note 64, at 412 (citing KACZOROWSKI, *supra* note 109, at 155). The violence against Black Americans continued almost immediately after the *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.

¹²⁹ Encyclopedia.com, *U.S. v. Cruikshank: 1875* (2020), <https://www.encyclopedia.com/law/law-magazines/us-v-cruikshank-1875>.

¹³⁰ *Id.*

¹³¹ *Compromise of 1877*, HISTORY (Nov. 27, 2019), <https://www.history.com/topics/us-presidents/compromise-of-1877>.

¹³² *Id.*

¹³³ Kinoy, *supra* note 30, at 396.

*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.¹³⁴ During this time, prosecutors and law enforcement were poorly equipped to prosecute violent white supremacists.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.¹³⁶

In 1883, the Supreme Court delivered another deafening blow in the *Civil Rights Cases*.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.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 *Civil Rights Cases*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,¹⁴⁰ further emboldening white supremacists and weakening the powers of a Republican Congress to enact legislation in efforts to remedy racial discrimination.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

¹³⁴ Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 155 (1995).

¹³⁵ *Id.* at 159.

¹³⁶ *Id.*

¹³⁷ See *infra* Section I.H.

¹³⁸ See *infra* Section I.I.

¹³⁹ 109 U.S. 3 (1883).

¹⁴⁰ *Id.* at 20–25.

¹⁴¹ Melvin I. Urofsky, *Civil Rights Cases*, ENCYC. BRITANNICA (Oct. 8, 2019), <https://www.britannica.com/topic/Civil-Rights-Cases>.

outlaw private acts of racial discrimination using the Fourteenth Amendment.¹⁴² Despite the national government's responsibility to uphold and defend the citizenship rights of all Americans, the decision in the *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.¹⁴³

The *Civil Rights Cases* marked a return to strengthening the tenets of white supremacy in mirroring the language in the *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.¹⁴⁴ However, Justice Harlan in his dissenting opinion argued that the Wartime Amendments disavowed the idea of Black racial inferiority.¹⁴⁵ In stark response to the opinion in *Dred Scott*, Justice Harlan argues the Wartime Amendments renounced the idea of Black inferiority and codified the idea of Black equality into law.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.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."¹⁴⁸

The *Civil Rights Cases* continued the judicial ideological thought incepted by the *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.¹⁴⁹

¹⁴² The *Civil Rights Cases*, 109 U.S. at 25.

¹⁴³ *The 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, *Civil Rights Cases*, ENCYC. 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").

¹⁴⁴ Kinoy, *supra* note 30, at 393.

¹⁴⁵ The *Civil Rights Cases*, 109 U.S. at 30–36 (Harlan, J., dissenting); Kinoy, *supra* note 30, at 393.

¹⁴⁶ Kinoy, *supra* note 30.

¹⁴⁷ Kinoy, *supra* note 30.

¹⁴⁸ Kinoy, *supra* note 30.

¹⁴⁹ See *supra* Section I.I.

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.¹⁵⁰ 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.¹⁵² President Woodrow Wilson helped revive the KKK by praising “The Birth of a Nation,” a movie depicting the KKK as heroes.¹⁵³ Alexander Graham Bell and John D. Rockefeller, Jr., were outspoken supporters of eugenics,¹⁵⁴ 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.¹⁵⁵ 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*.¹⁵⁶ 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.¹⁵⁷

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

¹⁵⁰ Adam Serwer, *White Nationalism’s Deep American Roots*, THE ATLANTIC (April 2019), <https://www.theatlantic.com/magazine/archive/2019/04/adam-serwer-madison-grant-white-nationalism/583258/>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Blake, *supra* note 55.

¹⁵⁴ Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, THE NEW YORKER (Apr. 27, 2016), <https://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement>.

¹⁵⁵ Edwin Black, *The Horrifying American Roots of Nazi Eugenics*, GEO. WASH. UNIV. HIST. NEWS NETWORK (Sept. 2003), <http://hnn.us/article/1796>.

¹⁵⁶ Serwer, *supra* note 150.

¹⁵⁷ Serwer, *supra* note 150.

time through racist literature, media, and legislation.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

With a resurgence and growth of white nationalist groups in recent years and increased number of racially motivated public shootings on the rise,¹⁶³ law enforcement and prosecutors are struggling

¹⁵⁸ Serwer, *supra* note 150.

¹⁵⁹ Abby L. Ferber & Michael Kimmel, *Reading Right: The Western Tradition in White Supremacist Discourse*, 33 SOCIO. FOCUS 193, 193 (2000).

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).

¹⁶¹ *Compare Slavery by Another Name, White Supremacy and Terrorism*, <https://www.pbs.org/tpt/slavery-by-another-name/themes/white-supremacy/> (last visited Jan. 7, 2021), with Anti-Defamation League, *supra* note 160, and Simon Clark, *How White Supremacy Returned to Mainstream Politics*, Center for American Progress (Jul. 1, 2020 9:02am), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics/>.

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.¹⁶⁴ First Amendment free speech issues arise as an obstacle to prosecuting white supremacists, because hate speech is constitutionally protected.¹⁶⁵ Moreover, while United States Attorneys can individually prosecute white nationalist public shooters on their crimes committed during the public shootings,¹⁶⁶ each of these horrific instances are extreme¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ The RICO Act,¹⁷¹ 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.*

¹⁶⁴ 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> (outlining the lack of governmental infrastructure and resources needed to address home-grown violent extremists driven by domestic ideology like white supremacy).

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).

¹⁶⁹ ANTI-DEFAMATION LEAGUE, *FUNDING HATE: HOW WHITE SUPREMACISTS RAISE THEIR MONEY* 9 (2017), <https://www.adl.org/sites/default/files/documents/adl-report-funding-hate-how-white-supremacists-raise-their-money.pdf>.

¹⁷⁰ Mettler, *supra* note 13.

¹⁷¹ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2016).

extended criminal penalties and civil causes of actions for acts performed as a part of an ongoing criminal organization.¹⁷² 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.¹⁷³

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;¹⁷⁴ Pittsburgh,

¹⁷² *Id.*; see also Karen Zraick, *Arkansas White Supremacist Group Conspired to Kill to Protect Drug Sales, Prosecutors Say*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/arkansas-white-supremacists.html>.

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;¹⁷⁵ San Diego, California;¹⁷⁶ and El Paso, Texas,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.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.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.¹⁸⁰ Historian Carol Anderson, who wrote a book titled *White Rage*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

¹⁷⁵ On October 27, 2018, Robert D. Bowers entered the Tree of Life Congregation, a Jewish church in Pittsburgh, Pennsylvania, armed with an AR-15-style assault rifle and at least three handguns, shouting anti-Semitic slurs. He killed at least 11 people and wounded six others. See Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

¹⁷⁶ On April 27, 2019, a suspect opened fired in a synagogue during a Passover celebration, later stating to dispatchers that he did it because “Jewish people are destroying the white race.” One person died and three others were injured. See Matthew Fuhrman, Jack Date, & Anthony Rivas, *1 dead, 3 injured in shooting at San Diego synagogue during Passover celebration*, ABC NEWS (Apr. 28, 2019), <https://abcnews.go.com/US/san-diego-police-investigating-shooting-synagogue/story?id=62676419>; ABC News 7, *San Diego Synagogue shooting: New video shows moment gunman opened fire, killing 1, injuring 3*, ABC NEWS (Sep. 19, 2019), <https://abc7.com/san-diego-synagogue-shooting-poway-county-chabad-of/5552909/>.

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, *El Paso Shooting Suspect Told Police He Was Targeting “Mexicans”. Here’s What to Know About the Case*, TIME (Aug. 9, 2019, 4:15 PM), <https://time.com/5643110/el-paso-texas-mall-shooting/>. See also *Texas Man Charged with Federal Hate Crimes and Firearm Offenses related to August 3, 2019, Mass Shooting in El Paso*, 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.” *Id.*

¹⁷⁸ See *supra* notes 174–77.

¹⁷⁹ See *supra* note 174; *supra* note 177; Donovan, *supra* note 7.

¹⁸⁰ Blake, *supra* note 55.

¹⁸¹ CAROL ANDERSON, *WHITE RAGE* (Bloomsbury USA, 1st ed. 2016).

you go.”¹⁸² 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.¹⁸³ 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,”¹⁸⁴ 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.”¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ The First Amendment protects the right to freedom of speech or press and the right of people to peaceably assemble.¹⁸⁸ 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.¹⁸⁹ Thus, the racist, hateful speech that white nationalists espouse is constitutionally

¹⁸² Blake, *supra* note 55.

¹⁸³ Blake, *supra* note 55.

¹⁸⁴ Blake, *supra* note 55.

¹⁸⁵ *Texas Man Charged with Federal Hate Crimes and Firearm Offenses related to August 3, 2019, Mass Shooting in El Paso*, 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>. “. . . [A] federal grand jury in El Paso, Texas, indicted Patrick Wood Crusius, 21, of Allen, Texas, on hate crimes and firearm charges in connection with the murder of 22 people and attempted murder of 23 others at a Walmart in El Paso, Texas, on Aug. 3, 2019. . . .” *Id.* Crusius uploaded a document on the internet that stated his attack, “. . . is a response to the Hispanic invasion of Texas. They are the instigators, not me. I am simply defending my country from cultural and ethnic replacement brought on by the invasion.” *Id.*; Donovan, *supra* note 7.

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.¹⁹⁰ However, the First Amendment does not protect against crimes or illegal acts committed in pursuance of a group's beliefs.¹⁹¹

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,¹⁹² but as a way of connecting with one another through online communities and spreading the reach of their message across the globe.¹⁹³ 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.¹⁹⁴ 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 Hershenov, 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).

¹⁹³ 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/>.

¹⁹⁴ Donovan, *supra* note 7.

websites.¹⁹⁵ 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.¹⁹⁶ White supremacists create robust communities on the internet through online discussion forums, such as 4chan, 8chan, and Reddit,¹⁹⁷ which play a critical role in disseminating the extremist content.¹⁹⁸ Unfortunately, without explicit intentions to commit violence, propaganda and content in support of white supremacy on the internet is constitutionally protected speech.¹⁹⁹

However, an individual is not constitutionally protected by the First Amendment when illegal actions are committed, stemming from hate speech.²⁰⁰ 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.²⁰¹ Thus, any illegal actions taken by white supremacists acting on their racist beliefs is punishable by law.²⁰² 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.²⁰³

¹⁹⁵ Val Burris, Emery Smith & Ann Strahm, *White Supremacist Networks on the Internet*, 33 *Socio. Focus* 215, 216 (2000).

¹⁹⁶ *Id.*

¹⁹⁷ *CTR. ON EXTREMISM, ANTI-DEFAMATION LEAGUE, NEW HATE AND OLD: THE CHANGING FACE OF AMERICAN WHITE SUPREMACY* 4 (2018).

¹⁹⁸ *Meeting the Challenge of White Nationalist Terrorism at Home and Abroad: Hearing Before the H. Comm. on Foreign Aff. Subcomm. on the Middle East, N. Afr., and Int'l Terrorism, & H. Comm. on Homeland Sec. Subcomm. on Intelligence and Counterterrorism*, 116th Cong. 25–26 (2019) (statement of Sharon Nazarian, Ph.D., Senior Vice President for Int'l Aff., Anti-Defamation League).

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. RSCH. 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-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.

²⁰¹ *Hate Crime Acts*, 18 U.S.C. § 249 (2009).

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

²⁰⁴ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (1970). See also *Racketeer Influenced and Corrupt Organizations Act*, NOLO LEGAL ENCYC., <https://www.nolo.com/legal-encyclopedia/content/rico-act.html> (last visited August 31, 2019); Zraick, *supra* note 172.

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).

²⁰⁷ Victoria G.T. Bassetti, *Weeding RICO out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 104–05 (1992).

²⁰⁸ *Cf.* United States v. Persico, 832 F.2d 705, 718 (2d Cir. 1987) The United States Court of Appeals, Second Circuit affirmed the lower court’s judgements of RICO conspiracy convictions for members of New York’s Colombo crime family. *Id.*; United States v. Langella, 804 F.2d 185, 186–90 (2d Cir. 1986) The United States Court of Appeals, Second Circuit affirmed 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. *Id.*; *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. *Id.*; Complaint at 2, Lennon, et al. v. United Conference of Catholic Bishops et. al., No. 1:18-CV-02618 (D.D.C. 2018) (citing RICO in a class action

To convict a defendant under RICO, the government must prove that: (a) the defendant engaged in two or more instances of racketeering activity;²⁰⁹ and (b) that the defendant participated, invested, or maintained an interest in a criminal enterprise affecting interstate or foreign commerce.²¹⁰

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.²¹¹ RICO defines “racketeering activity” by the enumeration of state and federal criminal offenses,²¹² which includes any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.²¹³

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.²¹⁴ The general definition and language of enterprise in the RICO statute allows prosecutors to apply RICO broadly.²¹⁵

G. Robert Blakey, retired law professor and the author of the RICO statute, asserted that law enforcement “should be using RICO to more invasively investigate white extremist groups without violating

against alleged sexual abusers within the Catholic Church). This case was ultimately voluntarily dismissed on May 31, 2019. Notice of Voluntary Dismissal, Lennon, et al. v. United Conference of Catholic Bishops et. al., No. 1:18-CV-02618 (D.D.C. 2019); Verdict Form, United States v. Michael Gurry, et al., No. 16-cr-10343-ADB (D. Mass. 2019) (finding the pharmaceutical executive defendants guilty for racketeering activity); Mettler, *supra* note 13; Peter J. Henning, *RICO Offers a Powerful Tool to Punish Executives for the Opioid Crisis*, WASH. POST (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/dealbook/rico-insys-opioid-executives.html>.

²⁰⁹ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (2016). See also Shobith Seth, *Racketeering*, INVESTOPEDIA, (Jul. 1, 2020), <https://www.investopedia.com/terms/r/racketeering.asp>.

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).

²¹³ 18 U.S. Code § 1961 (1)(A) (2018); see generally Shobith Seth, *Racketeering*, INVESTOPEDIA, (Jul. 1, 2020), <https://www.investopedia.com/terms/r/racketeering.asp>.

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 supremacist 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.

²²¹ ADL Center on Extremism, *New Hate and Old: The Changing Face of American White Supremacy*, ANTI-DEFAMATION LEAGUE (Sept. 2019), <https://www.adl.org/new-hate-and-old>; Katie Reilly, *Trump Says He Doesn’t See White Nationalism as a Rising Global Threat After New Zealand Shooting*, TIME (Mar. 15, 2019), <https://time.com/5552850/donald-trump-white-nationalism-global-threat-new-zealand/>.

²²² *All 43 Defendants in Operation Vanilla Gorilla Now Convicted of Drug, Firearms Crimes*, DEP’T OF JUST., U.S. ATT’YS’ OFF.: S.D. GA., (July 17, 2019), <https://www.justice.gov/usao-sdga/pr/all-43-defendants-operation-vanilla-gorilla-now-convicted-drug-firearms-crimes>.

²²³ *Thirty-Nine “Unforgiven” And “United Aryan Brotherhood” Gang Members And Associates Indicted For Arms And Drug Trafficking In Pasco County*, DEP’T OF JUST., U.S. ATT’YS’ OFF.: S.D. GA., (Nov. 15, 2018), <https://www.justice.gov/usao-mdfl/pr/thirty-nine-unforgiven-and-united-aryan-brotherhood-gang-members-and-associates>.

²²⁴ *Racketeer Influenced and Corrupt Organizations Law*, JUSTIA, <https://www.justia.com/criminal/docs/rico/> (last visited Nov. 22, 2019).

A. *Using RICO Against White Supremacist Organizations:
United States v. Yarbrough*

In 1988 a case, *United States v. Yarbrough*,²²⁵ 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.²²⁶ In order to fund their activities, defendants robbed armored cars and certain businesses, and committed two murders.²²⁷ 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.”²²⁸ 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).²²⁹

The Order engaged in illegal activities to raise funds for their organization by attempting to rob a store,²³⁰ counterfeiting money,²³¹ and robbing armored cars.²³² The group also murdered two people in May and June of 1984.²³³ The first person was Richard West, a prospective member of the group who was believed to be a government agent.²³⁴ The second person was Alan Berg, a Jewish Denver radio talk show host.²³⁵ Berg was critical of right-wing white nationalist groups like the Order on his radio show.²³⁶ Berg was brutally machine-gunned down in the driveway in front of his home.²³⁷

In November 1984, federal and state law enforcement agencies started to make arrests of members from the Order.²³⁸ The government

²²⁵ 852 F.2d 1522, 1526 (9th Cir. 1988).

²²⁶ *Id.* at 1526.

²²⁷ *Id.* at 1526–27.

²²⁸ *Id.*

²²⁹ *Id.* at 1527.

²³⁰ *Yarbrough*, 852 F.2d at 1527.

²³¹ *Id.*

²³² *Id.* In the first two robberies in March and April of 1984, they obtained \$574,000. *Id.* Then, after working with a sympathetic employee of the armored car company who supplied the Order with the routes, crews, and cargoes, the group stole \$3,600,000 on July 19, 1984. *Id.*

²³³ *Id.*

²³⁴ *Yarbrough*, 852 F.2d at 1527.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

indicted 23 defendants, twelve of whom pled guilty before the trial.²³⁹ The jury found all of the appellants guilty of the substantive RICO count and the conspiracy RICO count.²⁴⁰ One of the defendants alleged that his conviction on the RICO conspiracy count violated his first amendment rights of political advocacy and association.²⁴¹ Under 18 U.S.C. § 1962(c) and (d), Congress has made association with an enterprise one element of a RICO offense.²⁴² This element does not unconstitutionally punish associational status. The courts have recognized that RICO proscribes conduct and not status or belief.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.²⁴⁴

*B. Arkansas Case that Indicts Fifty-Four in Investigation Targeting Arkansas Based White Supremacy Group Using RICO.*²⁴⁵

A case in Arkansas²⁴⁶ is using RICO to prosecute the white supremacist group, New Aryan Empire (NAE).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. § 1962(d), the fifty-four NAE members were charged with conspiracy to violate RICO.²⁴⁸ “Assistant Attorney General Brian A. Benczkowski of the Justice Department’s Criminal Division, U.S.

²³⁹ *Yarbrough*, 852 F.2d at 1527.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1528.

²⁴² *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)).

²⁴³ *Rubio*, 727 F.2d at 792.

²⁴⁴ *See id.*

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.

²⁴⁶ *USA v. Loadholt et al*, Docket No. 4:17-cr-00293.

²⁴⁷ *Multiple White Supremacist Gang Members among 54 Defendants Charged in RICO Indictment*, DEP’T OF JUST., OFF. OF PUB. AFF., (Feb. 12, 2019), <https://www.justice.gov/opa/pr/multiple-white-supremacist-gang-members-among-54-defendants-charged-rico-indictment>.

²⁴⁸ Indictment at 1–2, *United States v. Loadholt et. al.*, (E.D. Ark. Filed Feb 5, 2019), <https://www.justice.gov/opa/press-release/file/1131401/download>.

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

²⁴⁹ *Multiple White Supremacist Gang Members among 54 Defendants Charged in RICO Indictment*, DEP’T OF JUST., OFF. OF PUB. AFF., (Feb. 12, 2019), <https://www.justice.gov/opa/pr/multiple-white-supremacist-gang-members-among-54-defendants-charged-rico-indictment>.

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.

²⁵⁴ Chauncey De Vega, *Haunted America: The ghost of George Floyd and the ghost of the Confederacy*, SALON (Jun. 28, 2020), <https://www.salon.com/2020/06/18/haunted-america-the-ghost-of-george-floyd-and-the-ghost-of-the-confederacy/>.

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.²⁵⁵ However, we as a nation still bear the scars of post-Reconstruction battles for Black equality lost.²⁵⁶ 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.²⁵⁷

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.²⁵⁸ Like their counterparts during the Reconstruction, white supremacists have taken to violent action to display their intolerance in attempts of intimidating non-white Americans.²⁵⁹ Racially motivated public shootings in recent history have shown what pain those motivated by ignorance and hate can cause.²⁶⁰

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.²⁶¹ 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.

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.