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Samuel D. Brunson

Loyola University Chicago School of Law, sbrunson@luc.edu

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ADDRESSING HATE: GEORGIA, THE IRS, AND THE KU KLUX KLAN

Samuel D. Brunson*

In 1944, the Ku Klux Klan officially suspended its operations. Two years later, it had entirely ended. In part this was the inevitable result of a decade of declining influence and membership. In part, though, it was the result of actions by the federal government and the state of Georgia.

In 1916 the Ku Klux Klan incorporated as a Georgia fraternal organization, following a model of the Masons and other fraternal organizations. It also claimed to be a tax-exempt fraternal beneficiary society under the new federal income tax. These legal statuses provided the Klan with legal rights and benefits and also shrouded it in a cloak of respectability: it could claim that it was not merely a terroristic white supremacist group, but that it provided fraternal benefits to its members and the surrounding community.

While the Klan's incorporation and tax status provided it with benefits, they also imposed obligations on the organization. The Klan ultimately proved incapable of meeting these requirements. It violated the terms of its corporate charter and of tax exemption as a fraternal beneficiary society. In 1944 the Bureau of Internal Revenue assessed a \$685,305 tax on the Klan and, when the Klan did not pay, filed a lien. The state of Georgia in turn revoked its corporate charter. While these moves did not cause the downfall of the early twentieth-century version of the Klan, they did seal its death.

This Article relates the story of the Klan's corporate and tax statuses. It focuses on this story both because the story has never been related in any detail and because it provides a perspective on how government can deal with contemporary white nationalist groups without violating the Constitution.

* Georgia Reithal Professor of Law, Loyola University Chicago School of Law. Thank you to Ellen P. Aprill for her helpful comments on a draft of the paper, as well as participants in the 2021 Law and Society Annual Conference. Thank you to the Loyola University School of Law for its generous summer stipend.

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I. INTRODUCTION

On April 23, 1944, James Colescott, Imperial Wizard of the Ku Klux Klan, called a final Klonvocation in Atlanta. That gathering had a single purpose: to formally dissolve the white supremacist group. The organization surrendered its charter and members were relieved of whatever obligations they had with respect to the Klan.¹ About thirty years into its second iteration, the Klan was no more.²

Historians and others have written extensively about this early twentieth-century Ku Klux Klan. They have spent little time, however, analyzing how the Ku Klux Klan used state corporate law and federal tax exemption to promote its white supremacist agenda and to gain legitimacy for its aims. State corporate law and federal tax law cut two ways, though, and eventually helped seal the demise of the organization.

In this Article, I detail how the second Klan organized itself to take advantage of Georgia and federal law. I also detail where it failed to follow the entity laws and how those failures ultimately helped bring about its death. While the story of the Ku Klux Klan's legal structure is specific to its time and its place, it carries relevance even today. Currently there are at least four white nationalist groups that are incorporated and exempt from federal taxes.³ The Constitution likely prohibits the IRS and the groups'

¹ WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 222 (1st ed. 1965).

² HENRY PECK FRY, *THE MODERN KU KLUX KLAN* 34 (Greenwood Publishing Corp. 1969) (1922).

³ David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non) Profits*, 52 WAKE FOREST L. REV. 1111, 1156 n.389 (2017); Michael Kunzelman, *White Nationalists Raise*

states of incorporation from revoking their status because of their hateful ideology.⁴ But the history of the Ku Klux Klan demonstrates that the IRS and state governments have tools they can use to delegitimize these organizations.

This Article proceeds as follows. Part II provides a brief outline of the three generations of the Ku Klux Klan that have existed in the United States. Part III narrows the scope to the second Klan and discusses both its self-image and its actions. Part IV then narrows the scope even more, focusing on the economics of the second Ku Klux Klan.

Part V traces how the Klan obtained a corporate charter in Georgia and how it claimed to be exempt from the federal income tax. It traces the qualification requirements for its statuses, the benefits these statuses conferred on the Klan, and how the Klan claimed to meet the qualification requirements.

Part VI lays out the death of the Klan. Its demise was not precipitated by its legal status but rather the Bureau of Internal Revenue's determination that it had failed to qualify as exempt together with an assessment of more than \$685,000 in back taxes. Georgia's revocation of its corporate charter then made its resurgence much more difficult and much weaker.

Finally, the Conclusion discusses the lessons that the second Klan's demise provide for current regulators dealing with modern white supremacist organizations. While they cannot remove these organizations' legal statuses for ideological purposes, they can and should explore whether the organizations meet the underlying corporate and tax qualifications.

II. THE HISTOR(IES) OF THE KU KLUX KLAN

The Ku Klux Klan has existed in three distinct iterations.⁵ While much of the recognizable iconography of the Ku Klux Klan — including its name, the costumes, and the secrecy — originated with former Confederate soldiers around 1865 in Pulaski, Tennessee,⁶ these proto-Klansmen claimed that they developed the ideas to amuse themselves.⁷

Millions with Tax-Exempt Charities, ASSOCIATED PRESS (Dec. 22, 2016), <https://apnews.com/aefc8163ac574bb3bd1f3facfca5fb83/White-nationalists-raise-millions-with-tax-exempt-charities> [<https://perma.cc/58FF-E6PY>].

⁴ See *infra* notes 306–307 and accompanying text.

⁵ Richard T. Schaefer, *The Ku Klux Klan: Continuity and Change*, 32 *PHYLON*, No. 2, 143, 143 (1971).

⁶ *Id.* at 144–45.

⁷ *Id.* at 145.

The Reconstruction Klan used violence and the threat of violence to discourage African Americans from voting.⁸ They also “struck against real or perceived resentment by the former slaves and quickly mobilized at the scattered signs of blacks achieving economic success.”⁹ Members of the Klan claimed that their costuming and secrecy were intended “for their own amusement, to avoid identification, or to frighten superstitious freed people.”¹⁰ In addition, though, the performative nature of the Reconstruction Klan had two other purposes. By couching their racism and violence as “theatrical, rather than political or military,” they could defy the federal government without appearing to do so.¹¹ They also used their theatrics to not only “reimpose white, male Democratic dominance,” but to “construct a more resilient white, male, southern identity.”¹²

By 1867, the Reconstruction Ku Klux Klan had emerged as a formal organization, headed by former Confederate general Nathan Bedford Forrest, and it ultimately spread across nine southern states.¹³ The Klan proved relatively effective at opposing civil rights for the newly-freed African Americans, as well as undermining Republican governance. For example, by the summer of 1869, “disguised bands had perpetrated a series of beatings, cuttings, shootings, and other outrages” in North Carolina, generally against African Americans.¹⁴ The Ku Klux Klan ultimately murdered at least fifteen people, as well as perpetrating hundreds of “lesser atrocities.”¹⁵ They succeeded in terrorizing both African Americans and white Republicans in North Carolina.¹⁶

Despite the violence and theatrics, the Reconstruction Ku Klux Klan was short-lived. Forrest disbanded the organization in 1869, two years after its formal organization.¹⁷ The end of the Ku Klux Klan did not, of course, mean an end to racial violence. The Ku Klux Klan was not the only racist vigilante group operating in the post-Civil War United States.¹⁸ And while

⁸ *Id.*

⁹ *Id.*

¹⁰ Elaine Frantz Parsons, *Midnight Rangers: Costume and Performance in the Reconstruction-Era Ku Klux Klan*, 92 J. AM. HIST. 811, 813 (2005).

¹¹ *Id.* at 813–14.

¹² *Id.* at 814.

¹³ See Schaefer, *supra* note 5, at 144–45.

¹⁴ Otto H. Olsen, *The Ku Klux Klan: A Study in Reconstruction Politics and Propaganda*, 39 N.C. HIST. REV. 340, 341 (1962).

¹⁵ *Id.*

¹⁶ *Id.* at 341–42.

¹⁷ See Schaefer, *supra* note 5, at 145.

¹⁸ See, e.g., MICHAEL W. FITZGERALD, AFTER SLAVERY: RACE, LABOR, AND CITIZENSHIP IN THE RECONSTRUCTION SOUTH 144 (Bruce E. Baker & Brian Kelly eds., 2013) (“Racist vigilantism in Alabama was hardly limited to the Ku Klux Klan; it included groups like the Knights of the White Camelia and numerous variants and also local clusters who utilized similar techniques.”).

attacks on African Americans continued throughout the late nineteenth and early twentieth centuries, they spiked (in urban areas, at least) in the 1890s and 1900s, decades after the disbanding of the Reconstruction Ku Klux Klan.¹⁹

Unfortunately, the demise of the Ku Klux Klan proved temporary. Thomas Dixon Jr.'s 1905 play and novel *The Clansman*, and D.W. Griffith's 1915 film *Birth of a Nation* renewed white America's interest in the Klan and provided a visual and aesthetic iconography for the terroristic group.²⁰ And less than half a century after the original Klan disbanded, "a new Klan rose from the ashes in 1915."²¹ In October of that year, William Joseph Simmons proposed a new group patterned after the Reconstruction Klan and thirty-four people signed on.²²

While this new Klan was dedicated to white Protestant supremacy, that was only one of Simmons's goals in organizing the new group. Simmons had engaged in several vocations over his life, including as a lodge organizer in the Woodmen of the World, a popular fraternal beneficiary society.²³ In fact, Simmons was very much a man of his time. The early last decade of the nineteenth century and the first two decades of the twentieth "have been dubbed the 'golden age' of fraternalism."²⁴ During the 1920s, about one in three adult men participated in some fraternal organization.²⁵ And Simmons was a man of his time: prior to founding the Ku Klux Klan, he not only worked for the Woodmen of the World — he was also a member of several types of Masonic organizations and of the Knights Templar.²⁶ He described himself as a "fraternalist."²⁷ He expressed his love of the "intricacies of fraternal ritual" as he designed the new Ku Klux Klan.²⁸ Ultimately, his new organization replicated the fraternal beneficiary

¹⁹ Susan Olzak & Suzanne Shanahan, *Racial Policy and Racial Conflict in the Urban United States, 1869-1924*, 82 *SOCIAL FORCES* 481, 497-98 (2003).

²⁰ Katherine Lennard, *Old Purpose, "New Body": "The Birth of a Nation" and the Revival of the Ku Klux Klan*, 14 *J. GILDED AGE & PROGRESSIVE ERA* 616, 616 (2015).

²¹ RORY MCVEIGH, *RISE OF THE KU KLUX KLAN: RIGHT-WING MOVEMENTS AND NATIONAL POLITICS* 19 (2009).

²² Charles O. Jackson, *William J. Simmons: A Career in Ku Kluxism*, 50 *GA. HIST. Q.* 351, 353 (1966).

²³ THOMAS R. PEGRAM, *ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S* 6-7 (2011).

²⁴ David T. Beito, *The "Lodge Practice Evil" Reconsidered: Medical Care Through Fraternal Societies, 1900-1930*, 23 *J. URBAN HIST.* 569, 569 (1997).

²⁵ *Id.*

²⁶ MARY ANN CLAWSON, *CONSTRUCTING BROTHERHOOD: CLASS, GENDER, AND FRATERNALISM* 218 (1989).

²⁷ *Id.*

²⁸ PEGRAM, *supra* note 23, at 7.

societies of the day with a more-explicit focus on white Protestant superiority.²⁹

A month after Simmons introduced his new fraternalist Klan, sixteen men, including Simmons, drove from Atlanta to Stone Mountain in Georgia, where they built an altar and took an oath of allegiance to the "Invisible Empire, Knights of the Ku Klux Klan."³⁰

For all of the performative value³¹ of an oath of allegiance (made on a mountain at a stone altar with an American flag, a Bible, a canteen, and an unsheathed sword³²), a week after the oath perhaps Simmons's most important step in the formation of his new Ku Klux Klan occurred: the state of Georgia granted the organization's application for a state charter.³³ Six months later, on July 1, 1916, the Superior Court of Fulton County formally incorporated the revived Ku Klux Klan as a nonprofit organization.³⁴

The second generation Ku Klux Klan formally disbanded in 1944.³⁵ Just two years after its death, Samuel Green Sr. attempted to create a new Klan.³⁶ By the time he died three years later, his attempt proved a failure.³⁷ In 1953, Eldon Lee Edwards made a new attempt at chartering the Klan.³⁸ This time, in reaction to the Supreme Court's decision striking down segregated schools,³⁹ the racist organization found a purpose and managed to revive in its third iteration.⁴⁰ This third version of the Ku Klux Klan proved fractured and fragmented, though, as organizers failed to agree on a common set of actions and faced intra-group rivalries.⁴¹

There is no evidence that the first Klan organized itself as a formal entity and, during the years of its existence, the U.S. had no federal income

²⁹ *Id.* at 9 ("Militant Protestants usually found the Klan preferable to fraternal lodges as a vehicle of Protestant nationalism.").

³⁰ ARNOLD S. RICE, *KU KLUX KLAN IN AMERICAN POLITICS* 1 (1962).

³¹ Parsons, *supra* note 10, at 812 (noting that there is significant evidence that the Reconstruction Ku Klux Klan's violence and racism had roots in theater and entertainment).

³² RICE, *supra* note 30, at 1.

³³ *Id.*

³⁴ *Id.*

³⁵ WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 222-23 (1965).

³⁶ Schaefer, *supra* note 5 at, 151-52.

³⁷ *Id.* at 152.

³⁸ *Id.*

³⁹ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (74 S. Ct. 686, 692, 98 L. Ed. 873) (1954), *supp. sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, (75 S. Ct. 753, 99 L. Ed. 1083) (1955).

⁴⁰ Schaefer, *supra* note 5, at 152.

⁴¹ *Id.*

tax.⁴² Similarly, there is little evidence that the fragmented third Klan spent significant effort dealing with its corporate form or tax status. As a result, in this Article, I will focus on the second-generation Ku Klux Klan.

III. THE SHORT LIFE OF THE SECOND KLAN

The second-generation Ku Klux Klan only formally existed for about thirty years. It existed as a powerful institution for even less time. While Simmons conceived of the Klan in 1915, it did not begin to prosper until 1921.⁴³ In 1924, at its height, the Klan had about four million members.⁴⁴ And within four years political failures, scandals (both moral and financial), and internecine conflicts between various members and lodges of the Klan had “fatally damaged” the institution.⁴⁵ By 1930 Klan membership had declined to approximately 45,000.⁴⁶

While this Klan shared with the Reconstruction Klan a self-image as a “cleansing force in politics,” the second Klan began its existence as a “conventional fraternal order.”⁴⁷ In contrast to the Reconstruction Klan, this second iteration was “built upon twentieth-century developments such as mass entertainment and leisure, patriotic voluntary associations, advertising, and the go-go economic style of the 1920s.”⁴⁸ It argued that “white, Protestant values were the standard for true Americanism.”⁴⁹ In its quest to uphold and enshrine these values, the second generation Klan encountered a broader range of enemies than the Reconstruction Klan.⁵⁰ This Klan continued to attack African Americans. But it also targeted Catholics, Jews, immigrants, bootleggers, unfaithful husbands, and “sexually adventurous women.”⁵¹

While these enemies gave purpose to the Klan, the organization did more than just provide members with a common enemy. As a fraternal beneficiary society it also provided members with “a kind of ready-made

⁴² While the Union enacted an income tax to fund the Civil War, it expired under its own terms after 1872. Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 47 (2019).

⁴³ PEGRAM, *supra* note 23, at 7.

⁴⁴ MARTY GITLIN, *THE KU KLUX KLAN: A GUIDE TO AN AMERICAN SUBCULTURE* 20 (2009).

⁴⁵ PEGRAM, *supra* note 23, at 5.

⁴⁶ GITLIN, *supra* note 44, at 20.

⁴⁷ CLAWSON, *supra* note 26, at 218.

⁴⁸ PEGRAM, *supra* note 23, at 7.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 3.

sociability, an organizationally constructed friendship.”⁵² Like other fraternal organizations of the early twentieth century, the Klan recruited members by promising not only friendship but also “recreation, the thrill of secrecy and exclusivity, and an appealingly vague purposefulness.”⁵³ Still, essentially all fraternal societies provided friendship, recreation, and a sense of secrecy, and most white societies were racially discriminatory, albeit not to the extent of the Klan.⁵⁴ To stand out, the Klan positioned itself as “the most militant enforcer of morality and decency in communities across the country.”⁵⁵

In addition to providing benefits to its members (and concomitantly spreading hatred through the country), the Klan claimed to provide benevolent service to outsiders. It claimed, among other things, a long record of providing aid to widows and orphans.⁵⁶ It also said it had been involved in storm relief in the South.⁵⁷

By packaging its prejudice in the form of a fraternal beneficiary society, the Klan could claim a kind of respectability and could downplay its hateful rhetoric and actions.⁵⁸ In fact, in many cases it did precisely that. James Colescott, the final Imperial Wizard of the second Klan, asserted that “the klan has not engaged in disseminating racial and religious prejudices or hatred and has used no propaganda to enforce its principles upon the state . . . by force, violence, terrorism or hate.”⁵⁹

Denials aside, though, the core of the second Klan was racial and religious prejudice, just as it had been for the Reconstruction Klan. Roland Thomas, a journalist with the *New York World*, testified that any would-be member of the Klan had to testify that he was “native born, white, a Gentile,” and not Catholic.⁶⁰ He additionally testified that where the Klan went, it stoked prejudice and jeopardized communities’ peace.⁶¹ The Klan clearly patterned itself as a fraternal organization, and engaged in fraternal endeavors. But at best those fraternal endeavors masked its true purpose

⁵² CLAWSON, *supra* note 26, at 220.

⁵³ PEGRAM, *supra* note 23, at 21.

⁵⁴ Alvin J. Schmidt & Nicholas Babchuk, *The Unbrotherly Brotherhood: Discrimination in Fraternal Orders*, 34 *PHYLON* 275, 275 (1973) (“Racial discrimination has been practiced by most fraternal organizations in the United States since their inception . . .”).

⁵⁵ RICK BOWERS, *SUPERMAN VERSUS THE KU KLUX KLAN: THE TRUE STORY OF HOW THE ICONIC SUPERHERO BATTLED THE MEN OF HATE* 71 (2012).

⁵⁶ “Dismiss Suit, We Are Benevolent,” *Says Klan*, *DETROIT TRIB.*, Jul. 13, 1946, at 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *The Ku Klux Klan: Hearings before the House Committee on Rules*, 67th Cong. 1st Sess. 10-11 (1921) [hereinafter *Hearings*].

⁶¹ *Id.* at 11.

and allowed it to downplay what it actually sold: white Protestant supremacy.

And, in fact, the Klan tried to enforce its white Protestant supremacy through violence and intimidation. Its denials notwithstanding, during the 1920s, members of the Ku Klux Klan committed a number of crimes in pursuit of its racist goals, including “hangings, floggings, mutilations, tarring and featherings, kidnappings, brandings by acid, along with a new intimidation tactic, cross-burnings.”⁶² While the Klan may have provided its members with fraternity and with insurance, it had become a “clear threat to public safety and order.”⁶³

IV. PROFITING FROM HATE

The Klan may have formally organized itself as “a ‘purely benevolent and eleemosynary’ institution to be not unlike the Elks, the Masons, and the Odd Fellows,”⁶⁴ but for a time, it also operated as a deeply profitable enterprise. While its racist purpose may have predominated, the Klan also engaged in the economic world. It raised money by selling membership, costumes, and life insurance.⁶⁵

In its first few weeks, the Klan sold memberships to ninety-one new members for \$10 each.⁶⁶ Its dues collection procedure mirrored other fraternal organizations of the time and was structured as “pyramid scheme . . . that proved especially lucrative for its leaders.”⁶⁷ The white robes and hoods that made up the uniform of the Klan sold for \$6.50.⁶⁸ Moreover, the early Klan sold a type of mutual insurance. Like many other fraternal organizations, it used this “system of mutual beneficiary insurance to solidify the familial bond among members and to ensure that no member

⁶² FBI, *KKK Series*, <https://www.fbi.gov/history/famous-cases/kkk-series> [https://perma.cc/Y5YS-AC9U].

⁶³ *Id.*

⁶⁴ DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 30 (1981).

⁶⁵ *Id.*

⁶⁶ Charles C. Alexander, *Kleagles and Cash: The Ku Klux Klan as a Business Organization, 1915-1930*, 39 BUS. HIST. REV. 348, 350 (1965).

⁶⁷ Kathleen Blee & Amy McDowell, *The Duality of Spectacle and Secrecy: A Case Study of Fraternalism in the 1920s US Ku Klux Klan*, 36 ETHNIC & RACIAL STUDIES 249, 250 (2013).

⁶⁸ Alexander, *supra* note 65, at 350.

was ever in need.”⁶⁹ Forty-two of the initial ninety-one new members of the Klan subscribed to \$53,000 of insurance.⁷⁰

By the entry of the U.S. into World War I, though, the revived Klan had almost died again. While it had expanded beyond the confines of Atlanta and spread into Alabama, one of Simmons’s trusted subordinates stole several thousand dollars, “crippling the finances of the order.”⁷¹

The Klan may have died then, relatively obscure and with only a few thousand members, had Simmons not brought in Edward Young Clarke and Elizabeth Tyler, who offered to be “publicity agents” for the organization.⁷² Clarke and Tyler’s efforts increased the membership of the Klan exponentially — by 1921 it boasted nearly 100,000 members.⁷³ Simmons testified that as a result of this increase in membership “someone was going to get immensely rich out of the Ku-Klux Klan.”⁷⁴ Clark received \$8 of every \$10 initiation fee, with the other \$2 going to the Klan’s general fund.⁷⁵ Clarke then paid various expenses — including those owed to the membership salesman — out of his \$8.⁷⁶

Within a few years, the flow of money had been formalized. Commissioned salesmen — called “Kleagles” in the secret fraternal language of the Klan — sold memberships and kept \$4 of every \$10 membership fee.⁷⁷ Another \$2.50 went to the state’s Grand Dragon.⁷⁸ The remaining \$3.50 was split between five additional individuals with “the person in charge of sales in the state (King Kleagle) taking \$1, the regional sales overseer (Great Goblin) getting \$0.50, the national sales overseer (Imperial Kleagle) \$1.25, and the two most powerful men in the Klan (Imperial Wizard and Grand Wizard) splitting 75 cents.”⁷⁹ Similarly, profits from the sales of Klan robes were split four ways, with the national headquarters earning a \$3 profit on each set of robes sold.⁸⁰ After a local

⁶⁹ Miguel Hernandez, *Fighting Fraternities: The Ku Klux Klan and Freemasonry in 1920s America*, 70 (Sept. 11, 2014) (Ph.D. dissertation, University of Exeter) (on file with Open Research Exeter, University of Exeter).

⁷⁰ Alexander, *supra* note 65, at 350.

⁷¹ *Id.* at 351.

⁷² *Id.*

⁷³ *Hearings*, *supra* note 59.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 87-88.

⁷⁷ Roland G. Fryer Jr. & Steven D. Levitt, *Hatred and Profits: Under the Hood of the Ku Klux Klan*, 127 Q. J. ECON. 1883, 1908 (2012)..

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1908-09.

Klan organization received its charter, moreover, it paid an annual fee of \$1.80 per member per year to the national headquarters.⁸¹

The Klan earned money other ways, as well. Klan members were encouraged to buy, among other things, Klan insurance.⁸² The Klan's initial foray into insurance died early on, but in 1923, the Texas Klan revived it, obtaining a charter in Texas to sell insurance and selling about \$1 million of insurance by the end of the year.⁸³ The Atlanta headquarters of the Klan took over the insurance business the following year, though by around 1928, Empire Mutual — the Klan insurance company — collapsed.⁸⁴

V. A NONPROFIT TAX-EXEMPT HATE GROUP

Simmons, the organizer of the second Klan, took advantage of legal forms and statuses as he formed his new organization. Not content with an unincorporated club, he used Georgia law to give his new white supremacist group legal personhood. In addition, he attempted to design that legal personhood in a way that allowed the Klan to legally avoid paying taxes.

A. A Georgia Fraternal Beneficiary Society

In its charter application, Simmons requested a 20-year incorporation (with an option to renew) “as a patriotic, secret, social benevolent order.”⁸⁵ Its purpose and object were to be “purely benevolent and eelemosynary [sic], and there shall be no capital stock or profit or gain to the members thereof.”⁸⁶ This patriotic, secret organization wanted the power “to confer an initiative degree ritualism, fraternal and secret obligations, words, grips, signs, and ceremonies” which would unite its exclusively white male members.⁸⁷

In essence, the second iteration of the Ku Klux Klan wanted to create itself in the image of Masonry and other secret fraternal organizations that were popular in the 1920s, albeit in a more militant and explicitly racist way.⁸⁸ The incorporators of the Klan not only copied elements from these secret fraternal organizations, it explicitly mentioned them in its charter

⁸¹ *Id.* at 1909.

⁸² *Id.*

⁸³ Alexander, *supra* note 65, at 361.

⁸⁴ *Id.*

⁸⁵ *Hearings*, *supra* note 59, at 101.

⁸⁶ *Id.* at 102.

⁸⁷ *Id.*

⁸⁸ Blee & McDowell, *supra* note 66 at 250.

application. They wanted “such rights, powers, and privileges as are now extended to the Independent Order of Odd Fellows, Free and Accepted Order of Masons, Knights of Pythias, et al., under and by virtue of the laws of the State of Georgia.”⁸⁹ In fact, “fraternalism” was one of the “six essential qualities of the Klan,” and its pyramid structure of dues collections mirrored other secret fraternal organizations.⁹⁰

Georgia law at the time provided that the Superior Courts of the state had the power to create corporations (other than banking, insurance, railroad, trust, canal, navigation, express, and telegraph corporations, which had different statutory incorporation schemes).⁹¹ Incorporators had to file a petition in the relevant superior court laying out, among other things, the purpose and the name of the organization, as well as its place of doing business and the term of the corporation’s expected life.⁹² That term could not exceed twenty years, though the term could be renewed.⁹³

If the superior court granted a petition for corporate charter, the corporation could legally exercise “all corporate powers necessary to the purpose of their organizations.”⁹⁴

The law recognized several corporate powers. Among them, a corporation had “continuous succession,” meaning that its existence continued even if its members died or otherwise left.⁹⁵ Corporations could enter into contracts.⁹⁶ They had the ability to sue and be sued, to receive donations, and to purchase and hold property.⁹⁷ They also had the right to create by-laws that were binding on their members.⁹⁸ The law forbade corporations formed through the Superior Court from entering into *ultra vires* contracts or holding property not related to their corporate purpose or for securing debts, however.⁹⁹

Georgia law provided some additional details for fraternal corporations. Under its civil law, fraternal beneficiary corporations — like

⁸⁹ *Hearings*, *supra* note 59, at 102.

⁹⁰ Blee & McDowell, *supra* note 66 at 250..

⁹¹ JOHN L. HOPKINS, CODE OF THE STATE OF GEORGIA ADOPTED AUGUST 15, 1910, at 752 § 2823 (1911).

⁹² *Id.* at 752.

⁹³ *Id.* at 752-53.

⁹⁴ *Id.* at 753.

⁹⁵ *Id.* at 581 § 2215.

⁹⁶ Specifically, the law provided them with the ability to “have and use a common seal.” *Id.* at 582 § 2216. A “common seal” was prima facie evidence that the contract was not ultra vires under the law. *Solomon’s Lodge No. 1, A.F.M. v. Montmollin*, 58 Ga. 547, 551 (1877).

⁹⁷ HOPKINS, *supra* note 90, at 581 § 2216.

⁹⁸ *Id.* at 582 § 2216.

⁹⁹ *Id.* at 753.

the Ku Klux Klan aspired to be — had no stock.¹⁰⁰ Instead, they were organized for the benefit of their members. They needed to have a representative government and a lodge system, with a “ritualistic form of work for the meeting of” their local organizations.¹⁰¹ They could also provide benefits — including insurance, charity, or relief — to their members.¹⁰² The benefits they could provide included death, sickness, disability, and old age benefits.¹⁰³ A fraternal corporation funded these benefits by charging dues or other assessments to its members.¹⁰⁴ In spite of providing insurance to members, the corporate law replaced state insurance law in governing fraternal beneficiary corporations.¹⁰⁵ Fraternal corporations did, however, have to file an annual report with the state insurance commissioner.¹⁰⁶

In its application, the Klan explained precisely the benefits it wanted from incorporation. It said it wanted the right to own separate unto itself and to control the sale of all paraphernalia, regalia, stationery, jewelry, and such other materials needed by the subordinate branches of the order for the proper conduct of their business; the right to publish a fraternal magazine and such other literature as is needed in the conduct of the business of the order; the right to buy, hold, and sell real estate and personal property suitable to the purpose of the said corporation; to sell, exchange, or sublease the same or any part thereof; to mortgage or create liens thereon; to borrow money and secure the payment thereof by mortgage or deed of trust and to appoint trustees in connection therewith; to execute promissory notes; to have and to use a common seal; to sue and be sued; to plead and be impleaded; to do and perform all these things and exercise all those rights which under the laws of Georgia are conferred upon societies of like character.¹⁰⁷

Essentially, the Klan chose to incorporate because incorporation would allow it to act for itself. A corporate Klan would achieve legal personhood and with it the ability to do many things that people could do.¹⁰⁸ Granting the charter would give the Klan the legal, state-sponsored right to act.

¹⁰⁰ *Id.* at 765 § 2866.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 766 § 2867.

¹⁰⁴ *Id.* at § 2868.

¹⁰⁵ *Id.* at § 2869.

¹⁰⁶ *Id.* at 767 § 2872.

¹⁰⁷ *Hearings, supra* note 59, at 102.

¹⁰⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 466 (2010) (Stephens, J., concurring in part) (“Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction.”).

The Fulton Superior Court granted the Klan's application for a charter. In granting the charter, the court explained that the incorporators and their successors were thus "clothed with all the rights, privileges, and powers mentioned in said petition and made subject to all the restrictions and liabilities fixed by law."¹⁰⁹ Starting on July 1, 1916, the Knights of the Ku Klux Klan became a Georgia corporation.¹¹⁰

B. A Tax-Exempt Fraternal Beneficiary Society

In addition to the rights, privileges, and powers inherent in its corporate status, the Knights of the Ku Klux Klan was exempt from federal taxes. In fact, at least in its early years, it was tremendously successful at generating revenue, making its tax-exempt status that much more important.¹¹¹ At the Klan's inception, the federal income tax was still brand new. Congress had imposed a tax on corporate income — styled as a corporate *excise* tax — in 1909.¹¹² The excise tax did not, however, apply to every corporation. Congress exempted, among other things, "fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members."¹¹³

Describing the tax exemption of the Ku Klux Klan requires some assumptions. While the Klan claimed exemption from taxes, paperwork documenting the reason for its exemption does not exist. Prior to 1969, public charities qualified as exempt if they met the exemption requirements. While they could apply for an "exemption certificate," until Congress enacted section 508 in 1969, they faced no statutory requirement to apply for exemption.¹¹⁴ In 1915, regulations required "beneficiary societies" to "establish their right to the exemption" by affidavit or otherwise, but only at the request of the collector or Commissioner of Internal Revenue.¹¹⁵ Even

¹⁰⁹ *Hearings, supra* note 59, at 103.

¹¹⁰ *Id.*

¹¹¹ Fryer & Levitt, *supra* note 76, at 1907.

¹¹² The statute subjected every "corporation, joint stock company or association, organized for profit and having a capital stock represented by shares," as well as insurance companies, to "a special excise tax with respect to the carrying on or doing business" by the organization. Payne-Aldrich Tariff Act, ch. 6, § 38, 36 Stat. 11, 112 (1909).

¹¹³ *Id.* at 113.

¹¹⁴ BERNARD D. REAMS, JR., TAX REFORM 1969: A LEGISLATIVE HISTORY OF THE TAX REFORM ACT OF 1969 PUBLIC LAW 91-172 WITH RELATED AMENDMENTS 53 (1991).

¹¹⁵ ELIAS H. HENDERSON, WAR REVENUE AND INCOME TAX GUIDE FOR 1915 131 (1914), <https://books.google.com/books?id=KTAuAAAAAYAAJ&pg=PA46&lpg=PA46&dq=1915+treasury+income+tax+rulings&source=bl&ots=XYhBINEEez&sig=ACfU3U2QE397yRTVNxfIVbHN4C8rqoMtZg&hl=en&sa=X&ved=2ahUKEwjv3ZCWrajAhVldc0KHRNaCk8Q6AEwCXoECAkQAQ#v=onepage&q&f=false>. While it is unlikely that the Ku Klux Klan ever filed a formal exemption application, if it did apply, its application is inaccessible. I

today, other types of exempt organizations face no statutory requirement to file an application for exemption.¹¹⁶

Still, based on press accounts and judicial decisions, it is fair to assume that the Knights of the Ku Klux Klan claimed exemption either as a charitable organization or as a fraternal beneficiary association. *The Evening Star*, a Washington D.C. newspaper, reported in 1946 that the IRS revoked the Klan's exemption because the IRS determined that the Klan did not qualify for the exemption for fraternal organization.¹¹⁷

After the 1913 passage of the Sixteenth Amendment explicitly permitted the federal government to impose income taxes without apportionment,¹¹⁸ Congress enacted a new federal income tax that was explicitly an income tax.¹¹⁹ The Revenue Act of 1913 introduced a personal income tax.¹²⁰ In addition, like the 1909 corporate tax, it imposed a tax on corporate income.¹²¹ In keeping the 1909 Act's tax on corporate income, the Revenue Act of 1913 also kept the exemption for fraternal beneficiary societies acting under the lodge system.¹²² Moreover, based on the legal

filed Freedom of Information Act requests with the IRS asking about the tax treatment of the Ku Klux Klan. The IRS declined to respond because of taxpayer confidentiality. Letters in possession of author.

¹¹⁶ The IRS has asserted that today fraternal beneficiary associations must file an application for exemption. Sean M. Barnett & Ward L. Thomas, *IRC 501(c)(8) Fraternal Beneficiary Societies and IRC 501(c)(10) Domestic Fraternal Societies*, 2004 EP CPE TEXT 20, <https://www.irs.gov/pub/irs-tege/eotopicf04.pdf>. It bases that on the language of a Treasury regulation, which provides that for an organization to "establish its exemption," the organization must "file an application form as set forth below with the appropriate office as designated by the Commissioner in guidance published in the Internal Revenue Bulletin, forms, or instructions to the applicable forms." Treas. Reg. § 1.501(a)-1(a)(2) (as amended in 2017). However, the fact that Congress enacted section 508 to explicitly require organizations exempt under section 501(c)(3) to file an application for exemption suggests that an organization exempt under a different provision is not required to file an application, even if filing one is a good idea. The IRS's CPE text seems to acknowledge this, providing that a fraternal beneficiary society claiming exempt status must file a Form 990 if it believes itself exempt, even if it hasn't been officially recognized as such by the IRS. Barnett & Thomas, *supra*, at 20.

¹¹⁷ Francis P. Douglas, *United States Unable to Collect Taxes of \$685,355 Assessed on KKK*, *THE EVENING STAR*, June 15, 1946, at A2.

¹¹⁸ U.S. CONST. amend. XVI.

¹¹⁹ Joseph M. Dodge, *The Netting of Costs Against Income Receipts (Including Damage Recoveries) Produced by Such Costs, Without Barring Congress from Disallowing Such Costs*, 27 VA. TAX REV. 297, 356 (2007) ("The corporate income tax, enacted in the same year (1909) in which Congress proposed the Sixteenth Amendment, was explicitly a tax on 'net income,' as was the 1913 individual income tax.").

¹²⁰ Revenue Act of 1913, ch. 16, § II(A)(1), 38 Stat. 114, 166 (1913).

¹²¹ *Id.* at § II(G)(a), 38 Stat. at 172.

¹²² *Id.* It is worth noting that the exemption for fraternal beneficiary societies predates the 1909 corporation excise tax. The Revenue Act of 1894, ultimately struck down as unconstitutional, also would have exempted fraternal beneficiary societies from its corporate tax. Revenue Act of 1894, ch. 394, § 32, 28 Stat. 509, 556 (1894).

organization and activities of the Knights of the Ku Klux Klan, exemption as a fraternal beneficiary organization is the best fit. As a result, in the absence of primary documentation that may not exist and is inaccessible in any event, I will assume that the Ku Klux Klan claimed exemption as a fraternal beneficiary society.

According to 1914 Treasury regulations, to qualify as a fraternal beneficiary society, an organization had to be “organized under a charter, with properly appointed or elected officers, with an adopted ritual or ceremonial, holding meetings at stated intervals, and supported by fees, dues, or assessments.”¹²³ In 1926, the Board of Tax Appeals further discussed the definition of a *fraternal beneficiary association*, as well as what acting under the lodge system meant. The Board pointed out that state statutes defining “fraternal beneficiary association” long predated the enactment of the corporate tax in 1909.¹²⁴ The Board asserted that Congress had this preexisting definition in mind when it exempted fraternal beneficiary associations from tax.¹²⁵ It explained that under this preexisting law a “beneficiary association” is an association intended to accumulate contributions from members for the purpose of aiding or relieving members in sickness, in injury, or in death.¹²⁶

Mutual insurance alone was insufficient to meet the exemption requirements, though, because the exemption also required an organization to be fraternal and operate under the lodge system. In addition to providing mutual insurance, the *fraternal* requirement meant that an organization had to “create a brotherly feeling among those who are thus engaged.”¹²⁷ These fraternal organization not only provided benefits to their members, but they also promoted “the social, moral, and intellectual welfare of the members of such associations, and their families.”¹²⁸

Finally, to qualify for exemption, a fraternal beneficiary association had to act under the lodge system. The lodge system required a “ritualistic form of work and representative form of government.”¹²⁹ The ritualistic work happened during meetings in subordinate entities (lodges, chapters, or councils), while most benefits were paid by the supreme body of the fraternal beneficiary association.¹³⁰

¹²³ HENDERSON, *supra* note 114, at 131.

¹²⁴ Appeal of Philadelphia & Reading Relief Ass’n, 4 B.T.A. 713, 724 (1926).

¹²⁵ *Id.*

¹²⁶ *Id.* at 724–25.

¹²⁷ Nat’l Union v. Marlow, 74 F. 775, 778–79 (8th Cir. 1896).

¹²⁸ *Id.* at 779.

¹²⁹ Commercial Travelers’ Life & Accident Ass’n v. Rodway, 235 F. 370, 373 (N.D. Ohio 1913).

¹³⁰ See, e.g., HOPKINS, *supra* note 90, at 765.

In addition to the specific requirements to qualify as a fraternal beneficiary society, all tax-exempt organizations had to meet a general non-inurement requirement.¹³¹ The statutory non-inurement provision in the 1913 Act is ambiguous: “no part of the net income of which inures to the benefit of any private stockholder or individual” comes at the end of five different types of exempt organizations.¹³² It is plausible from the text that it applies to all five.¹³³ Equally plausibly, the clause may have only applied to the final category — corporations organized for “religious, charitable, scientific, or educational purposes.”¹³⁴

In 1914, the Third Circuit noted the ambiguity. It recognized that either interpretation of the statute was possible.¹³⁵ But it ultimately decided that the noninurement clause applied solely to religious, charitable, scientific, or educational organizations.¹³⁶ It justified this decision by pointing out that generally in fraternal beneficiary societies, net income does not inure to the benefit of private individuals, “and it would have been superfluous to add that feature to the description.”¹³⁷ So while the Third Circuit believed that the tax law’s noninurement clause did not apply to fraternal beneficiary societies, it believed that to be the case because such a tax requirement would have been unnecessary.

It is worth noting that the exemption for fraternal beneficiary societies that operate under the lodge system continues until the present.¹³⁸ The Treasury regulations — which were not enacted until 1960, but roughly track earlier law — provide a relatively simple definition of what it means to operate under the lodge system. The Treasury regulations provide that an organization operating under the lodge system means “carrying on its activities under a form of organization that comprises local branches, chartered by a parent organization and largely self-governing, called lodges,

¹³¹ Revenue Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913).

¹³² *Id.*

¹³³ The five types of exempt organizations that may have been subject to the first non-inurement clause of the section were “labor, agricultural, or horticultural organizations, . . . mutual savings banks not having a capital stock[,] . . . fraternal beneficiary societies, . . . domestic building and loan associations, . . . cemetery companies, . . . [and] any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes.” *Id.*

¹³⁴ *Id.*

¹³⁵ *Herold v. Park View Building & Loan Ass’n*, 210 F. 577, 580 (3d Cir. 1914) (“But certainly both constructions are available, and one seems as likely to be correct as the other.”).

¹³⁶ *Id.* at 578 (disagreeing with government’s argument that the noninurement clause applied to all organizations preceding it).

¹³⁷ *Id.* at 579.

¹³⁸ I.R.C. § 501(c)(8).

chapters, or the like.”¹³⁹ To qualify for exemption as a fraternal beneficiary society, then, an organization must provide certain insurance-like benefits to its members, must otherwise promote the welfare of its members, must have democratic governance, and must have ritualistic practices at its meetings.

Exemption for taxes can provide an organization with two financial benefits. The first is simply that the organization does not need to pay taxes. It keeps more of its money, which it can then use to fund its exempt purpose. The second is that current tax law provides a deduction to some donors, which effectively reduces the cost of donating.¹⁴⁰ The charitable deduction did not exist when the second-generation Ku Klux Klan first emerged, though. Congress did not enact a charitable deduction until 1917.¹⁴¹

Even when Congress enacted the charitable deduction, donors to the Ku Klux Klan (assuming there were donors) could not benefit from the deduction. The deduction benefitted donors to “corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals.”¹⁴² The deduction, then, applied to just a subset of tax-exempt organizations, a subset that did not include fraternal beneficiary societies. Moreover, this exclusion of donations to fraternal beneficiary societies from the realm of deductible donations does not seem to have been an accident or an error. Even today, the Internal Revenue Code does not allow donors to fraternal beneficiary societies to deduct their donations.¹⁴³

¹³⁹ Treas. Reg. § 1.501(c)(8)-1(a) (1970).

¹⁴⁰ I.R.C. § 170(a)(1). To illustrate how a charitable deduction reduces the cost of donating, imagine a taxpayer who is in the 36-percent tax bracket. That taxpayer gives \$100 to a tax-exempt organization in 2021. That donation imposes a \$100 out-of-pocket cost on the taxpayer. In 2022, however, the taxpayer files their tax return and deducts the \$100 donation. The deduction reduces their tax liability by \$36 (that is, the \$100 donation times the taxpayer’s 36-percent marginal tax rate). The after-tax cost of the donation is thus closer to \$64 than \$100 (time value of money considerations mean that the deduction in the subsequent year has a present value of something less than \$36).

¹⁴¹ Samuel D. Brunson, *“I’d Gladly Pay You Tuesday for a [Tax Deduction] Today”*: *Donor-Advised Funds and the Deferral of Charity*, 55 WAKE FOREST L. REV. 245, 249 (2020).

¹⁴² War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

¹⁴³ I.R.C. § 170(c). The deduction provision of the Code can be slightly misleading: donors can deduct donations to “a domestic fraternal society, order, or association, operating under the lodge system,” provided the fraternal society uses that money for certain charitable purposes. *Id.* § 170(c)(4). It turns out that under current law, there are exemptions for two different types of fraternal societies. One reflects the initial exemption for fraternal beneficiary societies operating under the lodge system that provide some sort of insurance benefit to members. *Id.* § 501(c)(8). The second is fraternal societies operating under the lodge system that engage in charitable endeavors and do not provide any type of insurance-like benefits. *Id.* § 501(c)(10). This second type of fraternal society is not relevant to discussions of the Ku Klux Klan — it emerged out of the Tax Reform Act of 1969, long

C. Qualifying as a Nonprofit and Tax-Exempt Organization

How did a violently racist group claim to qualify as a tax-exempt fraternal beneficiary society? The second-generation Ku Klux Klan sought qualification in much the same way as the Masons and other groups it patterned itself after did.¹⁴⁴

The Ku Klux Klan's qualification as a fraternal beneficiary society was not inevitable. For the state law designation, the Klan had to convince a judge. And although we do not know whether the Bureau of Internal Revenue requested that the Klan justify its exemption, at the very least, it had to stand ready to do so.¹⁴⁵

And, notwithstanding its violent and racist ideology, it likely met the qualification requirements, at least initially.¹⁴⁶ The Klan leaned into the ritualistic behavior that helped define fraternal beneficiary organizations. It intended to "confer an initiative degree ritualism," complete with "secret obligations, words, grip signs and ceremonies."¹⁴⁷

As he created the Klan, Simmons created secret jargon and an administrative structure, both of which he copied significantly from the Reconstruction Klan.¹⁴⁸ Members pledged themselves to each other and the larger Klan.¹⁴⁹ In fact, while the Klan proved more vitriolic in its racial exclusion than other fraternal societies of the time, its "racialized expression of brotherhood was unremarkable among its fraternal contemporaries."¹⁵⁰

The Klan also operated under the lodge system. In 1945, Samuel Green, the Grand Dragon of the Klan, explained that "[t]he Klan is operating in each state much as the Masons do — with one man in charge of each state organization. The Grand Dragon is the man in charge of the

after the second-generation Klan had been disbanded. *Zeta Beta Tau Fraternity, Inc. v. Commissioner*, 87 T.C. 421, 429 (1986).

¹⁴⁴ See *supra* notes 87–89 and accompanying text.

¹⁴⁵ See *supra* notes 110–111 and accompanying text.

¹⁴⁶ Prior to 1970, qualification as exempt was relatively mechanical. If an organization fit within one of the exemption categories and met the technical requirements of the tax law, it qualified as exempt. Michael Yaffa, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 156–57 (1982). It was not until 1970 that the IRS began to look at whether the actions of tax-exempt organizations violated public policy. See Herzig & Brunson, *supra* note 3, at 112.

¹⁴⁷ Henry Peck Fry, *The Modern Ku Klux Klan* 32 (1922).

¹⁴⁸ KENNETH T. JACKSON, *THE KU KLUX KLAN IN THE CITY, 1915-1930* 6 (1967).

¹⁴⁹ Blee & McDowell, *supra* note 66, at 250.

¹⁵⁰ *Id.*

state group, the Cyclops is in charge of the local group.”¹⁵¹ Ultimately, authority in the Klan devolved from the Imperial Wizard — the head of the whole organization, to eight “domains,” then to states, to provinces, and then to local chapters.¹⁵² At the local chapter level, the Klan exercised the democratic governance necessary to qualify as a fraternal beneficiary society.¹⁵³ Above the local level, though, members could not choose the leadership.¹⁵⁴

In all these ways, the Klan ensured that it was organized as a fraternal beneficiary society, qualifying both for incorporation in Georgia and for federal tax exemption. Like other such societies, it was organized under the lodge system, with a hierarchical structure that devolved from a headquarters through several levels to local organizations. The local organizations received charters and enjoyed a democratic governance. Members engaged in secret and symbolic rituals and practices. They enjoyed the benefits of access to insurance and mutual fraternity. But for the violence and white supremacy, the Klan, in its corporate and organizational structure, could have been mistaken for virtually any other fraternal beneficiary society of the early twentieth century.

D. Qualifying as a Foreign Corporation

The Ku Klux Klan’s Georgia charter allowed it to operate in Georgia with all the rights and privileges incorporation accorded.¹⁵⁵ It had its sights set higher, though. By the mid-1920s, it had expanded well beyond Georgia’s borders. In fact, “at least seventy-five congressional representatives were said to owe their seats to the Klan.”¹⁵⁶ And its expansion (and political clout) was not limited to the states abutting Georgia: the Klan “dominated” the political life of Indiana and Colorado and was able to amass the votes to defeat anti-Klan governors in Oregon and Kansas.¹⁵⁷ Indiana, Texas, Ohio, and Pennsylvania had the largest numbers of Klan members, with membership reaching the hundreds of thousands in the mid-1920s.¹⁵⁸ New York, Illinois, and Oklahoma followed

¹⁵¹ Interview of Samuel Green by Allan Swimm, Oct, 19, 1945, Ku Klux Klan Research File, Schomburg Center, New York Public Library.

¹⁵² JACKSON, *supra* note 148, at 7.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* notes 93–102 and accompanying text.

¹⁵⁶ Nancy MacLean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* 17–18 (1994).

¹⁵⁷ *Id.* at 18.

¹⁵⁸ PEGRAM, *supra* note 23, at 26

closely, while Colorado and Oregon had a relatively high concentration of Klan members for such small states.¹⁵⁹

But its expansion also encountered legal roadblocks. The principal roadblock appears to have been the registration of foreign corporations. Every state in the United States requires foreign corporations (that is, corporations not incorporated in that particular state) “to ‘register’ with a designated official if they do business in that state.”¹⁶⁰ States largely enforce their registration requirement by preventing foreign corporations from accessing state courts unless and until the foreign corporation registers with the state.¹⁶¹

The requirement that foreign corporations register before they do business in a state is not a new development. In fact, the Ku Klux Klan was penalized for not registering in at least three states: Virginia, Kansas, and New York.

Around September 1920, the Ku Klux Klan began operations in Virginia.¹⁶² Virginia law required “[e]very incorporated company doing business in this State” to have an office in Virginia.¹⁶³ In addition to an office, a foreign corporation doing business in Virginia had to provide the state with a written power of attorney granting the Secretary of the Commonwealth to receive service on behalf of the corporation, two copies of the corporation’s charter, and an auditor’s certificate saying the corporation had paid the requisite fee to Virginia.¹⁶⁴ A foreign corporation that met these requirements would get a certificate from Virginia and would be authorized to transact business in the state.¹⁶⁵

A foreign corporation doing business in Virginia without first registering faced two penalties. First, it could not “recover any money or property or enforce any contract in any court” without first obtaining a certificate of authority to do business in Virginia.¹⁶⁶ In addition to being locked out of courts, an unregistered foreign corporation faced a fine of between \$10 and \$1,000.¹⁶⁷ The Virginia statute treated every transaction done without registration as a separate offense, and officers, agents, and

¹⁵⁹ *Id.*

¹⁶⁰ Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of “Registration” Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 159 (2018).

¹⁶¹ *Id.* at 159-60.

¹⁶² *Knights of Ku Klux Klan v. Commonwealth, ex rel. State Corp. Comm’n*, 122 S.E. 122, 124 (Va. 1924).

¹⁶³ POLLARD’S CODE BIENNIAL 1920 170 § 3847 (1920).

¹⁶⁴ *Id.* at 171.

¹⁶⁵ *Id.*

¹⁶⁶ POLLARD’S SUPPLEMENT TO THE CODE OF VIRGINIA CONTAINING ALL STATUTES OF A GENERAL AND PERMANENT NATURE PASSED BY THE GENERAL ASSEMBLY 138 § 1105 (1910).

¹⁶⁷ *Id.*

employees of an unregistered foreign corporation faced personal liability for the fine.¹⁶⁸

The Ku Klux Klan did not register with Virginia as a foreign corporation.¹⁶⁹ But while it did not register with the state, between 1920 and 1924 it established fifty-four local units of the Klan in Virginia.¹⁷⁰ It charged a \$10 initiation fee to each member of those local units and sold Klan paraphernalia, including Klan costumes, to them.¹⁷¹

The Klan conceded that it had a significant presence in Virginia. It argued that it did not have to register, though, because it was not “doing business” in the state.¹⁷² The Klan argued that the “doing business” requirement limited the registration requirement to corporations that engaged in commercial activity, manufacturing, or similar endeavors.¹⁷³ The Klan argued that, as a fraternal beneficiary society, it was not engaged in commercial activity.¹⁷⁴

The court disagreed. “Doing business,” it explained, merely meant a corporation “promoting and carrying out its primary corporate purposes.”¹⁷⁵ The Klan was clearly doing that, and was thus subject to the requirement that it register with the state before it established lodges and perform its ceremonies in Virginia.¹⁷⁶ However, the court determined that whatever fine the state imposed should be “nominal,” because the Klan did not intend to violate Virginia law and proved willing to provide information to the state.¹⁷⁷

The Klan may not have intended to violate state law, but it also took very little care to comply with foreign corporation registration laws. And Virginia was not the only state in which it failed to comply with the registration laws for foreign corporations. At around the same time as Virginia determined that the Klan had not registered as a foreign corporation, the state of Kansas filed suit to “oust the [Ku Klux Klan] from doing business in this state as a foreign corporation.”¹⁷⁸

¹⁶⁸ *Id.*

¹⁶⁹ *Knights of Ku Klux Klan*, 122 S.E. at 123–24.

¹⁷⁰ *Id.* at 124.

¹⁷¹ *Id.*

¹⁷² *Id.* at 125.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The Klan also argued that other fraternal organizations had operated in Virginia for years without registering. The court demurred on engaging with that question, asserting that it could only deal with the facts in front of it. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *State v. Knights of Ku Klux Klan*, 232 P. 254 (Kan. 1925).

Kansas objected to the Klan's presence under two theories. First, the state said, the Ku Klux Klan was doing business in Kansas in violation of Kansas law.¹⁷⁹ Second, it "engaged in propagating race and religious prejudices and animosities, and ... using intimidations, threats, and violence to compel others to agree with the [Klan] and obey [its] commands."¹⁸⁰

As in Virginia, in Kansas, a foreign corporation had to apply to do business in the state. The application required the foreign corporation to provide a copy of its charter, the location of both its principal office and its principal office in Kansas, and the nature of its business.¹⁸¹ It had to give Kansas the names and addresses of its directors, a detailed lists of its assets and liabilities, and an explanation of the nature and character of its business.¹⁸² And, as in Virginia, a foreign corporation had to provide written authorization allowing actions against it to be commenced in any proper court in the state of Kansas.¹⁸³

If the Kansas state charter board determined that the foreign corporation was organized for a purpose that was legal in Kansas, it would grant the application and issue a certificate authorizing the foreign corporation to engage in business in Kansas.¹⁸⁴ The Kansas statute defined "doing business" in the state: under Kansas law, a foreign corporation did business in the state if it had an office or place of business located in the state, if it had a distributing point in the state, or if it used a resident agent in Kansas to sell, deliver, or distribute its products.¹⁸⁵

As in Virginia, the Ku Klux Klan argued that the statutory requirement that a foreign corporation register in Kansas did not apply because it was not *doing business* in the state. Again it argued that only corporations engaged in commercial, financial, or business enterprises could *do business* within the meaning of the statute.¹⁸⁶ Because the Klan was organized for religious, charitable, or benevolent purposes, it did not have to register.¹⁸⁷

The Kansas court did not accept the Klan's interpretation of the law. Its determination that the Klan was engaged in business largely mirrored Virginia's analysis (and, in fact, quoted the Virginia decision): nothing in

¹⁷⁹ *Id.* at 256.

¹⁸⁰ *Id.* at 254.

¹⁸¹ REVISED STATUTES OF KANSAS 229 § 17-501 (1923).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 229-30 § 17-503.

¹⁸⁵ *Id.* at 230 § 17-506.

¹⁸⁶ *State v. Knights of Ku Klux Klan*, 232 P. at 258.

¹⁸⁷ *Id.*

the statute limited the requirement to commercial corporations and the Klan did exercise its purposes in the state of Kansas.¹⁸⁸

The Kansas court went further than the Virginia court in explaining why a nonprofit corporation was subject to the rules. In the court's opinion, the statute limited foreign corporations to engaging in the types of activities in which corporations incorporated in Kansas could participate.¹⁸⁹ Kansas law allowed for benevolent corporations.¹⁹⁰ And while one purpose of the registration requirement was to allow foreign corporations to engage in activities permissible to domestic corporations, another was to require foreign corporations to obtain permission before they did so.¹⁹¹

While the statutory law required the Ku Klux Klan to register in Kansas as a foreign corporation, it did not describe the consequences of a foreign corporation doing business in Kansas without first registering. The court forbade the Georgia Knights of the Ku Klux Klan from organizing or controlling lodges in the state of Kansas.¹⁹² It also prohibited the Georgia corporation from exercising any corporate functions in Kansas.¹⁹³

In contrast to its failures to register in Virginia and Kansas, the Knights of the Ku Klux Klan did initially register as corporation in New York.¹⁹⁴ New York law required any prospective corporation to file a certificate of incorporation with the state.¹⁹⁵ That certificate had to include, among other things, the object for which the corporation was formed.¹⁹⁶ Before the corporation could file its certificate — and therefore become a corporation — a justice of the New York Supreme Court had to approve its certificate.¹⁹⁷

And Justice George Pierce of Buffalo did approve the certificate of the Knights of the Ku Klux Klan.¹⁹⁸ But the Klan made changes to its certificate of incorporation between the date on which the justice approved its certificate and the date on which it filed the certificate.¹⁹⁹ When Justice

¹⁸⁸ *Id.* at 260.

¹⁸⁹ *Id.* at 258.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The Klan also argued that to the extent it engaged in commerce, it was interstate commerce not subject to Kansas's regulation. *Id.* at 260. The court held that, while the sale of Klan paraphernalia from the Georgia organization to its subordinate Kansas-based lodges may have been interstate commerce, once they arrived in the state of Kansas, interstate commerce had ended. *Id.* at 261.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *People v. Smith*, 200 N.Y.S. 863, 864 (N.Y. Sup. Ct. 1923).

¹⁹⁵ N.Y. MEMBERSHIP CORPORATIONS LAW § 41 (McKinney 1917).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Smith*, 200 N.Y.S. at 864.

¹⁹⁹ *Id.*

Pierce approved the Klan's certificate, it authorized the Klan to "exercise such rights, powers and privileges as are now generally extended to certain fraternal organizations specifically named in the certificate[.]"²⁰⁰ The Klan deleted the specifically-named organizations and more broadly authorized itself to exercise the rights, powers, and privileges of "men's fraternal orders."²⁰¹

New York law permitted the state Attorney General to act, *sua sponte* or on an individual's complaint, against anyone acting as a corporation in New York without proper authorization.²⁰² Using this statutory authority, the Attorney General moved for a temporary injunction against the Knights of the Ku Klux Klan.²⁰³

The court held that New York law required both that a corporation's certificate be approved in the form it was filed and filed in the form it was approved.²⁰⁴ A corporation's primary purpose was to secure the legal right to exercise powers and enjoy privileges, and its certificate of incorporation granted those powers and privileges.²⁰⁵ The Klan's alteration of those powers from specific and circumscribed to broad and indefinite represented a material change, one not approved by New York law.²⁰⁶ The court therefore granted the temporary restraining order against the Klan.²⁰⁷

VI. THE DEATH OF THE KLAN

The height of the second Klan's power, influence, and membership occurred during 1924 and 1925.²⁰⁸ By the next year membership had begun to decline, and by 1928 "the decline became terminal."²⁰⁹ Historians have described a number of issues that factored into its decline, including hypocrisy by the leadership and fighting between various lodges.²¹⁰ The

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² N.Y. CORPORATE RIGHTS LAW § 1217 (Clevenger 1922).

²⁰³ *People v. Smith*, 200 N.Y.S. 863, 863 (N.Y. Sup. Ct. 1923).

²⁰⁴ *Id.* at 864.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* The case dealt not only with the Knights of the Ku Klux Klan, but also with Kamelia, Inc. *Id.* at 863. Between the approval of its certificate by Justice Pierce and its filing, Kamelia also deleted the names of the specific fraternal organizations it was emulating and replaced those names with "women's fraternal orders." *Id.* at 864. Kamelia was a women's Klan organization sponsored by William Simmons, the founder of the second-generation Ku Klux Klan. Kathleen M. Blee, *Women in the 1920s' Ku Klux Klan Movement*, 17 FEMINIST STUD. 57, 75 n.12 (1991).

²⁰⁸ MacLean, *supra* note 156, at 177.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 178.

Klan faced opposition by press and local leaders in some places.²¹¹ Some historians argue that the failure of the elected officials they chose to enact change precipitated the decline, or that their very success in electing officials led to complacency.²¹²

Critically, though, that the Klan had entered terminal decline did not mean that the Klan disappeared. During the last half of the 1920s, “the men who ran the Klan tried various ways to keep the order afloat.”²¹³ And the Klan continued to exist, both as a Georgia nonprofit corporation and as a tax-exempt entity, until the mid-1940s. But in April 1944, the Grand Dragon of the Ku Klux Klan held a secret convention in Atlanta.²¹⁴ During the convention, members of the Klan voted to “suspend the constitutional laws of the Knights of the Ku Klux Klan, Inc., to revoke all charter Klans and to order disbandment of all provisional Klans.”²¹⁵

James Colescott, the Klan’s Imperial Wizard, claimed that this vote did not end the Klan.²¹⁶ Rather, it “suspended” the Klan but the Klan could “meet and reincarnate at any time.”²¹⁷ Within two years, though, the option to meet and reincarnate was definitively off the table; by 1946 it was clear that Knights of the Ku Klux Klan would not resurrect.²¹⁸

What had happened? Two things occurred that effectively put the final nails into the white supremacist group’s coffin. First, the IRS revoked the Klan’s tax exemption retroactively, and demanded hundreds of thousands of dollars in back taxes.²¹⁹ Second, the state of Georgia revoked the Klan’s corporate charter.²²⁰

As a tax-exempt fraternal beneficiary society, the Klan had never paid federal income taxes. In April 1944, however, Colescott received a bill from the U.S. government for \$685,305.²²¹ The amount included back taxes, as well as interest and penalties, from the first half of the 1920s.²²² The Bureau of Internal Revenue calculated that the Klan owed \$25,393 from

²¹¹ *Id.*

²¹² *Id.*

²¹³ CHARLES C. ALEXANDER, *THE KU KLUX KLAN IN THE SOUTHWEST* 233 (1965).

²¹⁴ *Klan Disbands as a National Body; Claimed 5,000,000 Roll in 1920s*, N.Y. TIMES, June 5, 1944, at 21.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Shaefer, *supra* note 5, at 151–52.

²¹⁹ MacLean, *supra* note 156, at 177 (“Eight years later, the order quietly dissolved, unable to pay the taxes it had evaded over the years.”).

²²⁰ See *Georgia Orders Action to Revoke Charter of Klan*, N.Y. TIMES, May 31, 1946, at 1; see also Shaefer, *supra* note 5, at 152.

²²¹ MICHAEL NEWTON, *WHITE ROBES AND BURNING CROSSES: A HISTORY OF THE KU KLUX KLAN FROM 1866*, at 87 (2014).

²²² Douglas, *supra* note 117, at A2.

1921, \$79,554 from 1922, \$301,178 from 1924, and \$5,433 from 1926.²²³ According to the Bureau, the Klan owed no taxes from 1925 because it suffered a loss that year and investigators could not find any taxable income earned by the Klan after 1926.²²⁴

Colescott pointed to this tax bill as the reason he disbanded the Klan. He claimed that the Klan had to “sell all our assets and hand over the proceeds to the government and go out of business.”²²⁵ Colescott appears to have lied about the Klan selling assets — ultimately, the Bureau of Internal Revenue proved unable to collect voluntary payment from the Klan or to find assets against which it could levy.²²⁶

Moreover, the assertion of tax deficiency seems strange on its face. The government faces a statute of limitations in collecting unpaid taxes. In the 1920s, that state of limitations ran for four years after a taxpayer filed their return.²²⁷ As a general rule, then, the statute of limitations would prevent the Bureau from collecting a twenty-year-old tax deficiency. It did not, however, bar the Bureau from assessing and collecting these past-due taxes from the Klan. While the statute generally ended after four years, the law allowed the government to collect deficiencies related to fraudulent returns or unfiled returns at any time after they came due.²²⁸ As an allegedly tax-exempt organization, the Klan appears not to have filed any tax returns. As a result, the Bureau could collect taxes from the Klan even twenty years later.

Although this tax assessment crippled the Klan and encouraged its leaders to suspend it, as Colescott pointed out, it could rebirth at any moment.²²⁹ And, in fact, two years after it disbanded, the Klan revived its charter.²³⁰ Its inactivity had been precipitated by the tax assessment, but the United Press claimed that the Klan was also damaged by wartime sheet shortage and “a federal security ban on masking.”²³¹ In any event, whatever

²²³ *Id.* Note that the newspaper seems to have erred in its addition as it wrote the headline.

²²⁴ *Id.*

²²⁵ NEWTON, *supra* note 221, at 87.

²²⁶ Douglas, *supra* note 117, at A2.

²²⁷ Revenue Act of 1921, Pub. L. No. 67–98 § 250(d), 42 Stat. 265.

²²⁸ *Id.*

²²⁹ *Klan Disbands*, *supra* note 214, at 21.

²³⁰ *KKK Disclaimer ‘Of No Avail’*, LUBBOCK MORNING AVALANCHE, Jun. 1, 1946, at 3.

²³¹ *Id.* In the 1920s, several states enacted anti-masking laws. Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819, 826 (1991). In 1928, the U.S. Supreme Court upheld a New York law that required all organizations (other than labor unions and benevolent orders) that required an oath to join to provide the state with certain information, including a list of its members. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928). The New York law was not precisely an anti-masking law, however. While the early 1950s saw a number of Southern states impose

the causes of the Klan's inactivity, the tax assessment had damaged, but not destroyed, the Knights of the Ku Klux Klan.

The Bureau of Internal Revenue was not done with the Klan, though. On May 30, 1946, almost exactly two years after it delivered the tax assessment to Colescott and two months after the Klan itself was revived, the Bureau of Internal Revenue filed a tax lien against the Klan in Fulton County, Georgia.²³² The day after filing the lien the Bureau began searching for Klan property that it could seize to meet the Klan's liability.²³³

Marion Allen, the Revenue Collector for Georgia, admitted that the lien was only a "formality," though it would allow the Bureau to seize Klan assets if the Bureau could find any.²³⁴ He asked the public for help locating the Klan's assets.²³⁵ He promised that "[i]f anyone can point out any property of the Ku Klux Klan, Inc., I will seize it to satisfy the government claims."²³⁶

The Bureau received some tips. The Congress of Industrial Organizations (CIO) claimed that the Klan had collected \$200,000 over the course of the previous year.²³⁷ Stetson Kennedy, an investigative journalist who worked to expose the Klan,²³⁸ informed the Bureau of Internal Revenue that former members of the Klan in Philadelphia had bequeathed \$1,200 to the Klan.²³⁹ The Bureau was able to collect that money.²⁴⁰ By and large, though, the assessment and lien went uncollected.²⁴¹

While the Bureau of Internal Revenue did not ultimately collect the taxes, interest, and penalties the Klan owed, its lien provoked a second governmental move, one which definitively ended the second Klan. In

masking bans, I have been unable to find evidence that the federal government imposed a mask ban. Rob Kahn, *The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers*, 28 J.L. & POL'Y 71, 81 (2019). Similarly, I have been unable to find evidence of a sheet shortage, though during World War II U.S. residents economized on fabric. Terrence H. Witkowski, *World War II Poster Campaigns—Preaching Frugality to American Consumers*, 32 J. ADVERT. 69, 71 (2003). Given that the Klan did not make its costumes out of sheets, these assertions may have been hyperbolic, meant to mock the Klan.

²³² *U.S. Suing Klan for \$685,305 in Back Income Tax*, THE DAILY TIMES (Davenport, Iowa), May 31, 1946, at 5; see also *Georgia Orders Action to Revoke Charter of Klan*, *supra* note 220, at 1.

²³³ *KKK Disclaimer 'Of No Avail'*, *supra* note 230, at 2.

²³⁴ *Georgia Opens Fight on Klan*, WILMINGTON MORNING STAR, May 31, 1946, at 1.

²³⁵ *KKK Disclaimer 'Of No Avail'*, *supra* note 230, at 2.

²³⁶ *Id.*

²³⁷ *C.I.O. Says Klan Got \$200,000*, PHILA. INQUIRER, June 18, 1946, at 3.

²³⁸ Paul Ortiz, *Tearing Up the Master's Narrative: Stetson Kennedy and Oral History*, 41 ORAL HIST. REV. 279, 280 (2014).

²³⁹ STETSON KENNEDY, THE KLAN UNMASKED 90 (2011).

²⁴⁰ *Id.* at 91.

²⁴¹ *Id.*

1946, Democrats in Georgia nominated Gene Talmadge as their candidate for governor.²⁴² Samuel Greene, the Klan's Grand Dragon in Georgia, estimated that 100,000 members and former members of the Klan voted for Talmadge.²⁴³

Not everybody in Georgia was happy to see a resurgent Klan. It faced opposition from Georgia newspapers but that opposition was spearheaded by Ellis Arnall, the governor of the state.²⁴⁴ Governor Arnall believed that the Klan appealed to "ignorance, prejudice and intolerance" and that it "reflect[ed] discredit on our State."²⁴⁵

Governor Arnall ordered his state attorney general to use "his entire staff to prosecute the Klan."²⁴⁶ He also indicated that if current law did not provide him with the tools he needed he would ask the state General Assembly to "'de-hood' the secret night shirt-wearing order."²⁴⁷

Additionally, and more importantly, Governor Arnall instructed the state legal department to prepare and file a suit to revoke the Klan's charter in the same Fulton County court that had granted the charter in the first place.²⁴⁸ While the Klan had suspended its operations, it had kept its Georgia charter intact, presumably in case it decided to "reincarnate."²⁴⁹ With its corporate charter still intact, a reincarnated Klan could continue to enjoy the rights attendant to corporate status without needing to reapply to the state.

Eugene Cook, the Georgia Attorney General, followed Governor Arnall's instructions. By June 1946 he said the state had "gathered sufficient information to wage a successful fight against the hooded organization."²⁵⁰ On June 21, 1946, the state filed quo warranto proceedings to dissolve the Klan's Georgia charter.²⁵¹ Under Georgia law, a corporation forfeited its charter through the willful violation of the "essential conditions" on which the state granted the charter or through the

²⁴² Henry Lesesne, *Georgia Spearheads Fight to Destroy Resurgent Klan*, THE EVENING STAR (D.C.), Aug. 20, 1946, at A10.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Douglas, *supra* note 117, at A2.

²⁴⁶ *Georgia Opens Fight on Klan*, *supra* note 234, at 1.

²⁴⁷ *Id.*

²⁴⁸ Lesesne, *supra* note 242, at A10.

²⁴⁹ Douglas, *supra* note 117, at A2.

²⁵⁰ *Georgia Plotting Legal Klan Fight*, SUNDAY STAR-NEWS (Wilmington, N.C.), June 9, 1946, at 11B.

²⁵¹ *Klan is Accused of a Revolt Plot*, N.Y. TIMES, June 21, 1946, at 46. "The writ of quo warranto is a procedure to direct an individual or corporation to show by what authority certain powers are exercised." *Paradise Village Children's Home, Inc. v. Liggins*, 38,926 (La. App. 2 Cir. 10/13/04); 886 So. 2d 562, 567 n.2.

misuse of its franchises.²⁵² The state appears to have argued that the Klan should lose its charter for both reasons.

First, Georgia asserted that the Klan conspired to “seize key governmental agencies” and that it used “secret propaganda in an effort to enforce its doctrines upon the State by violence, terrorism, and hate.”²⁵³ Trying to seize the reins of government, and doing so through violence and terrorism, would violate the law. And using the corporate charter to engage in illegal activities would represent a significant misuse of the corporate charter.

The state additionally argued that the Klan had violated the “nonprofit and nonpolitical provisions of its charter.”²⁵⁴ The Klan had engaged in significant politicking during its existence.²⁵⁵ To demonstrate that it had operated for profit, the state pointed to tax assessment as evidence that the federal government had already determined that the Klan operated for profit.²⁵⁶

The state’s assertion that the Klan should lose its charter because it operated for profit was an odd legal assertion. For one thing, the grant of its charter explicitly anticipated the Klan engaging in profit-making endeavors. In its charter application, the Klan requested the powers, among other things, to own and sell clothing, jewelry, and other products, as well as to buy and sell property.²⁵⁷ The charter application mentions profit once by providing that the Klan would not distribute profit to members of the Klan.²⁵⁸

And in general, this is what “nonprofit” means. A nonprofit organization can earn a profit; unlike a for-profit enterprise, though, it must apply that profit to its mission rather than distribute the profit to its shareholders or other private individuals.²⁵⁹ And the statute governing fraternal beneficiary societies clearly embodies this view of nonprofits. Georgia law explicitly provided that nonprofit fraternal beneficiary societies

²⁵² THE CODE OF GEORGIA OF 1933 § 22-1205 (Orville A. Park et al. 1935).

²⁵³ *Klan is Accused of a Revolt Plot*, *supra* note 251, at 46.

²⁵⁴ Lesesne, *supra* note 242, at A10.

²⁵⁵ See *supra* notes 155–157 and accompanying text.

²⁵⁶ *Arnall, U.S. Revenue Collector Spur War Against Georgia Klan*, ATLANTA CONSTITUTION, May 31, 1946, at 1.

²⁵⁷ See *supra* note 106 and accompanying text.

²⁵⁸ *Hearings*, *supra* note 59, at 102.

²⁵⁹ *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 646 F.3d 983, 987–88 (7th Cir. 2011) (“The principal difference between the two types of firm is not that nonprofits eschew typical commercial activities such as the sale of services — they do not — but that a nonprofit enterprise is forbidden to distribute any surplus of revenues over expenses as dividends or other income to owners of the enterprise, but must apply the surplus to the enterprise’s mission.”).

could accumulate funds.²⁶⁰ They could distribute those funds to members essentially as insurance proceeds, but they could not distribute profits to their members.²⁶¹

There is no evidence that the Klan deliberately distributed profit to its members in violation of its charter and Georgia law. There is at least some evidence that the Klan suffered from “corruption and Imperial theft,” with some members embezzling money from the Klan.²⁶²

There is no reason to believe that unauthorized embezzlement would violate the state’s prohibition on distributing profit. Even if the state erred in its assertions about operating for profit, it appears to have had several other grounds on which to rest its revocation of the Klan’s charter.

Moreover, if the state’s assertion that the Klan operated for profit in violation of an essential provision of its charter was not entirely on point, the Klan’s reply to the state’s allegations proved inapposite. The Klan argued that the Fulton county court should dismiss the suit because the Klan had, in fact, disbanded two years earlier.²⁶³ Moreover, they argued, the Klan was in fact a benevolent organization worthy of its corporate charter.²⁶⁴

In the end, though, these arguments proved both unavailing and irrelevant. The combination of the Bureau of Internal Revenue’s tax lien and the state of Georgia’s revocation of the Klan’s corporate charter proved too much for the organization. While it argued that it qualified for a corporate charter, it was also forced to argue that it was a different organization altogether.²⁶⁵ If the Klan of 1946 that defended itself from Georgia’s attempt to revoke its charter were the same Klan that Georgia had chartered in 1916, it would owe the federal government almost \$600,000 in back taxes, interest, and penalties.

Georgia’s move had ripple effects for the national organization. For example, in late June 1946, the Indiana deputy secretary of state announced that the Klan had not paid any taxes or fees to the state.²⁶⁶ As a result, the Klan — which two decades earlier had claimed half a million members in

²⁶⁰ THE CODE OF GEORGIA OF 1933 § 56-1702 (Orville A. Park et al. 1935).

²⁶¹ *Id.*

²⁶² Alexander, *supra* note 65, at 362.

²⁶³ “Dismiss Suit, We Are Benevolent,” *Says Klan*, *supra* note 56, at 7.

²⁶⁴ *Id.*

²⁶⁵ *Id.* (“Green said his organization is not the same as that against which quo warranto proceedings have been initiated.”).

²⁶⁶ *No Klan Exists Under Laws of Hoosier State*, INDIANAPOLIS RECORDER, June 29, 1946, at 7, <https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=INR19460629-01.1.7&e=-----en-20-1-txt-txIN----->.

Indiana — did not exist as a legal entity in the state.²⁶⁷ Similarly, in September 1946, the attorney general of Kentucky sued to revoke the Klan's Kentucky charter.²⁶⁸ The suit went uncontested and a circuit judge signed an order declaring the charter void.²⁶⁹

It is important not to overstate the importance of the Bureau of Internal Revenue and the state of Georgia in shutting down the second-generation Klan. As historian Nancy MacLean points out, by 1926 — ten years after it received its Georgia charter — the Klan's membership and influence had begun to decline.²⁷⁰ Two years later, its death had become essentially inevitable, though it continued to limp along for another decade and a half.²⁷¹ In the intervening years, the Klan even sold its Imperial Castle as membership continued to fall.²⁷²

The collapse of the Klan, then, was not precipitated by either the tax assessment or the revocation of its charter. Nonetheless, both the tax assessment and the revocation of its charter were critical to its downfall. While the Klan had been declining for fifteen years when it suspended its operations in 1944, it was still operating. The tax assessment forced its hand. In 1944 Colescott, the erstwhile head of the Klan, said that the tax assessment did not cause him to suspend the Klan.²⁷³ Years later, after the Bureau of Internal Revenue filed its lien, Colescott contradicted himself. He claimed with racist and anti-Semitic invective that the tax assessment forced the Klan to go out of business and shut down.²⁷⁴ While the Bureau of Internal Revenue ultimately collected very little of its assessment,²⁷⁵ had the Klan continued to operate, the U.S. government would have taken its next \$685,305 in revenue.²⁷⁶ With membership costing \$10, the Klan would have needed nearly 70,000 new members before it would begin to accrue any of that income.

Georgia's revocation of the Klan's charter put a final nail in the Klan's coffin. In 1945 — a year after the Klan had suspended its charter — Samuel Green returned to Stone Mountain to introduce the new Association of

²⁶⁷ *Id.*

²⁶⁸ *Kentucky Today*, FULTON DAILY LEADER, Sept. 10, 1946, at 1, <https://digitalcommons.murraystate.edu/cgi/viewcontent.cgi?article=1448&context=fdl>.

²⁶⁹ *Id.*

²⁷⁰ MacLean, *supra* note 156, at 177.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *KKK Organization Reported Disbanded by Chief Klansman*, ORLANDO SENTINEL, June 5, 1944, at 3.

²⁷⁴ CHALMERS, *supra* note 63, at 323–24.

²⁷⁵ KENNEDY, *supra* note 239, at 90.

²⁷⁶ WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 222 (1965).

Georgia Klans.²⁷⁷ Green had long ties to the shuttered second-generation Klan — he had served as its second Grand Dragon and stayed with the organization as it declined in the 1930s.²⁷⁸ In launching his Association of Georgia Klans, Green attempted to bridge the second-generation Klan into his third iteration by reactivating the Georgia Charter.²⁷⁹

When Georgia began the proceedings to revoke the Klan's charter, Green and his Association of Georgia Klans were forced to defend it and argue that they were the proper successors. At the same time, however, if the Association of Georgia Klans was the successor to the Klan, it would have to face the \$685,305 tax lien.²⁸⁰ The effect of the Bureau of Internal Revenue's tax lien and the state of Georgia's revocation of the Klan's charter was that the third generation Klan got off on a rocky start, forced to argue that it was "in no manner connected with the Ku Klux Klan, Inc."²⁸¹

Unable to connect his Association of Georgia Klans with the now-defunct Ku Klux Klan, Green's attempt at creating a new Klan "failed miserably."²⁸² Still, the original Georgia charter, and the legitimacy it conferred, continued to be important to would-be Klans. When Eldon Edwards organized his U.S. Klans in response to the Supreme Court's decision holding that segregated schooling deprived minority students of equal educational opportunities,²⁸³ he claimed that his iteration of the Klan was legitimate because it had "the official charter."²⁸⁴

The "official charter" claim was just that — a claim. In the wake of second-generation Klan's collapse, though, the Civil Rights-era Klan emergence proved fragmented and confused. By the early 1970s, at least fourteen Klan organizations, with memberships ranging from twenty-five to 15,000 members, vied to embody the racist values of the Klan.²⁸⁵ Without the legitimacy conferred by incorporation and tax-exempt status, these Klan groups competed for power.²⁸⁶

²⁷⁷ DAVID CUNNINGHAM, *KLANSVILLE, U.S.A.: THE RISE AND FALL OF THE CIVIL RIGHTS-ERA KU KLUX KLAN* 26–27 (2012).

²⁷⁸ *Id.* at 27.

²⁷⁹ *Id.*

²⁸⁰ *Seize KKK Property, Allen Asked*, ATLANTA CONSTITUTION, Sept. 13, 1946, at 3.

²⁸¹ *Id.*

²⁸² Schaefer, *supra* note 5, at 152.

²⁸³ *Brown v. Bd. of Educ. of Topeka, Shawnee City, Kan.*, 347 U.S. 483, 493 (1954), supplemented *sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

²⁸⁴ CUNNINGHAM, *supra* note 277, at 31.

²⁸⁵ Schaefer, *supra* note 5, at 152.

²⁸⁶ *Id.*

A. Tax-Favored White Supremacy Today

While 1946 marked the death of the second Klan, it did not mark the end of the Ku Klux Klan. Similarly, it did not end the ability of white supremacist groups to apply for — and receive — tax exemption. Today, at least four white supremacist groups are exempt from the federal income tax.²⁸⁷ These four groups — the National Policy Institute, the New Century Foundation, the Charles Martel Society, and VDare Foundation²⁸⁸ — are also necessarily organized under state nonprofit laws.²⁸⁹ The National Policy Institute is incorporated in Virginia.²⁹⁰ The New Century Foundation is also organized in Virginia.²⁹¹ The VDare foundation is organized in Connecticut.²⁹² The Charles Martel Society appears to be organized in Georgia.²⁹³

Each of these organizations claims exemption as an educational organization.²⁹⁴ On its Form 990, the Charles Martel Society says that its exempt purpose is to “promote the study, discussion, and understanding of the concept of the Nation-State in general and of the American Nation-State in particular, especially in relation to historical, geographical, biological and cultural forces.”²⁹⁵ The New Century Foundation claims its mission is to “educate the public on matters of race, race relations, and immigration.”²⁹⁶ The National Policy Institute claimed its mission was to “conduct[] research and nonpartisan analyses and education on public issues, including social, cultural, and governance issues affecting the United States and other nations in the world.”²⁹⁷

²⁸⁷ Kunzelman, *supra* note 3.

²⁸⁸ *Id.*

²⁸⁹ For an organization to qualify as exempt it must be organized as a corporation, a community chest, fund, or foundation. I.R.C. § 501(c)(3).

²⁹⁰ Virginia Department of Agriculture and Consumer Services, Office of Charitable and Regulatory Programs, http://cos.va-vdacs.com/cgi-bin/char_search.cgi?act=2&sysorgno=28544&orgname=National%20Policy%20Institute%20C%20Inc.%20%28Registration%20Pending%29 [https://perma.cc/TZE2-FHCB].

²⁹¹ *Id.*

²⁹² State of Connecticut, Lookup Detail View, <https://www.elicense.ct.gov/Lookup/PrintLicenseDetails.aspx?cred=2075491&contact=2405139> [https://perma.cc/4K9B-QU2C].

²⁹³ The Charles Martel Society does not show up on Georgia’s charity or business lookup tool but its IRS Form 990 puts its address in Georgia. The Charles Martel Society, 2019 Form 990EZ at 1.

²⁹⁴ Kunzelman, *supra* note 3 (“With benevolent-sounding names such as the National Policy Institute and New Century Foundation, the tax-exempt groups present themselves as educational organizations and use donors’ money to pay for websites, books and conferences to further their ideology.”).

²⁹⁵ The Charles Martel Society, 2018 Form 990EZ at 2.

²⁹⁶ New Century Foundation, 2018 Form 990, at 2.

²⁹⁷ National Policy Institute, 2015 Form 990, at 13.

Meanwhile, on its 2018 Form 990, VDare Foundation claimed to have no mission.²⁹⁸ The previous year, it did list a mission:

The VDare foundation's mission is education on two main issues first, the unsustainability of current us immigration policy and second, the "national question," which is the viability of the us as a nation-state we do this through the VDare com webzine and VDare books, public speaking, conferences, debates and media appearances[.]²⁹⁹

Each of these organizations presents itself as an educational institution, and thus as qualifying for tax exemption, notwithstanding their underlying racism. If they are "organized and operated exclusively" for educational purposes, they may qualify as tax-exempt.³⁰⁰

For exemption purposes, an educational organization is one that either instructs or trains individuals so that they improve or develop their capabilities or instructs the public on subjects that are useful to individuals and beneficial to the community.³⁰¹ While schools are the paradigmatic educational organizations,³⁰² other types of organizations can also qualify. The exempt white supremacist organizations likely rely on the regulations' example of "[a]n organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs"³⁰³ in claiming their exemption as educational organizations.

The second Klan's demise provides a window into dealing with contemporary tax-exempt white supremacist organizations like the National Policy Institute, the New Century Foundation, the Charles Martel Society, and VDare Foundation.³⁰⁴ The Supreme Court has recognized that the "discriminatory denial of a tax exemption for engaging in speech is a

²⁹⁸ VDare Foundation, 2018 Form 990, at 2. According to the instructions for IRS Form 990, an exempt organization is supposed to describe its mission as adopted by its governing board. If its board has not adopted or ratified a formal mission, the organization needs to write "none." I.R.S., Instructions for Form 990 Return of Organization Exempt From Income Tax at 11 (2019).

²⁹⁹ VDare Foundation, 2017 Form 990, at 30.

³⁰⁰ I.R.C. § 501(c)(3).

³⁰¹ Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 2017).

³⁰² See *id.* § 1.501(c)(3)-1(d)(3)(ii) ex. 1.

³⁰³ *Id.* § 1.501(c)(3)-1(d)(3)(ii) ex. 2.

³⁰⁴ Dealing with these organizations is critical. A 2020 draft Department of Homeland Security report lists white supremacists as the "gravest terror threat to the United States." Betsy Woodruff Swan, *DHS Draft Document: White Supremacists Are Greatest Terror Threat*, POLITICO, Sept. 4, 2020, <https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236> [<https://perma.cc/ZU5J-79FV>]. While there is no reason to believe that these tax-exempt white supremacist organizations engage in terroristic conduct, they contribute to the philosophies that allow and encourage such white supremacist terrorism.

limitation on free speech.”³⁰⁵ As such, the Constitution prohibits governments from denying an organization incorporation or tax exemption based on its viewpoint, even if that viewpoint is despicable.³⁰⁶ If an organization’s *actions* violate the law or a fundamental public policy it can lose its exemption but not merely for its bad opinions.³⁰⁷

From a policy perspective, this viewpoint neutrality is probably for the best. While white supremacy is inarguably an evil philosophy, undeserving of society’s approbation, “there is no assurance that society’s norms will always move in a progressive direction.”³⁰⁸ If the state could use viewpoint to determine whether an organization merited incorporation or tax exemption, the state could suppress ideas with which it disagreed, not just white supremacist speech.³⁰⁹ In fact, the IRS has at times rejected exemption applications from organizations that advocate civil disobedience for public policy reasons or reason of illegality.³¹⁰

The history of the Ku Klux Klan demonstrates, however, that the state can use objective measures to police white supremacist groups. Just because it cannot engage in viewpoint discrimination does not mean that it cannot look at an organization’s actions. “A nondiscriminatory denial of a tax benefit, however, not aimed at suppressing speech content, does not infringe First Amendment rights.”³¹¹ The Bureau of Internal Revenue determined that the second Klan did not, in fact, meet the requirements for classification as a fraternal beneficiary society. The Klan therefore owed taxes on its income, taxes which the Bureau could assess and collect. Likewise, the state of Georgia determined that by acting for profit, by engaging in politics, and by attempting to take over the state, the Klan had

³⁰⁵ *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

³⁰⁶ *Id.* at 519 (“[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is ‘frankly aimed at the suppression of dangerous ideas.’”); see also *Hearing on How the Tax Code Subsidizes Hate Before the Subcom. on Oversight of the H. Com. on Ways and Means*, 116th Cong. 21 (2019) (statement of Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law, UCLA School of Law).

³⁰⁷ *Hearing on How the Tax Code Subsidizes Hate Before the Subcom. on Oversight of the H. Com. on Ways and Means*, 116th Cong. 21 (2019) (statement of Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law, UCLA School of Law). It is also important to note that while the Supreme Court has expressly permitted the IRS to revoke the exemption of a tax-exempt organization that violates fundamental public policy, *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96 (1983), it has used that power almost exclusively to reject the tax exemption of racially-discriminatory private schools. Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 IND. L.J. 1175, 1195 (2017).

³⁰⁸ Herzig & Brunson, *supra* note 3, at 1160.

³⁰⁹ *Id.*

³¹⁰ Brunson & Herzig, *supra* note 307, at 1194.

³¹¹ See *Nationalist Movement v. Commissioner*, 102 T.C. 558, 584, *aff’d*, 37 F.3d 216 (5th Cir. 1994).

violated fundamental terms of its charter and had otherwise acted contrary to the conditions of incorporation.

In short, the Klan lost its tax exemption and its charter not because of its hateful ideology but because its actions ran contrary to the objective conditions placed on its exemption and its charter. This loss of exemption for technical violations can occur today as well. For example, white nationalist Richard Spencer's National Policy Institute lost its exemption in 2017.³¹² It lost its exemption because it failed to file a return with the IRS for three straight years,³¹³ a penalty imposed by the Internal Revenue Code irrespective of an organization's ideology.³¹⁴

The National Policy Institute's loss of exemption will likely serve as a warning to other white supremacist tax-exempt organizations not to make a technical foot fault. But it is worth investigating whether they in fact meet the conditions of their exemption.

Provided that they file their Forms 990 — which, after the National Policy Institute's loss of exemption they will almost certainly do — there is no reason to think that these tax-exempt white supremacist groups will violate the technical requirements of tax exemption. That means that the IRS would have to investigate whether they qualify as educational organizations under the tax law.

In the first instance, that they have a viewpoint does not mean that they do not qualify as educational.³¹⁵ An organization can qualify as educational even when it “advocates a particular position or viewpoint.”³¹⁶ It cannot solely advocate a viewpoint, of course. Rather, it must present a “sufficiently full and fair exposition of the pertinent facts” to allow learners to come to an independent conclusion.³¹⁷ If, however, an organization fails to provide this full and fair exposition, but instead presents “unsupported

³¹² Matt Pearce, *IRS Strips Tax-Exempt Status from Richard Spencer's White Nationalist Nonprofit*, L.A. TIMES, Mar. 13, 2017, <https://www.latimes.com/nation/la-na-richard-spencer-taxes-20170223-story.html> [<https://perma.cc/QC3G-QCK3>].

³¹³ *Id.*

³¹⁴ I.R.C. § 6033(j)(1)(B). It is worth noting that the Internal Revenue Service has provided a streamlined procedure for an organization to reinstate its tax-exempt status where it lost status for failure to file. Rev. Proc. 2014-11, 2014-3 I.R.B. 411 (2014). The National Policy Institute appears to have used this procedure and it regained its tax-exempt status in 2018. Michael Kunzelman, “*Alt-Right*” Group Regains IRS Tax-Exempt Status, APNEWSBREAK, Oct. 4, 2018, <https://apnews.com/f2d27379c3a149df960e8c9b16802c8c> [<https://perma.cc/5ZVV-CS7R>].

³¹⁵ See generally Samuel D. Brunson & Ellen P. Aprill, *The University, Ideology, and Tax Exemption*, 168 TAX NOTES 1037 (2020).

³¹⁶ Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 2017).

³¹⁷ *Id.*

opinion” — it does not qualify as educational for tax exemption purposes.³¹⁸

If “full and fair exposition” seems like a vague and unwieldy test, that is because it is. In fact, in 1980, the D.C. Circuit determined that the “full and fair exposition” test was “vague both in describing who is subject to that test and in articulating its substantive requirements.”³¹⁹ The vagueness, the court said, meant the test failed to pass constitutional muster.³²⁰

In the late 1970s, the IRS also denied a tax exemption to the National Alliance, a white supremacist group that claimed to be educational.³²¹ The IRS originally denied the National Alliance’s exemption under the too-vague “full and fair exposition” standard.³²² During the district court proceedings, the IRS argued that it had denied the National Alliance’s exemption under a new “Methodology Test” that functioned as an explanatory gloss of the “full and fair exposition” standard in the regulations.³²³

The IRS’s new Methodology Test looked at four criteria:

(1) Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications.

(2) To the extent viewpoints purport to be supported by a factual basis, are the facts distorted?

(3) Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.

(4) Whether or not the approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.³²⁴

The IRS determined that under these four criteria, National Alliance’s materials were not educational.³²⁵

³¹⁸ *Id.*

³¹⁹ *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1039 (D.C. Cir. 1980).

³²⁰ *Id.*

³²¹ *Nat’l All. v. United States*, 710 F.2d 868, 869 (D.C. Cir. 1983) (National Alliances activities “all for the stated purpose of arousing in white Americans of European ancestry ‘an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage’”).

³²² *Id.* at 869–70. (“The regulation in effect at the time of the IRS National Alliance decision was the same regulation held unconstitutional in *Big Mama*.”).

³²³ *Id.* at 871.

³²⁴ *Id.* at 874.

³²⁵ *Id.*

The D.C. Circuit Court of Appeals agreed with the IRS.³²⁶ It acknowledged that “publication of the National Alliance material is protected by the First Amendment from abridgement by law.”³²⁷ But abridgement differs from exemption; the court held that “educational” does not “embrace[] every continuing dissemination of views.”³²⁸ It held that the IRS’s denial of exemption to the National Alliance was “consistent with any reasonable” definition of “educational” and upheld the denial.³²⁹

While the court did not decide whether the Methodology Test cured the vagueness problem of the regulation,³³⁰ the IRS formalized the test in a revenue procedure.³³¹ Under the IRS’s formalized Methodology Test, the presence of any of four factors meant that an organization did not qualify as educational.³³² Those four factors reflected the criteria in the National Alliance case:

(1) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization’s communications.

(2) The facts that purport to support the viewpoints or positions are distorted.

(3) The organization’s presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

(4) The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.³³³

Almost a decade after the IRS formalized its methodology test, the Tax Court found that the test was “not unconstitutionally vague or overbroad on its face, nor is it unconstitutional as applied.”³³⁴

The history of the Ku Klux Klan and taxes suggests that the IRS could — and should — evaluate tax-exempt white supremacist groups that claim to be educational to determine whether they meet its Methodology Test.

³²⁶ *Id.* at 875.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 876.

³³¹ *Brunson & Aprill, supra* note 315, at 1039.

³³² Rev. Proc. 86-43, 1986-2 C.B. 729.

³³³ *Id.*

³³⁴ *Nationalist Movement v. Commissioner*, 102 T.C. 558, 588–89, *aff’d*, 37 F.3d 216 (5th Cir. 1994). On appeal, the Fifth Circuit followed the D.C. Circuit in declining to rule on the constitutionality of the Methodology Test. *Nationalist Movement v. Commissioner*, 37 F.3d 216, 221 (5th Cir. 1994).

Such an evaluation would not run afoul of constitutional prohibitions on the government discriminating based on an organization's ideology.³³⁵ The Klan lost its tax exemption not because it promoted a hateful ideology but because it did not meet the criteria necessary to qualify as a tax-exempt fraternal beneficiary society.

Similarly, it is at least plausible that one or more of the modern tax-exempt white nationalist organizations does not meet the criteria to qualify as a tax-exempt educational organization. For instance, a cursory review of VDare's website finds a significant amount of invective. One article characterizes previous GOP platforms as including "'Nation-of-Immigrants' eyewash" and talks about 2020 Democratic presidential nominee Joe Biden's "unvarnished immigrant-uber-alles platform."³³⁶ Another describes a "BLM mob" surrounding a diner.³³⁷ Yet another bemoans Biden "kowtow[ing] to the family of accused felon Jacob Blake" and worries about "Black-on-White Femicides."³³⁸

While this is far from a comprehensive look at the putatively educational content provided by VDare, each of these articles appears to violate the third factor of the IRS's methodology test. These articles matter; according to VDare, it pursues its educational mission "*through the VDARE.com webzine and VDARE Books, public speaking, conferences, debates and media appearances.*"³³⁹ The articles on its website represent a significant portion of its educational mission. And the three articles mentioned above use "inflammatory and disparaging terms" and focus on the audience's emotional response.³⁴⁰ If these samples are representative of the way VDare presents its allegedly educational content, it likely does not qualify as an exempt educational organization and, like the Ku Klux Klan before it, should lose its tax exemption.

Of course, this cursory review of VDare does not mean that the organization fails the Methodology Test. In 1991, the IRS denied The

³³⁵ See *supra* note 305; but see *supra* note 306 and accompanying text.

³³⁶ Washington Watcher II, *GOP Official Immigration Position Better Than Biden—Not As Good As Trump 2015. But Why Can't He Campaign On His Achievements?*, VDARE.COM (Sept. 8, 2020), <https://vdare.com/articles/gop-official-immigration-position-better-than-biden-not-as-good-as-trump-2015-but-why-can-t-he-campaign-on-his-achievements> [<https://perma.cc/49N2-EEC2>].

³³⁷ Lance Welton, *IT'S OFFICIAL: Leftists Think They're Rational. But They're Not*, VDARE.COM (Sept. 5, 2020), <https://vdare.com/articles/it-s-official-leftists-think-they-rational-but-they-re-not> [<https://perma.cc/65TN-4G7W>].

³³⁸ Kenn Gividen, *Biden Kowtows In Kenosha—But What About The Black-On-White Femicides In August?*, VDARE.COM (Sept. 3, 2020), <https://vdare.com/articles/biden-kowtows-in-kenosha-but-what-about-the-black-on-white-femicides-in-august> [<https://perma.cc/MA3C-SWPR>].

³³⁹ VDARE Foundation Mission Statement, <https://vdare.com/about> [<http://perma.cc/6ZCZ-A4ER>] (emphasis added).

³⁴⁰ Rev. Proc. 86-43, 1986-2 C.B. 729.

Nationalist Movement's application for tax exemption.³⁴¹ Similar to the current exempt white nationalist groups, The Nationalist Movement presented itself as an educational organization with a philosophy "favoring those Americans who are white, Christian, English-speaking, and of northern European descent."³⁴² The Nationalist Movement disseminated its message through "discussions, forums and television interviews" as well as through a newsletter it published and distributed.³⁴³

The Tax Court reviewed twenty representative issues of The Nationalist Movement's newsletter.³⁴⁴ In those newsletters it found numerous examples of violations of all four factors from the IRS's Methodology Test.³⁴⁵ As a result, the court determined that the newsletter did not further an educational purpose.³⁴⁶ Moreover, because the newsletter represented a "substantial part of [The National Movement's] overall activities," the Tax Court held that the IRS was right to deny its exemption.³⁴⁷

Whether VDare — or any of the other white nationalist exempt organizations — similarly fail to engage in educational activities is a question the IRS, and possibly the courts, will need to grapple with. On a cursory glance, though, VDare appears to fail the Methodology Test. And applying the Methodology Test to these organizations is a non-ideological analysis, one that does not violate the Constitution. And it is similar to the method that proved successful in dealing with the Ku Klux Klan.

But while the IRS can potentially revoke these organizations' exemptions, the government may lack a tool that proved equally important in dealing with the Klan. While the state of Georgia was able to revoke the Klan's charter for nonideological reasons, the states of incorporation of modern-day white supremacist nonprofits may have a harder time.

This is because many states have very broad nonprofit incorporation laws. In fact, Virginia, Georgia, and Connecticut — the three states in which the tax-exempt white nationalist groups are incorporated — do not require an organization to have a particular charitable or educational purpose to qualify as a nonprofit under their state laws. Connecticut law allows the formation of a nonstock corporation "for the conduct of any affairs or the promotion of any purpose which may be lawfully carried on

³⁴¹ *Nationalist Movement v. Commissioner*, 102 T.C. 558, 570 (1994).

³⁴² *Id.* at 560.

³⁴³ *Id.* at 589.

³⁴⁴ *Id.* at 591.

³⁴⁵ *Id.* at 591–94.

³⁴⁶ *Id.* at 594.

³⁴⁷ *Id.* at 594, 596.

by a corporation” other than certain types of banking.³⁴⁸ Virginia law requires that its nonstock corporations have “the purpose of engaging in any lawful activity.”³⁴⁹ And Georgia provides that nonprofit corporations incorporated in the state enjoy “the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.”³⁵⁰ Even if these organizations have repugnant values and ideas, the First Amendment prohibits states from outlawing bad ideas. As a result, even if the organizations did not qualify as educational and lost their federal income tax exemption, that analysis would not impact their corporate charters.

That does not mean states are entirely foreclosed from addressing white supremacist organizations. Not all states take such a lenient view of nonprofit purpose. To qualify as a nonprofit corporation in Illinois, for example, a nonprofit corporation must pursue one of thirty-five enumerated purposes.³⁵¹ The list of permissible purposes includes educational purposes.³⁵²

Illinois and other states with similar enumerated lists of permissible corporate purposes could examine a white supremacist group incorporated in that state to ensure it met the terms of its incorporation, similar to how Georgia examined the Klan in 1946. But states with a broader scope of acceptable purposes — including Georgia today — do not have that tool in their arsenals.

Effectively this means that if the IRS were to audit these organizations and determine they did not qualify as educational under its Methodology Test, it could revoke their exemptions. The IRS could even follow the same course as it did with the Klan and revoke a disqualified organization’s exemption retroactively.³⁵³

That revocation would be harmful to a formerly exempt organization. The organization would now have to pay taxes on its income and donors could no longer deduct their donations, raising the after-tax cost of supporting the white supremacist organization’s goals.³⁵⁴ But it is not clear

³⁴⁸ CONN. GEN. STAT. ANN. § 33-1035(a) (West 2021) (effective June 6, 2014).

³⁴⁹ VA. CODE ANN. § 13.1-825 (West through 2001 Sess.) (effective July 1, 2007).

³⁵⁰ GA. CODE ANN. § 14-3-301(a) (West through Laws 2021, Act 27).

³⁵¹ 805 ILL. COMP. STAT. ANN. § 105/103.05(a) (West 2020).

³⁵² *Id.* at § 105/103.05(a)(4).

³⁵³ See *Canton Police Benev. Ass’n of Canton, Ohio v. United States*, 844 F.2d 1231, 1237 (6th Cir. 1988) (“Clearly, if the Commissioner can retroactively apply a changed interpretation of a tax law, the Secretary can, in the instant case, retroactively revoke the Association’s tax exemption to the date of the Association’s initial violation of an *existing* regulation.”).

³⁵⁴ See I.R.C. §§ 11, 170. The deductibility of charitable contributions effectively means that the government subsidizes a portion of the charitable donation. If a donor in the 37-percent tax bracket donates \$100 to VDare and can take a deduction for that donation,

that revocation of tax exemption would have the instant and massive effective of the revocation of the Klan's exemption. The Bureau of Internal Revenue assessed taxes, interest, and penalties against the Klan of \$685,305 that it said arose two decades earlier.³⁵⁵ The statute of limitations did not apply because the law did not require tax-exempt organizations to file tax returns but the statute only began to run once a taxpayer filed its return.³⁵⁶

Today, most tax-exempt organizations — including exempt educational organizations — must file an information return with the IRS.³⁵⁷ While that information return is not exactly a tax return, as long as an organization “determines in good faith that it is an exempt organization” and files the required information return, its information return starts the statute of limitations.³⁵⁸ As long as these organizations are filing their returns, then, even if the IRS revoked their exemptions retroactively it could only pursue them for three years of back taxes.³⁵⁹

While the IRS and states lack some of the tools the Bureau of Internal Revenue and the state of Georgia could use in the 1940s, the IRS has at least one additional tool it could use to regulate tax-exempt educational organizations, including the tax-exempt white supremacist organizations. Currently, for a private school to obtain and maintain its federal income tax exemption, it must have, publicize, and follow a racially nondiscriminatory policy.³⁶⁰ Such a policy provides that the school does not discriminate against students in terms of admissions or activities on the basis of race.³⁶¹ The IRS could expand this type of nondiscrimination policy requirement to all exempt educational organizations.

Between the statute of limitations and the general inability of states to revoke putatively educational white supremacist organizations' tax exemptions, the dramatic and virtually instant collapse of the second-generation Ku Klux Klan is unlikely to repeat itself with modern exempt white supremacist organizations. Nonetheless, while not as dramatic or instant, there is still value in the IRS examining these groups to determine whether they are, in fact, educational. If they are not and they lose their exemptions, the cost of raising capital and of the organizations' operations

they reduce their tax bill by \$37. As a result, the donation only costs them \$63 after taxes. If VDare were to lose its tax-exempt status, though, donors could no longer deduct their donations and a donor would bear the full cost of their \$100 donation.

³⁵⁵ Douglas, *supra* note 117, at A2.

³⁵⁶ See *supra* notes 227–228 and accompanying text.

³⁵⁷ I.R.C. § 6033(a)(1).

³⁵⁸ Treas. Reg. § 301.6501(g)-1(b) (amended 1978).

³⁵⁹ I.R.C. § 6501(a).

³⁶⁰ Rev. Proc. 75-50, 1975-2 C.B. 587.

³⁶¹ Rev. Rul. 71-447, 1971-2 C.B. 230.

will increase and they will lose the implied seal of legitimacy that tax exemption confers.³⁶² So while a revocation may not impel the instant decision to put the organization on hold as it did for the Klan, loss of exemption would nonetheless force the organizations to rethink their future plans.

VII. CONCLUSION

While they were not the sole nor necessarily the principal causes of the second-generation Ku Klux Klan's demise, the one-two punch of the Bureau of Internal Revenue assessing back taxes and Georgia revoking the Klan's corporate charter effectively ended the Klan as a viable entity. Its fall had been steep, even before the tax lien, but it had no way to emerge from the tax assessment. And while the Klan did regroup, it regrouped in a fractured state and never regained the power or place in American society it had enjoyed in the 1920s.³⁶³

The death knell of the second Klan depended on many things working together. It relied on the Klan believing it was a tax-exempt fraternal beneficiary society and additionally failing to meet the tax law requirements to qualify as a fraternal beneficiary society. It was aided by the lack of a filing requirement, which prevented the statute of limitations on collecting back taxes from starting. It relied on the Klan's actions violating the terms of its Georgia nonprofit incorporation. It almost certainly relied on the tax and state law violations being something more than bad ideological commitments. And it is on the willingness of regulators, both at the Bureau of Internal Revenue and in the state of Georgia, to act on these failures.

As in the 1910s, today it is possible for organizations with racist ideologies to incorporate as nonprofits and to claim tax-exempt status. The constraints the Bureau of Internal Revenue and the state of Georgia faced in the 1940s apply equally today: the government cannot punish these organizations for their bad opinions and beliefs. But portions of the 1940s playbook are still available to the IRS and to state governments. Specifically, they can investigate whether these organizations meet the legal requirements for incorporation and for income tax exemption. To the extent they do not meet the legal requirements — and it seems likely that at least some of these organizations do not qualify as “educational” for tax purposes — they can and should have their legal and/or tax status revoked.

³⁶² While tax exemption does not represent an endorsement, explicit or tacit, by the government, many people and exempt organizations read that type of legitimacy into a tax exemption. *See, e.g.*, SAMUEL D. BRUNSON, *GOD AND THE IRS: ACCOMMODATING RELIGIOUS PRACTICE IN UNITED STATES TAX LAW* 125 (2018) (“With the apparent imprimatur of the US government, [the Church of Scientology] could forcefully argue that it was a true religion, deserving of that status in other countries, too.”).

³⁶³ Richard T. Schaefer describes the third generation of the Klan as a “fragmented ghost of the past.” Schaefer, *supra* note 5, at 143.