

THE SECOND DEATH OF 42 U.S.C. SECTION 1985(3): THE USE AND MISUSE OF HISTORY IN STATUTORY INTERPRETATION†

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A page of history is worth a volume of logic.¹

In 1871, in a rearguard action to protect the gains of Reconstruction from the Southern reaction, the 42nd Congress enacted the Civil Rights Act of 1871 (commonly known as the Ku Klux Klan Act). Section 2 of the Ku Klux Klan Act provided criminal penalties and civil liability for conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ."² Shortly after the enactment of the Ku Klux Klan Act, the Supreme Court embarked on a series of cases which, by 1883, had largely dismantled the legal achievements of Reconstruction.³ Section 2 survived for only twelve years. In 1883, the Supreme Court in *United States v. Harris*⁴ held unconsti-

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¹ Frankfurter, J. in *Ulman v. United States*, 350 U.S. 422, 438 (1955) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

² Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. The civil conspiracy portion of § 2 was originally codified in 1874 as Rev. Stat. § 1980(3). It later appeared as 8 U.S.C. § 47(3) and, for a short time, as 42 U.S.C. § 1985(c). Irrespective of its codification at a particular point in time, it will be referred to throughout this article as it presently appears, 42 U.S.C. § 1985(3). The section reads in full:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

³ See *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

⁴ 106 U.S. 629, 644 (1883).

tutional the criminal portion of Section 2 (Rev. Stat. Section 5519) on grounds that would have applied as well to the civil conspiracy provisions of the section, which are presently codified at 42 U.S.C. Section 1985(3). Consequently, during the succeeding 88 years, Section 1985(3) was invoked infrequently, and the Court had only one occasion to consider, and reject, a cause of action brought under the section.⁵

In 1971, one hundred years after the enactment of the Ku Klux Klan Act and in the waning days of the civil rights movement, the Supreme Court resurrected Section 1985(3) by upholding a cause of action under the section in *Griffin v. Breckenridge*.⁶ The second life of the section, however, was no longer than the first. Beginning in 1971, at about the same time that it revived Section 1985(3), the Supreme Court, in a pattern reminiscent of its predecessor one hundred years earlier, decided a series of cases which reversed or limited many of the legal gains of the civil rights movement. The bulk of these decisions drastically restricted the application of Section 1983, the principal surviving portion of the Ku Klux Klan Act.⁷ In 1983, one hundred years after *Harris* and but twelve years after *Griffin*, the Supreme Court apparently again dealt Section 1985(3) a mortal blow in *United Brotherhood of Carpenters v. Scott*.⁸ In *Harris*, the Court invalidated Section 2 by interpreting it broadly and then finding it unconstitutional. By contrast, in *Carpenters*, the Court simply eviscerated Section 1985(3) by giving it an apparently narrow interpretation, which the lower courts have since applied in an exceedingly restrictive fashion.

In *Griffin*, the Court had concluded that the "equal protection of the laws" and "equal privileges and immunities" language of 1985(3) made "class-based animus" an element of a cause of action under the section. In *Carpenters*, the Court referred to legislative history for its conclusion that the 42nd Congress primarily intended to deal with racially motivated conspiracies, and it therefore held that only racial and perhaps political, class-based animus was meant to come within Section 1985(3).⁹ Assuming, as

⁵ See *Collins v. Hardyman*, 341 U.S. 651, 661 (1951).

⁶ 403 U.S. 88 (1971).

⁷ Section 1 of the Ku Klux Klan Act was the forerunner of the present 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (1982). On the one hand, the Court accomplished the restriction of Section 1983 by statutory interpretation. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that there is no Section 1983 action for denial of due process when the state affords adequate administrative or judicial remedies for the plaintiff's loss); *Parratt v. Taylor*, 451 U.S. 527 (1981). On the other hand, the Court accomplished the restriction through various collateral doctrines. The Court held that Section 1983 was limited by various preexisting doctrines (*res judicata*, and collateral estoppel). See *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (Eleventh Amendment). The Court also limited Section 1983 through the development of a new and sweeping comity doctrine. See *Younger v. Harris*, 401 U.S. 37 (1971). See also *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 113-15 (1981); *Moore v. Sims*, 442 U.S. 415 (1979); *Rizzo v. Goode*, 423 U.S. 362 (1976).

⁸ 463 U.S. 825 (1983).

⁹ *Id.* at 836-38. The Court also attempted to buttress its interpretation of Section 1985(3) by adverting to the supposed practical problems that would result from giving the language of the

the Court did, that Congressional intent can be determined,¹⁰ and given the necessarily indeterminate nature of historical evidence, such a determination should have involved a careful analysis of the widest range of historical material. The Court in *Carpenters*, however, did not engage in such an analysis. Rather, it made only passing reference to the legislative history of Section 1985(3) and made no reference to contemporaneous constructions of the statute. Nor did the Court examine the language, legislative history, and contemporaneous constructions of the statute in light of more general historical materials concerning the context in which the statute was passed.

As a result, the Court misinterpreted the statute in two critical respects. The Court's virtual equation of class-based animus with racial animus is not supported by the historical evidence on Congressional intent. In addition, the Court's failure to give meaning to the distinction made by Congress between "equal protection of the laws" and "equal privileges and immunities" defeats the broad Congressional purpose of protecting the democratic process from attacks by antidemocratic forces. Nevertheless, despite the *Carpenters* decision, Section 1985(3) remains on the books, and the lower courts continue to wrestle with cases brought under it. Thus, inevitably, the Supreme Court will again deal with Section 1985(3) and have an opportunity to correct its mistakes, and in the section's third life, it may yet achieve its intended effect.

Part I of this article will trace the tortuous history of Section 1985(3) from its enactment through the lower courts' current attempts to apply the *Carpenters* decision. Part II will discuss the Court's flawed class-based animus analysis and will conclude, based on a much fuller examination of the historical materials bearing on legislative intent, that Congress had no intent to limit the application of Section 1985(3) to conspiracies directed against *particular* classes. Finally, Part III will offer an alternative construction of the section that is grounded in the distinction Congress intended between "equal protection of the laws" and "equal privileges and immunities" and more consistent with the historical evidence of legislative intent.

I. THE HISTORY OF SECTION 1985(3)

A. *The Passage of the Ku Klux Klan Act and the First Death of Section 1985(3)*

On March 23, 1871, President Grant responded to a renewed wave of politically inspired terrorism which was sweeping the South by sending an urgent message to Congress requesting immediate legislation.¹¹ Five days later, Representative Shellabarger

section full play. *Id.* at 836, 838-39. Even if this concern were valid, it could not justify the *particular* limitations the Court placed on the statute.

¹⁰ It is certainly debatable whether the whole enterprise of attempting to ascertain legislative intent is valid and/or relevant. See generally Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Much of the debate about the value of legislative history has centered around the interpretation of the Constitution, and it could be argued that a different analysis should be applied to the use of legislative intent in statutory interpretation.

¹¹ The legislative history of the Act has been discussed by the Supreme Court on numerous occasions. See *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 665-89 (1978); *Monroe v. Pape*, 365 U.S. 167, 172-85 (1961). See also *Carpenters*, 463 U.S. at 841-47 (Blackmun, J., dissenting); *Griffin*, 403 U.S. at 96-102. See generally Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979) [hereinafter Comment, *A Construction*]. Although the present article disagrees with the author of this Comment as to the proper interpre-

introduced H.R. 320, which was to become the Ku Klux Klan Act. The bill was titled, "An Act to Enforce the Fourteenth Amendment and for other Purposes." Section 1 of the Act, the forerunner of the present 42 U.S.C. Section 1983, constituted the attempt to enforce the fourteenth amendment. The remaining sections had the "other purpose" of suppressing Ku Klux Klan violence in the Southern states.¹² As originally introduced, Section 2 of the bill made it a crime to conspire to violate the "rights, privileges and immunities to which a citizen is entitled under the Constitution and laws," by acts, which, if committed in an area under the jurisdiction of the United States, would constitute "murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers . . . , arson, or larceny"¹³

Predictably, H.R. 320 was opposed by all the Democrats in the House, and a number of Republicans voiced concern about the breadth of Section 2. Given that many members of Congress apparently interpreted deprivations of "rights, privileges and immunities," to include all deprivations of life, liberty, or property,¹⁴ the section could have been broadly interpreted to punish any crime committed by two or more persons. So interpreted, the section would have usurped the states' criminal jurisdiction.¹⁵ Although some Republicans were prepared to pass the section as written rather than engage in "constitutional hair-splitting,"¹⁶ the objectors drafted an amendment to Section 2 that contained the present language of Section 1985(3). Representative Shellabarger, the bill's sponsor, introduced the amendment and explained the purpose of the amendment as follows:

The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.¹⁷

tation of ambiguous legislative history, *see infra* note 17, the author's summary of the history is complete.

¹² *Monell*, 436 U.S. at 665.

¹³ CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871) [hereinafter GLOBE] (remarks of Rep. Shellabarger).

¹⁴ *See infra* text accompanying notes 191-94.

¹⁵ This was the position of Rep. Willard, the drafter of the subsequent limiting amendment. CONG. GLOBE APP., 42nd Cong., 1st Sess. 188 [hereinafter GLOBE APP.].

¹⁶ *Id.* at 73 (remarks of Rep. Blair).

¹⁷ *Globe supra* note 13, at 478 (remarks of Rep. Shellabarger). It is unclear whether the amendment was substituted simply to clarify the intent of the section as originally drafted or, on the other hand, to limit the scope of the section. The author of *Comment, A Construction*, *supra* note 10, developed an interpretation of the section based on the theory that because some moderate Republicans were concerned about the constitutionality of the section as introduced and because the moderates' votes were needed to pass the bill, the final version of the section must have represented a compromise limiting the scope of the section.

The theory depends on two premises, neither of which can be proved. The first is that the moderates all had a consistent view of Congress's constitutional power. In fact, the evidence is to the contrary. For example, Representative Cook, a moderate and one of the authors of the amendment, expressed a view of Congressional power as sweeping as that of any radical: "Congress may legislate to protect any right the denial of which by a State court would give the citizen affected thereby a right to appeal to the Supreme Court of the United States for redress." GLOBE, *supra* note 13 at 485 (remarks of Rep. Cook). And Representative Garfield, who is cited as the spokes-

The statute, as amended, passed both houses and was signed into law by President Grant on May 3, 1871.¹⁸

Twelve years after passage of the Ku Klux Klan Act, the Supreme Court first considered the constitutionality of Section 2. In *United States v. Harris*,¹⁹ the Court interpreted the criminal portion of the section, which was then codified as Rev. Stat. Section 5519. At issue was the validity of an indictment charging a violation of the section by twenty men who took four prisoners from jail and beat them. The Court had no trouble finding that the section was meant to cover the conduct, despite the absence of state action, stating that "Section 5519, according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons."²⁰ The Court then examined whether any provision of the Constitution authorized such a statute. The Court found no authority in the fourteenth amendment to protect individuals from invasions by private persons because that amendment required state action for its application and neither Section 5519 nor the indictment referred to state action.²¹ The Court also found no authority under the thirteenth amendment because a prohibition of slavery offered no support for Section 5519, which could have been applied to a conspiracy against a white person.²²

Four years later, in *Baldwin v. Franks*,²³ the Court again set aside a conviction obtained under Section 5519. In *Baldwin*, the prosecution attempted to distinguish *Harris* on the ground that the victims in *Baldwin* were alien Chinese and Section 5519 was constitutional to the extent that it was enforcing terms of the treaty between the United States and the Emperor of China. The Court rejected the argument because, even if the statute would have been constitutional as applied to aliens protected by a treaty, Section 5519 already had been held unconstitutional in at least some of its applications. The *Baldwin* Court

person for the moderates' point of view, had taken the "radical" position only a year earlier in voting for the 1870 Civil Rights Bill. H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 238-40 (1908).

The second premise is that the moderates would have broken ranks with their party and voted against the bill if it were not to their liking. Even assuming that there was a substantive difference between the views of the two wings of the party, it is impossible to tell which wing compromised its views because the vote on the bill was strictly along party lines. For example, Representative Farnsworth, who found even the "moderate" position too radical, voted for the bill. *GLOBE*, *supra* note 13, at 115, 522. The view of contemporaries was that, to the extent there was a difference, the radicals had prevailed: "It is one of the most stringent measures against the Ku Klux that has been offered in the House and was so radical that its best friends hardly hoped to pass it." *New York Herald*, Apr. 7, 1871, at 6. This has also been the view of historians. See, e.g., A. TRELEASE, *WHITE TERROR* 388 (1971).

The amendment was adopted, and the bill passed the House on April 7, 1871. *GLOBE*, *supra* note 13, at 522. The Senate added certain amendments without altering the language of what was to become Section 1985(3) and sent the bill to conference on April 14, 1871. *Id.* at 709.

¹⁸ Proclamation of President Grant on May 3, 1871.

¹⁹ 106 U.S. 629 (1883).

²⁰ *Id.* at 637.

²¹ *Id.* at 637-40.

²² *Id.* at 640-43. The Court also dismissed the fifteenth amendment and Article IV, § 2 as possible authority. The fifteenth amendment was dismissed because unlike Section 5519, the fifteenth amendment was limited to protecting the right to vote. *Id.* at 637. Article IV, § 2 was dismissed because, unlike Section 5519, it was limited by a state action requirement. *Id.* at 643-44.

²³ 120 U.S. 678 (1887).

concluded that because the constitutional and unconstitutional applications were not defined by separable provisions, the entire statute had to fall.²⁴

The *Harris* and *Baldwin* decisions not only invalidated the criminal conspiracy portion of the statute, but appeared, by like reasoning, to doom Section 1985(3) as well. As a result, in the one hundred years between *Harris* and *Griffin*, Section 1985(3) was invoked infrequently, and the Supreme Court decided only one case brought under the section, *Collins v. Hardyman*.²⁵ In *Collins*, plaintiffs were members of a political group opposed to the Marshall Plan. The plaintiffs alleged that the defendants, members of the American Legion, had attacked them and broken up their meeting because of defendants' contrary political views. In a 6-3 decision, the Court took an entirely different approach from that taken in *Harris* and *Baldwin* and found that the plaintiffs had no cause of action because the statute did not cover purely private discrimination. The Court stated: "[p]laintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired."²⁶ The Court then laid the groundwork for the later misinterpretation of the purpose of Section 1985(3). In explaining the significance of the term "equal" in the section, the Court said: "That accords with the purpose of the Act to put the lately freed Negro on an equal footing before the law with his former master."²⁷ The dissenting opinion in *Collins* argued, as the Court had held in *Harris*, that Congress's intent was in fact to reach such wholly private conduct.²⁸ Thus, in the only decision between *Harris* and *Griffin*, the Court divided over an issue on which the earlier *Harris* court was, and the later *Griffin* court would be, unanimous. As a result, the Court failed to reach the issues which would trouble the Court in *Griffin* and the post-*Griffin* cases.

B. *Griffin v. Breckenridge* and the Second Life of Section 1985(3)

In 1971, one hundred years after the enactment of the Ku Klux Klan Act, the Supreme Court, for the first time, upheld a cause of action under the conspiracy section. In *Griffin v. Breckenridge*,²⁹ the black plaintiffs alleged that they were traveling in Mississippi and were pulled from a car and beaten by the defendants. The plaintiffs alleged that they were attacked because the defendants mistakenly thought the car's driver was a civil rights worker and that the defendants intended thereby to deny plaintiffs their:

freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of the law.³⁰

The *Griffin* Court began its decision by adopting the position of the dissent in *Collins*. After examining the legislative history of Section 1985(3) and the *Harris* Court's contem-

²⁴ *Id.* at 687. This basis for the Court's holding was later rejected in *United States v. Raines*, 362 U.S. 17, 20-24 (1960).

²⁵ 341 U.S. 651 (1951). In two other cases which reached the Supreme Court, the plaintiffs asserted a cause of action under Section 1985(3), but the Court did not discuss the section. See *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Snowden v. Hughes*, 321 U.S. 1 (1944).

²⁶ *Collins*, 341 U.S. at 661.

²⁷ *Id.*

²⁸ *Id.* at 663-64 (Burton, J., dissenting).

²⁹ 403 U.S. 88 (1971).

³⁰ *Id.* at 90 (quoting from the Complaint at paragraphs 5, 12).

poraneous construction of the section and after taking into account the obligation to accord civil rights statutes "a sweep as broad as [their] language,"³¹ the Court concluded that the section was meant to reach wholly private conduct. The Court listed the elements of a cause of action under the section: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;³² (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his or her person or property or deprived of any right or privilege of a citizen of the United States.³³

The Court then was obliged to address a question not reached in *Collins* — whether the statute, as so interpreted, was constitutional. The Court first held that the constitutionality of the statute was to be determined with respect to the particular facts of the case in question.³⁴ The Court then held that the statute, as applied to the allegations of the case — that defendants attacked the black plaintiffs, who were traveling on public roads, because they believed the driver was a civil rights worker — could be upheld under either the thirteenth amendment's prohibition of slavery or the constitutional right to travel.³⁵

Perhaps because the facts alleged by the plaintiffs in *Griffin* were so close to the facts which prompted passage of the statute in the first place, the Court was not forced to define the scope of Section 1985(3) and, in particular, the second element of the cause of action. Thus, even while the Court unanimously upheld the plaintiffs' cause of action, the imprecision of Justice Stewart's opinion created two problems which further propelled the Court toward its later misconstruction of the section in *Carpenters*. The first problem was the Court's statement that "racial or, perhaps otherwise class-based animus" was an element of the cause of action.³⁶ The statement contained two dubious implications: first, that "class-based animus" could be treated as an element separate from the "protection of the laws" or "privileges and immunities" language of the section and second, that racial animus was the sole or principal concern of the Congress which enacted the Ku Klux Klan Act.

The second problem was Justice Stewart's failure to specify whether the cause of action was sustained because plaintiffs alleged a deprivation of equal protection of the laws, a deprivation of equal privileges and immunities, or both. As a result of this failure, the Court did not even address the critical questions posed by the different prongs of

³¹ *Id.* at 97 (quoting *United States v. Price*, 383 U.S. 787, 801 (1965)).

³² *Id.* at 102–03. The Court interpreted the term "equal," which was added by the limiting amendment to the original bill, to require allegation and proof that there existed "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

³³ *Id.* at 102–03.

³⁴ *Id.* at 104. The Court stated: "Consequently, we need not find the language of Section 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case." *Id.*

³⁵ *Id.* at 104–06. It should be noted that neither of these constitutional bases for upholding this application of Section 1985(3) was discussed by the 42nd Congress in the extensive debate over the constitutionality of the Act. Only two Republicans, Representative Wilson and Senator Sumner, mentioned the thirteenth amendment (in conjunction with the fourteenth amendment) as possible support for the bill, see *GLOBE*, *supra* note 13, at 481, 650, and although several members of Congress voiced concern about the effect of the Klan attacks on freedom of travel in the South, no one suggested the right of travel as authority for the bill.

³⁶ *Griffin*, 403 U.S. at 102.

the statute: in the case of the equal protection prong, how could private parties deprive persons of protection of the laws, and in the case of the privileges and immunities prong, what would be the privileges and immunities encompassed by the statute? This imprecision in the Court's treatment of the second element of the cause of action haunted the second life of Section 1985(3).

Between *Griffin* and *Carpenters*, the Supreme Court decided only one case interpreting Section 1985(3). In 1979, *Great American Federal Savings & Loan Association v. Novotny*³⁷ presented a situation about as far from Klan attacks on Reconstruction as could be fit within the language of the statute, and for that reason, the Court's rejection of plaintiff's cause of action did little to clarify the meaning of the section. The plaintiff in *Novotny* was a man who sued his former employer alleging that he was dismissed for advocating equal employment opportunities for women. He claimed, and the Third Circuit agreed, that he stated a cause of action under Section 1985(3) when he alleged that the defendant had deprived him of his Title VII rights because of a class-based animus against women.³⁸ The Supreme Court disagreed, however, first stating that, "[s]ection 1985(3) provides no substantive rights . . ."³⁹ The Court then found that Title VII rights could not be asserted within the "remedial framework" of section 1985(3) because that would defeat Congress's intent to require Title VII complainants to follow the procedures specially established in Title VII.⁴⁰

Meanwhile, in the twelve years between *Griffin* and *Carpenters*, the lower courts struggled to interpret Section 1985(3) in a myriad of fact situations but reached no consensus on how to approach the two questions created by the analytical framework of the *Griffin* opinion: what classes were meant to be protected under the "equal" language of the statute, and what were the "laws" or "privileges and immunities" whose violation was reached by the statute?⁴¹ In approaching the class-based animus issue, the courts agreed that Section 1985(3) was not limited in its reach to situations involving racial

³⁷ 442 U.S. 366 (1979).

³⁸ *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235 (3rd Cir. 1978) (en banc), vacated and remanded, 442 U.S. 366 (1978).

³⁹ *Novotny*, 442 U.S. at 372.

⁴⁰ *Id.* at 376. Justices Powell and Stevens would have gone further and limited Section 1985(3) to reach only those conspiracies that violate "fundamental rights derived from the Constitution." *Id.* at 379 (Powell, J., concurring); *id.* at 381 (Stevens, J., concurring). Justice White dissented in an opinion joined by Justices Brennan and Marshall. *Id.* at 385 (White, J., dissenting). In his dissent, Justice White stated two things which seem curious in light of his later opinion for the Court in *Carpenters*. On the subject of class-based animus, Justice White noted that the Court had assumed correctly that class-based animus other than racial animus was covered by Section 1985(3) and that animus toward someone because of his or her sex clearly was covered. *Id.* at 389 n.6 (White, J., dissenting). Justice White also questioned the Court's conclusion that the section was solely remedial and did not create any substantive rights. *Id.* at 388-91 (White, J., dissenting).

⁴¹ Less frequently, other issues divided the circuits. The meaning of "conspiracy" when applied to entities occasioned some problems. Compare *Novotny*, 584 F.2d at 1245-55 with *Herrmann v. Moore*, 576 F.2d 453 (2d Cir.), cert. denied, 439 U.S. 1003 (1978). See generally Note, *Intracorporate Conspiracies Under 42 U.S.C. Section 1985(c)*, 92 HARV. L. REV. 470 (1978). Similarly, the question of whether one not a member of the class against whom the animus was directed could sue under Section 1985(3) produced inconsistent answers. Compare *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720-21 (9th Cir.), cert. denied, 454 U.S. 967 (1981) with *Novotny*, 584 F.2d at 1241-45.

animus.⁴² They also agreed that to invoke the section, a plaintiff would at least have to show animus toward a class *qua* class, as opposed to animus toward a group of persons arising from personal disputes or engendered by the victims' actions on a particular occasion.⁴³

The Third Circuit⁴⁴ and some district courts⁴⁵ indicated that Section 1985(3) should apply only to classes defined by immutable characteristics.⁴⁶ None of these courts, however, explained why the section should apply to all classes defined by "immutable characteristics" or should exclude all other classes. A somewhat different approach was to apply Section 1985(3) to all "suspect classes."⁴⁷ This type of analysis meant that Section 1985(3) was found to protect religious groups in addition to some groups defined by immutable characteristics.⁴⁸ All of the circuits which actually dealt with the issue also applied Section 1985(3) to classes defined by political views and associations.⁴⁹ The Sixth Circuit, in an early case and by way of dictum indicated that Section 1985(3) should apply to all classes.⁵⁰ No other court read the class-based animus requirement so broadly.

⁴² See cases cited *infra* notes 46-49.

⁴³ In short, a group of persons suffering a common injury as the result of a conspiracy was not necessarily a class within the meaning of the Section. *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 748 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981). See also *Browder v. Tipton*, 630 F.2d 1149, 1149-51 (6th Cir. 1980) (people crossing picket line not a class); *Askew v. Bloemaker*, 548 F.2d 673, 678 (7th Cir. 1976) (family subject to a police raid not a class); *Hughes v. Ranger Fuel Corp.*, Div. of Pittson Co., 467 F.2d 6, 10 (4th Cir. 1972) (individuals taking photographs of industrial polluters not a class).

⁴⁴ See *Carchman v. Korman Corp.*, 594 F.2d 354, 355-56 (3d Cir.), *cert. denied*, 444 U.S. 898 (1979).

⁴⁵ See *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 459 (D. Md. 1978); *Heyn v. Board of Supervisors*, 417 F. Supp. 603, 607-08 (D. La. 1976), *aff'd*, 550 F.2d 1282 (5th Cir. 1977); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1026-27 (D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).

⁴⁶ A number of courts applied Section 1985(3) to classes defined by nonracial immutable characteristics. See *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 42-43 (2d Cir. 1982) (physical disability); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (gender); *Novotny*, 584 F.2d at 1243-44 (gender); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978) (gender); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1065 (6th Cir. 1973) (national origin). See also *Silkwood*, 460 F. Supp. at 407 (dictum), *aff'd*, 637 F.2d 743 (10th Cir. 1979), *cert. denied*, 454 U.S. 833 (1981).

⁴⁷ See *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1049-50 (5th Cir. 1981).

⁴⁸ See *Taylor v. Gilmartin*, 686 F.2d 1346, 1355-60 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *Ward v. Conner*, 657 F.2d 45, 47-48 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Marlowe*, 489 F.2d at 1065 (6th Cir. 1973). See also *Silkwood*, 460 F. Supp. at 407. This approach apparently looked to fourteenth amendment jurisprudence to limit the Section, but in fact, the equal protection clause of the fourteenth amendment, although applied more strictly in the case of "suspect" classes, has never been limited in its application to particular classes.

⁴⁹ See *Keating v. Carey*, 706 F.2d 377, 387 (2d Cir. 1983) (Republicans); *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979) (members of the Black Panther party), *modified on other grounds*, 446 U.S. 754 (1980); *Means v. Wilson*, 522 F.2d 833, 838 (8th Cir. 1975) (political opponents of a tribal officer), *cert. denied*, 424 U.S. 958 (1976); *Glasson v. City of Louisville*, 518 F.2d 899, 910-12 (6th Cir.) (political opponents of Richard Nixon), *cert. denied*, 423 U.S. 930 (1975); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) (supporters of a political candidate). See also *Silkwood*, 460 F. Supp. at 407. Such an interpretation was entirely consistent with Congress' view that the Klan was primarily a political organization.

⁵⁰ *Azar v. Conley*, 456 F.2d 1382, 1386-87 n.5 (6th Cir. 1972).

Rather, the lower courts generally found that the section did not protect classes other than "immutable characteristic" classes, "suspect" classes, and "political" classes.⁵¹

The lower courts followed the lead of the Supreme Court in *Griffin* and gave relatively little attention to the meaning of "protection of the laws" and "privileges and immunities."⁵² When the circuits considered the meaning of these phrases, however, they divided on a number of levels. Following *Griffin*, it was clear that Section 1985(3) could be applied to violations of federal constitutional rights held as against private persons⁵³ and, presumably, to violations of federal constitutional rights held as against the federal or state governments, when federal or state officials were involved in the conspiracy.⁵⁴ Whether Congress intended Section 1985(3) to create a cause of action for private interference with rights held only as against the federal or state governments, such as first amendment rights, was the subject of serious dispute. The issue of whether Section 1985(3) was meant to protect such rights from the actions of private parties also became confused with the question of whether Congress, under the Constitution and particularly under the fourteenth amendment, section 5, could create such a cause of action. Both the Eighth⁵⁵ and the Third⁵⁶ Circuits took the position that, because Congress could act under section 5 of the fourteenth amendment to reach private persons in order to effectuate the rights guaranteed against the states in section 1 of the fourteenth amendment, it presumably did so in Section 1985(3).⁵⁷ By contrast, the Fourth⁵⁸ and Seventh⁵⁹ Circuits reasoned that Section 1985(3) was strictly remedial and that there was no independent right enforceable against private persons created by the first or fourteenth amendments.⁶⁰ While the lower courts generally agreed that a violation of federal statutory rights could be the basis for a Section 1985(3) action,⁶¹ they disagreed over whether a violation of state-created rights could support a cause of action.⁶²

⁵¹ Among the classes found unprotected were those based on economic status, economic association, sexual orientation, status as litigants, and former residency. See *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982) (economic status); *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), cert. denied, 454 U.S. 1110 (1981) (status as litigants); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (sexual orientation); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979) (economic status); *Morgan v. Odem*, 552 F.2d 147 (5th Cir. 1977) (former residency); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (economic status); *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974) (economic association).

⁵² The lower courts also followed the Supreme Court in failing to distinguish between equal protection and equal privileges and immunities.

⁵³ See, e.g., *Means*, 522 F.2d at 838 (right to vote in a federal election).

⁵⁴ See, e.g., *Cameron*, 473 F.2d at 610 (conspiracy among state officials to interfere with first amendment rights).

⁵⁵ *Action v. Gannon*, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc).

⁵⁶ *Richardson v. Miller*, 446 F.2d 1247, 1249 (3rd Cir. 1971).

⁵⁷ *Action*, 450 F.2d at 1234-38; *Richardson*, 446 F.2d at 1249.

⁵⁸ *Bellamy*, 508 F.2d at 507.

⁵⁹ *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1194-95 (7th Cir. 1976).

⁶⁰ *Id.*; *Bellamy*, 508 F.2d at 507. See also *Novotny*, 442 U.S. at 382 (Stevens, J., concurring).

⁶¹ E.g., *Fisher v. Shamburg*, 624 F.2d 156, 160-61 (10th Cir. 1980). But see *Novotny*, 442 U.S. at 379 (Powell, J., concurring); *id.* at 381-82 (Stevens, J., concurring).

⁶² Compare *Reichardt*, 591 F.2d at 505 (Section 1985(3) not limited to deprivations of federal rights) with *Kinniburgh v. Burlington N. R.R.*, 568 F. Supp. 655 (D. Mont. 1983) (Section 1985(3) action cannot be based on state law entitlement). See also *Scott v. Moore*, 640 F.2d 708, 718 n.7 (5th Cir. 1981).

C. *Carpenters v. Scott and the Second Death of Section 1985(3)*

1. The Facts and Lower Court Decisions

The *Carpenters* case arose out of an incident of labor violence at a construction project of the Cross Construction Co. near Port Arthur, Texas. Cross had hired a number of non-union workers from out of the area, and although no union was then trying to organize Cross, local residents warned Cross's workers that Port Arthur was a "union area" and that Cross's policy of hiring non-union workers could lead to trouble.⁶³ The Court of Appeals for the Fifth Circuit summarized the incident as follows:

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment.⁶⁴

Cross and two of the employees brought suit under Section 1985(3) seeking injunctive relief and damages against various unions and individuals.

The district court upheld the cause of action under 1985(3) and granted judgment for the plaintiffs.⁶⁵ The court found a deprivation of the protection of the laws because the defendants had conspired to and did violate state criminal and civil laws.⁶⁶ The court

⁶³ *Scott v. Moore*, 461 F. Supp. 224, 226 (E.D. Tex. 1978), *rev'd in part and aff'd in part*, 640 F.2d 708 (5th Cir. 1981), *rev'd in part and aff'd in part*, 680 F.2d 979 (5th Cir. 1982) (en banc) *rev'd sub nom.* *United Bd. of Carpenters v. Scott*, 463 U.S. 825 (1983).

⁶⁴ *Scott v. Moore*, 680 F.2d 979, 983-84 (5th Cir. 1982) ((en banc), *rev'd sub nom.*, *United Bd. of Carpenters v. Scott*, 463 U.S. 825 (1983)).

⁶⁵ *Scott*, 461 F. Supp. at 231.

⁶⁶ *Id.* at 228-30. The court went on to say: "men and women have the right to associate or not to associate with any group or class of individuals, and concomitantly, to be free of violent acts against their bodies and property because of such association or non-association." *Id.* at 230. Having already found a Section 1985(3) cause of action based on the violation of state laws, the district court confused the issue (and ultimately the analysis of the Court of Appeals) by introducing the possibility of a violation of the "right to associate."

found that the defendants acted with class-based animus against "non-union laborers and employers of non-union laborers."⁶⁷

On appeal, a panel of the Fifth Circuit affirmed the judgment in part and reversed in part,⁶⁸ but rehearing *en banc* was granted. A divided Fifth Circuit again affirmed in part and reversed in part.⁶⁹ The twelve judges constituting the majority agreed with the district court that the plaintiffs had a cause of action under Section 1985(3), but they differed with the district court in their analysis.⁷⁰ Where the district court had sustained the cause of action on the grounds that defendants had conspired to violate state laws with class-based animus, the majority of the court of appeals affirmed on the grounds that the defendants had conspired to deprive plaintiffs of their first amendment rights.⁷¹ On the subject of class-based animus, the majority of the court of appeals found that the 1871 Klan was a political organization whose victims were almost always selected because of their association with the Republican Party. The court concluded that the plaintiffs' class was like the 1871 Republicans and was therefore covered by the section in that the class was attacked because of the members' exercise of their right of association and because of pervasive regional hostility toward the members' views.⁷²

Ten judges dissented.⁷³ The principal dissent, signed by eight judges, disagreed with the majority on both critical issues: whether a right was violated and whether there was a showing of class-based animus.⁷⁴ The dissenters argued that the constitutional right of

⁶⁷ *Id.* at 230. There is a serious question whether the court correctly described the attackers' motive and whether there was any class-based animus at all. It seems more reasonable to describe the attack as directed at a particular employer for his actions on a particular occasion. See *Scott*, 680 F.2d at 1016 (Rubin & Williams, JJ., dissenting).

⁶⁸ *Scott v. Moore*, 640 F.2d 708, 731 (5th Cir. 1981), *rev'd in part and aff'd in part*, 680 F.2d 979 (5th Cir. 1982) (*en banc*) *rev'd sub nom.*, *United Bd. of Carpenters v. Scott*, 463 U.S. 825 (1983).

⁶⁹ *Scott*, 680 F.2d at 1004.

⁷⁰ *Id.* at 986-98, 1004. The Fifth Circuit also decided two issues, the applicability of the Norris-LaGuardia Act and the sufficiency of the evidence against certain defendants, not presented to the Supreme Court and beyond the scope of this article. *Id.* at 984-86, 999-1004.

⁷¹ *Id.* at 988-91.

⁷² *Id.* at 994. The majority relied for its analysis on its previous decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*). The majority reached its conclusion despite its view that the plaintiffs were attacked for their *economic*, rather than their *political*, association and its view that the Forty-Second Congress could not have been concerned with the activities of labor unions since "[t]he labor union movement in America was yet to be born. . . ." *Scott*, 680 F.2d at 992. Whether labor union activity is "economic" rather than "political" is itself a debatable question, but the majority was plainly wrong in saying that the labor movement did not exist in 1871. See J. RANDALL AND D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 662 (1969). Not only were unions in existence, but there were even black unions. W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 417 (1935). In fact, in debates in the Forty-Second Congress on a Republican-sponsored bill to appoint a commission to study the subject of the "wages and hours of labor and the division of profits between labor and capital in the United States" (H.R. 374), a number of Republicans, who were active in the passage of the Ku Klux Klan Act, acknowledged the growth and importance of the labor movement. CONG. GLOBE, 42nd Cong., 2nd Sess. 104 (remarks of Rep. Kelley); *id.* at 220 (remarks of Rep. Storm); *id.* at 225 (remarks of Rep. Hawley).

⁷³ *Scott*, 680 F.2d at 1004 (Rubin & Williams, JJ., dissenting, joined by Justices Brown, Vance, Kravitch, Randall, Tate, and Johnson); *id.* at 1022 (Anderson, J., dissenting); *id.* at 1022 (Garwood, J., dissenting).

⁷⁴ The principal dissent began by agreeing with the majority that the 1871 Klan "was for the most part a political organization." *Id.* at 1010 (Rubin & Williams, JJ., dissenting). The dissent went on to point out, however, that: "Congress did not seek primarily to prevent racial discrimination but to proscribe conspiracies whose objective or effect was to frustrate the 'constitutional operations

association never incorporated the "[workers'] right to work only with the kind of persons they choose to work with."⁷⁵ They also argued that the plaintiffs' class was not a class protected by the statute and probably not a class at all.⁷⁶

2. The Supreme Court Decision

The Supreme Court reversed the Fifth Circuit, dividing 5-4.⁷⁷ The majority opinion, authored by Justice White, confirmed the mode of analysis implied in *Griffin*: it treated "class-based animus" as a threshold question distinct from an analysis of "protection of the laws" or "privileges and immunities," and it failed to distinguish between, or describe the scope of, the two prongs of the section. The opinion is striking for the sweep of its language, although its holding is narrow, and for the scarcity of its analysis. Justice White had little trouble disposing of the two issues which had divided the Fifth Circuit and numerous of the other lower courts since *Griffin*. He first concluded, by way of dictum, that plaintiffs had failed to prove a conspiracy to deprive them of their first amendment rights, because they had failed to prove either that the state was involved in the conspiracy or that the conspiracy was aimed at influencing the state.⁷⁸ Justice White then held that animus against plaintiffs' class⁷⁹ was not "class-based animus" for purposes of Section 1985(3).⁸⁰

The Court's conclusion in *Carpenters* that Section 1985(3) does not make actionable a private conspiracy to deprive persons of those rights protected by the first and fourteenth amendments resolved one of the issues that had been dividing the courts of appeal. In reaching this conclusion, Justice White made no reference to legislative history, but simply relied on a syllogism: 1) section 1985(3) "provides no substantive rights itself";⁸¹ 2) the first and fourteenth amendments proscribe only those private actions at least intended to influence state activity; 3) therefore, because there was no suggestion that the defendants here intended to influence state action, there was no cause of action under Section 1985(3).⁸² Curiously, although the Court went out of its way to decide this

of government through assaults on the person, property and liberties of individuals." *Id.* at 1010 (Rubin & Williams, JJ., dissenting) (quoting from Comment, *A Construction*, *supra* note 11, at 403).

⁷⁵ *Id.* at 1015 (Rubin & Williams, JJ., dissenting).

⁷⁶ *Id.* at 1017 (Rubin & Williams, JJ., dissenting). In the course of rejecting the plaintiffs' class, the dissenters alluded to some of the criteria which might define classes covered by Section 1985(3): "[The plaintiffs' class] is not a 'class' marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection." *Id.* at 1018 (Rubin & Williams, JJ., dissenting). In his separate dissent, Judge Garwood attempted to distinguish between the equal protection of the laws and the equal privileges and immunities prongs of the Section. *Id.* at 1022-24 (Garwood, J., dissenting). He concluded that there could be no denial of equal protection of the laws without at least some intent on the part of the conspirators to affect state action and that no privilege or immunity of federal citizenship was involved in the case. *Id.*

⁷⁷ See *United Bd. of Carpenters v. Scott*, 463 U.S. 825 (1983).

⁷⁸ *Id.* at 831-34.

⁷⁹ Justice White nowhere described the class he was discussing, but he probably assumed it to be "non union employees in the Port Arthur area." *Id.* at 836. In using this class definition, the Court continued the confusion surrounding defendants' motive in attacking plaintiffs. If anything, defendants' animus was against nonunion *employers* in the Port Arthur area.

⁸⁰ *Id.* at 834-39.

⁸¹ *Id.* at 833 (quoting *Novotny*, 442 U.S. at 372).

⁸² *Id.* at 833-34. In reaching this conclusion, the Court did not indicate whether it thought the

aspect of the scope of Section 1985(3), it expressly left open the troublesome question whether a Section 1985(3) cause of action could be based on a conspiracy to violate other provisions of the Constitution, federal statutes, or state law.⁸³

In holding that plaintiffs' class was not of the kind intended to be protected by Section 1985(3), Justice White voiced serious doubts that the section was meant to reach any animus other than racial animus.⁸⁴ In support of this suggestion, which was contrary to the unanimous view of the courts of appeal⁸⁵ and commentators,⁸⁶ Justice White argued, without a single citation to the legislative history that Congress's true intent was not to protect those who supported Reconstruction — Republicans and, among them, Negroes — but to protect "Negroes and those who championed their cause, most notably Republicans."⁸⁷ While Justice White left open the question whether political groups are protected by Section 1985(3), the majority held that animus directed against a class of persons because of their "economic views, status, or activities" was not class-based animus.⁸⁸ Justice White appeared to recognize, however, that this holding is at odds with statements in the legislative history indicating that the 42nd Congress thought the Klan and like groups were hostile to Northerners because of their role in the economic life of the South.⁸⁹ Justice White attempted to explain this apparent conflict when, with a single ambiguous citation to the legislative history,⁹⁰ he determined that the Northerners

plaintiffs were relying on the Section's "equal protection of the laws" prong or the "equal privileges and immunities under the laws" prong or whether the distinction mattered.

⁸³ *Id.*

⁸⁴ *Id.* at 836.

⁸⁵ See *supra* text accompanying notes 41–62.

⁸⁶ See, e.g., Sheehan and Rapp, *The Scope and Application of 42 U.S.C. Section 1985(c): Beyond the Fourteenth Amendment Question*, 2 ANTIOCH L.J. 131, 152–57 (1982); Note, *Conspiracies to Deny Civil Rights: Using Section 1985(3) to Control Labor Violence*, 56 S. CAL. L. REV. 1079, 1085–90 (1983); Note, *The Class-Based Animus Requirement of 42 U.S.C. Section 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635, 642–57 (1980); Comment, *The Supreme Court 1970 Term*, 85 HARV. L. REV., 3, 103 (1971).

⁸⁷ *Carpenters*, 463 U.S. at 836. Justice White also expressed concern that if Section 1985(3) were to reach "political" animus, it would convert the federal courts into "monitors of campaign tactics in both state and federal elections." *Id.* His one concrete example of the kind of problems that might result from such an interpretation — that a political party might have a federal cause of action for the heckling of its speakers by a rival party — is singularly unpersuasive. See *id.* At a minimum, as Justice White acknowledged two sentences earlier, the heckling would first have to be "otherwise unlawful" to be actionable. See *id.* Whether heckling a political opponent would be unlawful under state law (and whether such a state law would survive a first amendment challenge) is doubtful. In addition, in light of the Court's earlier conclusion that first amendment claims may not be the basis of a Section 1985(3) action in the absence of some involvement of the state, it is unclear how a Section 1985(3) action for heckling could be brought even if heckling were otherwise unlawful. See *supra* notes 80–82 and accompanying text.

⁸⁸ *Carpenters*, 463 U.S. at 837–39. Justice White engaged in some sleight-of-hand in this part of the opinion also, shifting the discussion from animus toward persons with certain economic views to "economic and commercial animus." *Id.*

⁸⁹ See *GLOBE*, *supra* note 13, at 368 (remarks of Sen. Sheldon); *id.* at 414 (remarks of Rep. Roberts); *id.* at 500 (remarks of Rep. Frelinghuysen); *id.* at 653 (remarks of Sen. Osborn).

⁹⁰ *Carpenters*, 463 U.S. at 838. Justice White relied on remarks by Senator Pool. Previously he had dismissed the statements of Senator Edmunds (the manager of H.R. 320 in the Senate) concerning the scope of the Section on the ground that the bill originated in the House. *Id.* at 836–37.

were really the victims of Klan hostility because they were Republicans who were thought to be sympathetic to Negroes.⁹¹

The dissent, authored by Justice Blackmun, accepted Justice White's mode of analysis but, relying to a greater degree on the legislative history and on some historians' treatment of the Reconstruction period, disagreed with the majority's conclusions on both issues. In response to the majority's conclusion on the use of the first amendment, Justice Blackmun first argued that the 42nd Congress believed that the fourteenth amendment conferred the right to equal protection directly on individuals and that private conspirators could violate the right.⁹² What actions by private conspirators would constitute such a violation, however, was not made clear in the remainder of the dissent. On the one hand, Justice Blackmun appeared to disagree with the majority's assumption that the plaintiffs had to point to the violation of an independent right, such as a violation of the first amendment, to state a cause of action under Section 1985(3). He said that "[n]o violation of an independent legal right is required"⁹³ On the other hand, he also stated that the gravamen of the cause of action was preventing the "equal enjoyment and exercise of . . . civil rights"⁹⁴ or the "equal exercise and enjoyment of . . . legal rights."⁹⁵ Justice Blackmun nowhere indicated what actions by private conspirators would deprive someone of equal protection or what he meant by "civil rights" or "legal right"; nor did he indicate in what way the plaintiffs in *Carpenters* were denied equal protection.

Justice Blackmun's dissent was far clearer, however, on the issue of "class-based" animus. He was undoubtedly correct in arguing that the language of the section itself did not exclude coverage of political or economic classes and that, if there is anything to be learned from legislative history, it is that Congress viewed the Klan as a preeminently political organization and Reconstruction as having political, racial, and economic aspects.⁹⁶ Justice Blackmun then concluded by proposing a functional approach to the class-based animus factor:

Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of

⁹¹ *Id.* at 838. Justice White stated:

We do not interpret these parts of the debates as asserting that the Klan had a general animus against either labor or capital, or against persons from other states as such. Nor is it plausible that the Southern Democrats were prejudiced generally against enterprising persons trying to better themselves.

Id.

Justice White again referred to the supposed practical problems which would result from adopting the broader interpretation and indicated that such problems were best dealt with by "statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property." *Id.* at 839. Justice White's only attempt to identify a specific concern — that, in light of the National Labor Relations Act, 29 U.S.C. § 151, it would be "unsettling" if strike and picket-line violence had to be considered under Section 1985(3) — simply ignores the fact that the NLRA does not regulate such violence; such violence is regulated, if at all, by state authorities and the state courts. *See id.* at 838–39. *See generally* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

⁹² *Carpenters*, 463 U.S. at 846–49 (Blackmun, J., dissenting).

⁹³ *Id.* at 841 (Blackmun, J., dissenting).

⁹⁴ *Id.* at 849 (Blackmun, J., dissenting).

⁹⁵ *Id.* at 847 (Blackmun, J., dissenting).

⁹⁶ *See infra* text accompanying notes 114–43.

the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, other traits also may implicate the functional concerns in particular situations.⁹⁷

Thus, Justice Blackmun's functional approach contrasted sharply with the majority's conclusion that animus directed against particular classes — possibly "political" classes, certainly "economic" classes — was not class-based animus.

3. Section 1985(3) Since *Carpenters*

The *Carpenters* Court's holding, that Section 1985(3) did not apply to conspiracies resulting from economic or commercial animus, and its conclusion, that first amendment rights were not implicated by private action not intended to have an effect on state officials, were narrow. Nevertheless, the breadth of the Court's language and its clearly expressed desire to limit the scope of Section 1985(3) conveyed a strong message which has not been lost on the lower courts. As the Seventh Circuit has stated, "[t]he import of both *Griffin* and *Scott* is that the legislative history of Section 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against 'Negroes and their supporters.'"⁹⁸ The Tenth Circuit has concurred:

In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend Section 1985(3) to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from *Scott* we get a signal that the classes covered by Section 1985(3) should not be extended beyond those already expressly provided by the Court.⁹⁹

Since the *Carpenters* decision, no court has found class-based animus where plaintiffs suing under Section 1985(3) have alleged that a conspiracy was directed against a purely "political" class.¹⁰⁰ Where Section 1985(3) plaintiffs have alleged that a conspiracy was directed against a non-racial "suspect" class or a class defined by other immutable characteristics, the lower courts have been in conflict. Some have read *Carpenters* as requiring allegations of racial animus in order to state a cause of action under Section 1985(3).¹⁰¹ Other courts have continued to apply Section 1985(3) to previously recog-

⁹⁷ *Carpenters*, 463 U.S. at 853 (Blackmun, J., dissenting).

⁹⁸ *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985).

⁹⁹ *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984). See also *Nilan v. De Meo*, 575 F. Supp. 1225, 1226-27 (D. Pa. 1983); *Fiske v. Lockheed-Gear Co.*, 568 F. Supp. 590, 593-95 (D. Ga. 1983).

¹⁰⁰ See, e.g., *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 157-63 (4th Cir. 1985) (characterizing Section 1985(3) as being a response to violence and acts of terror directed at blacks and their supporters). Accord *Grimes*, 776 F.2d at 1366; *Fiske*, 568 F. Supp. at 593-95.

¹⁰¹ *Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1986); *Rayborn v. Mississippi State Bd. of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1985). One court has gone further and suggested that not all racial animus, but only animus against blacks, is covered. *Marsh v. Board of Educ. of City of Flint*, 581 F. Supp. 514 (D. Mich. 1984).

nized, non-racial, "suspect" classes and classes defined by other immutable characteristics, such as national origin,¹⁰² religion,¹⁰³ sex,¹⁰⁴ and handicap.¹⁰⁵

The conflict among the lower courts as to how to apply *Carpenters* to classes not discussed in *Carpenters* indicates that the Court's reasoning was less than clear. The inability of the lower courts to apply the Court's holding even to the classes discussed in *Carpenters* is evidence that the Court's interpretation is wrong. The case that presents the clearest challenge to the Court's determination of legislative intent is the 1984 North Carolina district court case of *Waller v. Butkovich*.¹⁰⁶ The *Waller* case grew out of an incident occurring on November 3, 1979, in Greensboro, North Carolina. On that day, the Communist Workers Party staged a "Death to the Klan" rally whose participants were attacked by members of the Ku Klux Klan and the American Nazi Party. In the end, five of the demonstrators were killed and numerous others were injured. In a lawsuit brought in part under Section 1985(3), plaintiffs alleged that the attack resulted from a conspiracy involving various defendants, including state and federal officials. The plaintiffs alleged that the conspiracy was motivated by the defendants' hostility to the demonstrators because the demonstrators were members of the Communist Workers Party, which advocated equal rights of blacks and/or labor organizers. Thus, the Greensboro episode — a violent attack by the Klan and others on a minority political party espousing unpopular political, racial, and economic views — comes as close as any present-day incident could come to the outrages which prompted the enactment of the Ku Klux Klan Act.¹⁰⁷

The defendants moved to dismiss the Section 1985(3) claim, and the district court in *Waller* attempted to follow what it took to be the Supreme Court's approach in *Carpenters* by parsing the defendants' motivation for the attack. The district court held that to the extent the defendants attacked the plaintiffs because of their support for blacks, plaintiffs stated a cause of action under Section 1985(3).¹⁰⁸ The court also held that to the extent defendants attacked plaintiffs because they were pro-labor, plaintiffs did not state a cause of action.¹⁰⁹ Finally, the court held that to the extent defendants attacked plaintiffs because they were Communists, the court would not decide whether a cause of action existed because "the animus against communists and advocates of equal rights for black people, in the instant case, may be inextricably intertwined."¹¹⁰

¹⁰² *Photos v. Township High School Dist. No. 211*, 639 F. Supp. 1050 (D. Ill. 1986). *Contra* *Hauptmann v. Wilentz*, 570 F. Supp. 351 (D.N.J. 1983).

¹⁰³ *Eilers v. Coy*, 582 F. Supp. 1093, 1100 (D. Minn. 1984); *Stolzhus v. Ulrich*, 587 F. Supp. 1226, 1230 (D. Pa. 1984) (dictum).

¹⁰⁴ *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 942 (D. Neb. 1986); *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986); *Scott v. City of Overland Park*, 595 F. Supp. 520, 528-29 (D. Kan. 1984); *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1220 (D.N.J. 1984).

¹⁰⁵ *Tyus v. Ohio Dept. of Youth Services*, 606 F. Supp. 239, 246-47 (D. Ohio 1985). *Contra* *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1485-87 (7th Cir. 1985).

¹⁰⁶ 584 F. Supp. 909 (D.N.C. 1984) (ruling on defendants' motions to dismiss); 605 F. Supp. 1137 (D.N.C. 1985) (ruling on plaintiffs' renewed motion to dismiss defendants' counterclaims).

¹⁰⁷ There were further similarities in *Waller* to the situation in 1871 in the criminal prosecutions which resulted from the Greensboro incident. Despite films which showed certain defendants shooting at the demonstrators, the state in 1980 and the federal government in 1984 failed to obtain convictions for the killings against any defendants in cases tried to all-white juries. N.Y. Times, Apr. 16, 1984, at 1.

¹⁰⁸ *Waller*, 584 F. Supp. at 936-37.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 937. In *Hobson v. Wilson*, the D.C. Circuit Court of Appeals used a similar analysis and

The *Waller* court's analysis was even less conclusive when it came to dealing with the counterclaims of the Ku Klux Klan and Nazi defendants. The defendants counterclaimed against the plaintiffs under Section 1985(3), alleging that they were in fact attacked by plaintiffs because of plaintiffs' animus toward anti-communist Christians and white Americans and because of plaintiffs' desire to interfere with defendants' first amendment rights, their right to travel, and "other constitutional rights."¹¹¹ The district court rejected plaintiffs' motion to dismiss the counterclaims without explaining whether it was the racial, religious, or political animus allegations, or all three, which satisfied the class-based animus requirement of Section 1985(3).¹¹² If anything illustrates the unworkability of the distinctions suggested by *Carpenters*, it is the prospect of a trial on the merits on Section 1985(3) claims such as those in *Waller*, with each side trying to establish which of several possible invidious motives was the animating force behind a criminal conspiracy.¹¹³

By reading *Carpenters* as limiting Section 1985(3) to cases involving racial, or perhaps sectional animus, the lower courts have largely ended the twelve-year revival of the section. Because the perceived intent of the 42nd Congress in enacting the Ku Klux Klan Act formed the basis of the restrictive language of the *Carpenters* decision, Part II examines the historical materials bearing on Congress's intent as to class-based animus.

II. THE MISUSE OF HISTORY AND THE MISCONSTRUCTION OF "CLASS-BASED ANIMUS"

The language of the statute itself ought to be the starting point for its interpretation.¹¹⁴ Section 1985(3) is broad and applies to "any person or class of persons." The word "equal" — the source of the class-based animus element — suggests no limit as to the classes to be covered. Moreover, unlike the four other Reconstruction era civil rights

upheld a cause of action where it was alleged that the plaintiffs were attacked because they were members of a political group which, *inter alia*, championed civil rights for blacks. 737 F.2d 1, 16 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985). See also *Martinez v. Winner*, 771 F.2d 424, 440-41 (10th Cir. 1985).

¹¹¹ *Waller*, 605 F. Supp. at 1138-40.

¹¹² *Id.* at 1145. It was apparently the position of the court in *Waller* that the plaintiffs satisfied the class-based animus element if racial animus motivated the conspirators to any degree. The court in *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, however, seems to have read *Carpenters* more restrictively. 615 F. Supp. 916 (N.D. Tex. 1985). There, a hispanic union organizer attempting to organize hispanic farmworkers, his union, and the legal services organization which represented them sued various growers and packers of produce for conspiring with local law enforcement officers to harass the plaintiffs into giving up the organizing efforts and leaving the area. *Id.* at 921-30. Although the court acknowledged that the defendants may have had other than economic motives, such as hostility to the attorneys because they were "carpetbaggers" from Harvard, it held that no class-based animus had been shown because "the suit as a whole 'generally rest[ed] on economic motivations.'" *Id.* at 939 (quoting *Carpenters*, 463 U.S. at 838).

¹¹³ In fact, the trial in *Waller* did not center on the question of animus because the court dismissed the counterclaims at the beginning of the trial and the defendants defended on other grounds. The jury brought in a verdict for three of the sixteen plaintiffs against eight defendants and awarded a total of just under \$400,000 in damages. N.Y. Times, June 9, 1985, at 35.

¹¹⁴ The Supreme Court, in *Albernaz v. United States*, stated: "absent a 'clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive.'" 450 U.S. 333, 336 (1981) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

acts, which were aimed at granting or securing substantive rights to freedmen,¹¹⁵ the Ku Klux Klan Act made no mention of "race" or "color" in defining "equality." In fact, the equal protection language of the section is taken from the fourteenth amendment, which, from the earliest cases interpreting it, has been applied to any discrimination, not to just racial discrimination.¹¹⁶

The Court's construction of Section 1985(3) as a statute passed primarily for the protection of the newly freed slaves derives not from the language of the statute, but from the Court's determination of Congressional intent. While such a construction has its roots in Justice Jackson's off-hand statement in *Collins* and in Justice Stewart's reference to class-based animus in *Griffin, Carpenters* is the first and only case where that construction was a basis for the holding. The effect of this construction is, of course, to limit drastically the scope of the statute and to make class-based animus the central element of the cause of action. Nothing in historical materials bearing on Congressional intent supports the proposition that class-based animus was thought to be exclusively racial animus, or that animus directed toward groups defined by their economic views or other non-racial, non-political characteristics was excluded from Section 1985(3) coverage. Quite the contrary, even a relatively superficial examination of the historical context in which the Ku Klux Klan Act was passed confirms that Congress intended what the unqualified language of Section 1985(3) suggests: the section was meant to protect any class subject to the unlawful conduct forbidden by the section.

A. *The Specific Historical Evidence: Legislative History and Contemporaneous Construction of Section 1985(3)*

In *Carpenters*, Justice White, writing for the majority, offered two conclusions about class-based animus from his reading of the legislative history. First, he stated that "[t]he central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to power."¹¹⁷ Second, he concluded, "[w]e do not interpret . . . the debates as asserting that the Klan had a general animus against either labor or capital, or against persons from other States as such."¹¹⁸

Yet a fair reading of the legislative history does not support either conclusion. Some members of the 1871 Congress expressly described the breadth of coverage intended by the section. Senator Edmunds, one of the two managers of the bill in the Senate, interpreted the section to cover a conspiracy formed against a man "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . ."¹¹⁹ Representative Buckley stated, "[t]he proposed

¹¹⁵ Compare Civil Rights Act of 1866, 14 Stat. 27, Enforcement Act of 1870, 16 Stat. 140, First Force Act of 1871, 16 Stat. 433, Civil Rights Act of 1875, 18 Stat. 335. Even as to these Acts, the Court long ago indicated that, though enacted to protect freedmen, they were applicable generally. See *United States v. Mosley*, 238 U.S. 383, 387-88 (1915).

¹¹⁶ It has been estimated that the overwhelming majority of cases heard under the equal protection clause since its adoption have involved alleged discrimination against economic interests rather than racial groups. See R. HARRIS, *QUEST FOR EQUALITY* 59 (1960). In the same vein, Section 1 of the Ku Klux Klan Act (42 U.S.C. § 1983) has long been applied to deprivations under color of law having no racial overtones.

¹¹⁷ *Carpenters*, 463 U.S. at 836.

¹¹⁸ *Id.* at 838.

¹¹⁹ GLOBE, *supra* note 13, at 567 (remarks of Sen. Edmunds). Justice White conceded that Senator Edmunds's views were "not without weight," but he ultimately disregarded Edmunds's

legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women"¹²⁰ President Grant also spoke in broad terms in his proclamation issued on the signing of the act, referring to the act as maintaining "the rights of all citizens of the United States" and securing "to all such citizens" the equal protection of the laws.¹²¹

During the debates on H.R. 320, the members of the Republican majorities in both the House and Senate expressed a consistent view of the nature of the Ku Klux Klan problem.¹²² Speaker after speaker described the Klan as a political organization bent on seizing political power by terror and on overthrowing Reconstruction. Representative Butler stated:

It is evident that the lawlessness of the South, at first undirected save by its hates, is now become organized in the service of a political party to crush its opponents, and to drive from their borders every friend of a Republican Administration. For this purpose it is organized. For this purpose it receives the orders and executes the decrees of a central chief. For this purpose it murders legislators and judges, burns school-houses and churches, murders mail agents, overawes courts and assaults the judges, breaks jails and kills or releases the prisoners as they are foes or friends, hinders the collection of the revenue and outrages its officers, and levies a stealthy war upon the United States, in which it is supported by a majority of those who favor the cause of secession in the South

If it was not political in the beginning, yet as the objects of its fury, as to persons, were negroes and northern men who had gone South, the only friends of republican liberty; and as to property, school-houses, and churches, and the humble dwellings of the people — all of which we proudly claim to be friends and instruments for the propagandism of Republican principles — it has necessarily become a political engine in the hands of the Democracy ¹²³

Similarly, Representative Coburn stated:

The commission of isolated outrages is not what is complained of, but of crimes perpetrated by concert and agreement, by men in large numbers acting with a common purpose for the injury of a certain class of citizens entertaining certain political principles We find that this society is political in its nature, is exclusive in its membership, and is utterly hostile to

interpretation on the ground that the bill and its subsequent amendment originated in the House. *Carpenters*, 463 U.S. at 837. It is difficult to understand Justice White's reasoning here. If legislative intent matters, it is the intent of the bodies which adopted the measure, not the intent of the drafters, which counts; and, if the two bodies had different intents, there is no logical justification for favoring the intent of one over the other.

¹²⁰ *GLOBE APP.*, *supra* note 15, at 190.

¹²¹ Proclamation of May 3, 1871.

¹²² The members of Congress referred throughout to the Ku Klux Klan, but in fact, the Klan was just one of a number of similar groups, among them the Knights of the White Camelia, the White Brotherhood, the Pale Faces, and the '76 Association, operating at the time. K. STAMPP, *THE ERA OF RECONSTRUCTION* 199 (1965). The groups will be jointly referred to here as the Ku Klux Klan.

¹²³ *GLOBE*, *supra* note 13, at 443 (remarks of Rep. Butler).

the Republican party and to the Union of the States, and that its victims are members of that party.¹²⁴

As evidence that the Klan was acting for political purposes, several speakers emphasized that the Klan was only active in areas where elections might be close.¹²⁵ It was the understanding of the Republicans that the Klan only operated where there was an opportunity to oust the Republican Party from power and that, in those areas where the Democrats returned to power, the illegal outrages ceased and the oppression was accomplished under law.¹²⁶ The Democrats did not take issue with the assertion that the Klan was motivated by political purposes. Those Democrats who did not deny altogether the Klan outrages attempted to explain them away as "natural" responses to Republican misgovernment.¹²⁷

If any theme emerges from the debates on the bill, it is that the 42nd Congress was principally concerned with protecting Republicans and those who might be suspected of Republican sympathies. Representative Roberts emphasized this point:

But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; new-comers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by. Omit that sign, and the torch may kindle the roof that covers women and children; the scourge may fall upon shoulders that stoop with weakness and with age; the bullet may pierce the breast without warning. Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.¹²⁸

Numerous Republican speakers stressed that the Klan was such a serious problem precisely because political rather than racial animosity was involved and that the attacks therefore threatened the prospects for free and democratic governments in the South. Representative Buckley stated: "Nor does this Ku Klux business take its origin in the antagonisms of race. White and black suffer alike; more colored than white, because the colored are the most numerous. But all races, all nationalities are the victims."¹²⁹ Representative Coburn also commented on this issue:

We may fairly say that, however bad it may be to commit crimes, it is an additional wickedness to conspire together to do so. It argues still greater

¹²⁴ *Id.* at 457 (remarks of Rep. Coburn). *Accord id.* at 157 (remarks of Sen. Sherman); *id.* at 197 (remarks of Sen. Ames); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelly); *id.* at 252 (remarks of Sen. Morton); *id.* at 437 (remarks of Rep. Cobb); *id.* at 444 (remarks of Rep. Butler); *id.* at 517 (remarks of Rep. Shellabarger); *GLOBE APP.*, *supra* note 15, at 184-86 (remarks of Rep. Platt); *id.* at 196 (remarks of Rep. Snyder); *id.* at 256 (remarks of Rep. Wilson); *id.* at 273-76 (remarks of Rep. Porter); *id.* at 298-99 (remarks of Rep. Stevenson).

¹²⁵ *GLOBE*, *supra* note 13, at 154 (remarks of Sen. Sherman); *id.* at 200 (remarks of Sen. Nye); *id.* at 413 (remarks of Rep. Roberts).

¹²⁶ *GLOBE APP.*, *supra* note 15, at 276-77 (remarks of Rep. Porter).

¹²⁷ *GLOBE*, *supra* note 13, at 329-30 (remarks of Rep. Morgan); *id.* at 361 (remarks of Rep. Swann); *id.* at 451 (remarks of Rep. Cox); *GLOBE APP.*, *supra* note 15, at 178 (remarks of Rep. Voorhees).

¹²⁸ *GLOBE*, *supra* note 13, at 413 (remarks of Rep. Roberts).

¹²⁹ *GLOBE APP.*, *supra* note 15, at 194 (remarks of Rep. Buckley).

depravity to organize their commission into a system, but the very height of criminal enormity is reached when these banded outlaws, with murderous hands, strike at innocent and helpless men for merely entertaining certain political opinions.¹³⁰

In the debates, Republican speakers specifically referred to Republicans and to three other groups, Unionists, Negroes, and Northerners ("carpetbaggers"), as the objects of Klan attacks.¹³¹ Unionists were attacked because of the Klan's hostility to their political beliefs. Blacks were in overwhelming numbers members of the Republican Party.¹³² The Blacks and the carpetbaggers were attacked, not simply because of racial or sectional animus, but because of their presumed affiliation with the Republican Party.¹³³ The 42nd Congress also understood that the ultimate goal of the Klan was to realize certain political goals — at a minimum, the restoration of hegemony of the Democratic Party in the South, perhaps the return to power of the Democratic Party on a national level. This was the evil the Republican Congress was addressing in enacting the Ku Klux Klan Act, and the principal attacks on the Act from the Democrats were on this precise point — the implications of the Act for the fortunes of the two major parties.¹³⁴

Justice White's other distinction in *Carpenters*, between animus engendered by persons' "political" views or actions and animus engendered by their "economic" views or actions, also finds no support in the legislative history and makes no sense. Again, some speakers specifically referred to "economic" aspects of the Klan's activities by referring to the Klan as acting "to intimidate capital and enterprise, and constrain them to remain without [the South's] borders or to flee from them after having had the temerity to enter,"¹³⁵ interfering with "[t]he right to migrate and to engage in legitimate traffic,"¹³⁶ and interfering with the right of workingmen to migrate to the South.¹³⁷

The other speakers who identified Republicans as the target of Klan activity simply failed to indicate whether Republicans were attacked for their political or for their economic views. Yet in a country where the central political issue has often been the treatment of the economy, it is not surprising that the speakers did not consider making such a distinction. As is discussed below, the Republican Party's Reconstruction program

¹³⁰ GLOBE, *supra* note 13, at 457 (remarks of Rep. Coburn).

¹³¹ See *id.* at 338 (remarks of Rep. Kelly); *id.* at 384 (remarks of Rep. Hawley); *id.* at 441 (remarks of Rep. Butler); *id.* at 459 (remarks of Rep. Coburn); GLOBE APP., *supra* note 15, at 190 (remarks of Rep. Willard); *id.* at 228 (remarks of Sen. Boreman); *id.* at 229 (remarks of Rep. Stevenson).

¹³² GLOBE, *supra* note 13, at 157 (remarks of Sen. Sherman).

¹³³ *Id.* at 443 (remarks of Rep. Butler) ("[T]he objects of its fury, as to persons, were negroes and northern men who had gone South, the only friends of republican liberty . . .").

¹³⁴ GLOBE APP., *supra* note 15, at 231 (remarks of Rep. Blair); GLOBE, *supra* note 13, at 354–57 (remarks of Rep. Beck); *id.* at 603 (remarks of Sen. Saulsbury). The conclusion that Congress was not primarily concerned with racial animus is also supported by what was *not* said during the debates. Only two of the Republicans who discussed the constitutionality of Section 2 mentioned the thirteenth amendment, which would surely have been invoked if the purpose of the section was to protect the freedmen. Rep. Shellabarger made this point in distinguishing Section 1 of the bill from the 1866 Civil Rights Act, which, he pointed out, had been enacted under the Thirteenth Amendment and for the protection of the former slaves only. GLOBE APP., *supra* note 15, at 68 (remarks of Rep. Shellabarger).

¹³⁵ *Id.* at 338 (remarks of Rep. Kelly).

¹³⁶ *Id.* at 368 (remarks of Rep. Sheldon).

¹³⁷ *Id.* at 500 (remarks of Rep. Frelinghuysen).

aimed at changing both the political and the economic life of the South, and the various Reconstruction goals were inextricably intertwined. Given the concern of several Congressmen about the Klan's role in impeding the free movement of labor, it cannot be said that even the specific views said to be at issue in *Carpenters* — views about the desirability of labor unions — were simply "economic" views and thus beyond the concerns of the 42nd Congress.¹³⁸

The Supreme Court's own contemporaneous construction of Section 2 of the Ku Klux Klan Act is equally unsupportive of the Court's current class-based animus analysis. In 1882, eleven years after the enactment of the statute, Justice Woods, sitting on circuit, held the criminal portion of Section 2 unconstitutional after finding that it would reach a case of two or more white men who conspired to deprive another white man of a protected right.¹³⁹ The following year, Justice Woods reiterated his interpretation on behalf of the whole Court in *United States v. Harris*, again holding the statute unconstitutional. Justice Woods held that the section applied to a case of two or more white men who conspired "for the purpose of depriving another free white citizen of a right accorded by the laws of the State to all classes of persons — as, for instance, the right to make a contract, bring a suit, or give evidence . . ." ¹⁴⁰ Justice Wood held that the statute's provisions were broader than any constitutional authority and therefore could not be sustained.¹⁴¹ Four years later, in *Baldwin v. Frank*,¹⁴² the Court found that Section 2 was intended to cover the situation then before the Court — a conspiracy against a group of persons identifiable by race or national origin — but the Court's opinion was ambiguous as to whether the violence against the group was a product of racial or economic considerations.¹⁴³ In short, *Harris* clearly indicates that racial animus was not thought, by the 1883 Supreme Court, to be a necessary element of an action under Section 2, and neither *Harris*, nor *Baldwin*, suggested that conspiracies arising from economic animus were excepted from its coverage.

B. The General Historical Evidence

The Supreme Court has ruled, in the context of another civil rights statute, that courts attempting to ascertain the Congressional intent in enacting a statute should, in

¹³⁸ Such a distinction between political views and economic views makes no more sense today. For example, to apply the distinction to a case such as *Waller*, a court would be required to determine whether animus toward Communists is animus towards persons because of their political, or because of their economic, views. The Supreme Court has long recognized the interrelated nature of politics and economics: "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). However, the Court's tendency to treat labor matters as not involving political and social dimensions was not an isolated development in *Carpenters*. In a series of recent cases, the Court has made this distinction over the objections of unions. *E.g.*, *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978). See generally Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 *Tex. L. Rev.* 1 (1981).

¹³⁹ *LeGrand v. United States*, 12 F. 577, 581 (C.C.E.D. Tex. 1882).

¹⁴⁰ *United States v. Harris*, 106 U.S. 629, 641 (1883).

¹⁴¹ *Id.*

¹⁴² 120 U.S. 678 (1887).

¹⁴³ The indictment charged that the victims "were engaged in legitimate business and labor to earn a living" and that the defendants conspired together to, and did, deprive them of "the privilege of conducting their legitimate business, and of the privilege of laboring to earn a living . . ." *Id.* at 681.

addition to examining legislative history, take account of the historical context in which Congress acted.¹⁴⁴ Because nothing in the language, legislative history or contemporaneous construction of Section 1985(3) indicates that Congress intended the section's coverage to be limited to a certain class or classes, Justice White in *Carpenters* must have made his determination of Congressional intent by reading Section 1985(3) (as did Justice Stewart in *Griffin*) in light of unstated assumptions about the purposes of the Republican Party, the goals of the Klan, and the politics of Reconstruction generally. The implicit assumption underlying Justice White's opinion in *Carpenters* is that the antagonists in the Reconstruction battle which resulted in the passage of Section 1985(3), were Republicans, principally motivated by concern for the plight of the freedmen, and Klan members, driven exclusively by racism. Such a simplified view of Reconstruction politics is contradicted by the historical evidence.

1. The Republicans and the Klan

With the exception of the former abolitionists in the Republican Party, Republicans were never motivated primarily by an unselfish concern for the plight of the freedmen. In fact, the Republican Party in general was quite racist. For example, prior to the war, Senator Trumbell, who later authored the 1866 Civil Rights Act and voted for the Ku Klux Klan Act, expressed Republicans' opposition to slavery as follows: "We, the Republican party are the white man's party. We are for free white men, and for making white labor respectable and honorable, which it can never be when negro slave labor is brought into competition with it."¹⁴⁵ Prior to and during the war, many prominent Republicans, including Lincoln, devised schemes for deporting the ex-slaves to colonies in Africa or Latin America.¹⁴⁶ Even after the war, all parties to the Reconstruction debate advocated white supremacy.¹⁴⁷ In vote after vote during the Reconstruction period, northern states, even those states under Republican control, rejected attempts to recognize the political rights, and particularly the right to vote, of blacks.¹⁴⁸ The attitude of the Republican Party toward blacks, as blacks, is perhaps most clearly revealed in the party's 1868 platform, which stated:

¹⁴⁴ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979) (Sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964 must be read in light of historical background from which the Act arose).

¹⁴⁵ Woodward, *Seeds of Failure in Radical Racial Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 126-27 (H. Hyman ed. 1966); L. LITWACK, *NORTH OF SLAVERY* 269-79 (1961).

¹⁴⁶ E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 267-80 (1970); Woodward, *supra* note 145, at 128-29. On August 14, 1862, in attempting to promote his colonization solution to the race problem, Lincoln called black leaders to the White House and told them:

There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us. [Y]our race suffer very greatly, many of them by living among us, while ours suffer from your presence If this be admitted, it affords a reason at least why we should be separated.

Woodward, *supra* note 145, at 129 (quoting from 5 R. BASSLER, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 371-72 (1953)).

¹⁴⁷ Nye, *Comment on C. Vann Woodward's Paper*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 150-51 (H. Hyman ed. 1966). Professor Woodward comments, "[t]he fact was that the constituency on which the Republican congressmen relied in the North lived in a race-conscious, segregated society devoted to the doctrine of white supremacy and Negro inferiority." Woodward, *supra* note 145, at 125-26.

¹⁴⁸ Woodward, *supra* note 145, at 130-31, 137-38.

The guaranty by Congress of equal suffrage to all loyal men of the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all the loyal [i.e., northern] States properly belongs to the people of those States.¹⁴⁹

Thus, at the height of radical Reconstruction, the Republican Party was in favor of permitting blacks to vote in the South, where the party needed their votes in order to compete, but opposed forcing enfranchisement of the blacks in the North, where the Republicans had a much stronger basis of support among white voters who might have been alienated by an overly pro-Negro stance.

Admittedly, the interest of the Republican Party and the freedmen did coincide at two points. These interests coincided on the issue of the abolition of slavery and its incidents and on the issue of the freedmen's right to vote. Even where the party did champion the cause of the freedmen, however, it acted as much for its own political and economic purposes as from concern for the freedmen. On the issue of the abolition of slavery, although the Republican Party from its inception was hostile to slavery, this opposition was not based as much on moral feelings as on the dominant social or economic ideology of the Republican Party.¹⁵⁰ The Republican vision of America was that of an expanding, democratic, capitalist society of small entrepreneurs and workers aspiring to become small entrepreneurs.¹⁵¹ A central tenet of this vision was a commitment to the concept of the dignity of "free labor." The South, with its aristocratic values and feudal economy, was seen as the antithesis of this vision. As Professor Foner points out,

The most cherished values of the free labor outlook — economic development, social mobility, and political democracy — all appeared to be violated in the South. Instead, the southern economy seemed stagnant to Republicans, the southern class structure an irrevocable fixed hierarchy, and southern society dominated by an aristocracy of slaveholders. To Republicans, the South appeared as an alien and threatening society whose values and interests were in fundamental conflict with those of the North.¹⁵²

Second, the interests of Republicans and freedmen coincided on the issue of the freedmen's right to vote because the Republican Party needed the black vote. Since its formation, the Republican Party had been a minority party in the country. In the 1860 presidential election, Lincoln received less than forty per cent of the popular vote in his contest with three other candidates from the splintered Democratic Party.¹⁵³ After the Civil War, the Republican Party's ability to retain control of the federal government depended on the votes of Southern blacks.¹⁵⁴ That the Republicans were united in their opposition to slavery and in their support of the right of blacks to vote in the South does not indicate that Reconstruction Republican legislators or their supporters were more generally concerned with the plight of blacks. As one historian has put it, "[t]he problems of black people occupied center stage for a time both because the institutions

¹⁴⁹ *Id.* at 139.

¹⁵⁰ E. FONER, *supra* note 146, *passim*.

¹⁵¹ *Id.* at 9–16.

¹⁵² *Id.* at 40.

¹⁵³ J. Randall and D. Donald, *supra* note 72, at 133.

¹⁵⁴ Woodward, *supra* note 145, at 125. To a much lesser extent, the Republican Party also was aided by the disenfranchisement, by the fourteenth amendment, of some Southern whites.

to be swept away involved them and because those doing the sweeping away discovered that they needed the freedmen's help in order to accomplish their ends."¹⁵⁵

If the Republicans were not primarily motivated by a concern for fair treatment of the freedmen, neither were the members of the Klan motivated exclusively by racism. The Klan, of course, was racist.¹⁵⁶ At the same time, the Klan was really a number of organizations whose units operated autonomously, and many Klan actions were for motives other than the political suppression of blacks. As to some of the actions, the motives were economic. Historians Simkins and Woody note:

Negroes were whipped for refusing to work for whites; several Negroes of Spartanburg were maltreated because they deserted farms to become railroad laborers. The prominent citizens of Spartanburg were of the opinion that a primary motive for Klan activities was the desire of the lower class whites to remove the Negro as a competitor in labor, and especially in the renting of land. The Klan activities were more violent in those upper rural counties, in which the mass of the white population had to work with their hands for a living, thereby coming into economic competition with the Negro.¹⁵⁷

Thus, the struggle between Republicans and Klan members was not simply a struggle over freedmen's rights, but over the Republicans' whole Reconstruction program. This program was intended to preserve and institutionalize the fruits of the Civil War victory. Just as the Civil War was not begun over the issue of slavery and was not fought principally to free the slaves or obtain equality for blacks,¹⁵⁸ Reconstruction, too, had other principal aims.

2. Reconstruction

The inherent plasticity of historical materials has spawned, among historians, a number of different theories to explain Reconstruction. The first generation of historians to write about the Reconstruction (and the ones who developed the theme of Reconstruction as a mistake and a failure) strongly emphasized the political, rather than the racial, goals of the Republicans. These historians emphasized the attempt by the federal government to increase its power vis-a-vis the states and the attempt by the Republican Party to secure control of, or at least establish a base in, the South.¹⁵⁹ The emphasis on

¹⁵⁵ Fields, *Ideology and Race in American History*, in RELIGION, RACE, AND RECONSTRUCTION 164 (J. Kousser and J. McPherson eds. 1982).

¹⁵⁶ One version of the Klan oath was, in part:

You solemnly swear . . . that you are not now a member of the Red String Order, Union League, Heroes of America, Grand Army of the Republic, or any other organization whose aim and intention is to destroy the rights of the South, or of the States, or of the people, or to elevate the negro to a political equality with yourself, and that you are opposed to all such principles

You further swear . . . that you will oppose all Radicals and negroes in all of their political designs

GLOBE, *supra* note 13, at 153 (remarks of Sen. Sherman).

¹⁵⁷ F. SIMKINS AND R. WOODY, *SOUTH CAROLINA DURING RECONSTRUCTION* 462 (1932). See also A. TRELEASE, *supra* note 17, at xlvii (1971).

¹⁵⁸ J. RANDALL AND D. DONALD, *supra* note 72, at 370-71; W.E.B. DuBois, *supra* note 72, at 55-57.

¹⁵⁹ See Dunning, *The Undoing of Reconstruction* in RECONSTRUCTION IN RETROSPECT 134-35 (R. Current ed. 1969) (a republication of articles originally appearing in 1900); Chamberlain, *Reconstruction in South Carolina* in RECONSTRUCTION IN RETROSPECT 75 (R. Current ed. 1969).

Republican political goals draws considerable support from Thaddeus Stevens, perhaps the leading Radical Republican, who was quite blunt on this point. In a speech before the House of Representatives, he declared:

Do you avow the party purpose? exclaims some horror stricken demagogue. I do. For I believe . . . that on the continued ascendancy of that party depends the safety of this great nation. If [Negro] suffrage is excluded in the rebel States then every one of them is sure to send a solid rebel representative delegation to Congress They, with their kindred Copperheads of the North, would always elect the President and control Congress For these, among other reasons, I am for negro suffrage in every rebel State.¹⁶⁰

More recent historians also have taken the view that political rather than racial, goals were predominant. Some have emphasized the partisan political motives:

[The First Reconstruction Act] was not primarily devised for the protection of Negro rights and the provision of Negro equality. Its primary purpose, however awkwardly and poorly implemented, was to put the southern states under the control of men loyal to the Union or men Republicans thought they could trust to control those states for their purposes.¹⁶¹

Other historians, such as Professor Fields, have emphasized that Republicans were attempting to make fundamental changes in the structure of the American political system: "It was much more fundamental to the historic task of Reconstruction to define the proper relation of the Southern states to the national government, and of the citizen to the national government, than it was to supervise relations between the ex-slaves and ex-masters."¹⁶²

In the early twentieth century, historians began to identify economic motivation behind Reconstruction, namely, the desire by the industrial North to prevent a renewal of the alliance between agrarian interests in the South and in the West and the desire to open up the South to capitalist development.¹⁶³ More recent historians also have focused on the Republicans' economic motives by pointing out that even before the Civil War, a central theme of the Republican ideology was the idea of reconstructing the South with northern values through the migration to the South of Yankee capitalists, manufacturers, and merchants.¹⁶⁴ These historians have stressed that the Republicans after the war adhered to these goals: "Many radicals declared that the South would have to be settled by northern men, developed with northern capital, and indoctrinated with northern views on economic policy — in short, 'northernized' — before it could be trusted with political power once more."¹⁶⁵ In fact, it was the enactment of the Black Codes by the southern states — laws which were "economic" in character because they

¹⁶⁰ K. STAMPP, *supra* note 122, at 93–94.

¹⁶¹ Woodward, *supra* note 145, at 135. See also Lerche, *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, J.S.H. Vol. 15 (1949).

¹⁶² Fields, *supra* note 155, at 164.

¹⁶³ See C. BEARD AND M. BEARD, 2 *THE RISE OF AMERICAN CIVILIZATION*, 3–121 (1930).

¹⁶⁴ E. FONER, *supra* note 146, at 52–4.

¹⁶⁵ K. STAMPP, *supra* note 122, at 97.

regulated freedmen's labor relations and returned them to a form of peonage¹⁶⁶ — which prompted the enactment of the 1866 Civil Rights Bill and precipitated the radical reconstruction policy.¹⁶⁷

In the last twenty-five years, revisionist historians have again emphasized the racial goals of Reconstruction, namely, to finish the work of abolition and to guarantee the freedmen their political and civil rights.¹⁶⁸ Yet, while there have been cycles in the historical interpretation of Reconstruction and, at different times, historians have emphasized one or the other of the aims, all have agreed that Reconstruction had at least these three principal and interrelated aims.¹⁶⁹ Because the aims were inextricably intertwined, there is no way to say which of the aims predominated in the 42nd Congress, and there is nothing to suggest that Congress was exclusively pursuing racial goals in enacting Section 1985(3). For the same reason, it is impossible to isolate a single motive for the Klan's activities.¹⁷⁰ It is interesting to observe that in the Compromise of 1877, which formally ended Reconstruction, the Republican Party was willing to abandon its racial aims in return for acceptance of its economic program.¹⁷¹

In sum, nothing in the language of Section 1985(3), the legislative history of the section, the contemporaneous construction of the section by the Supreme Court, or the more general historical evidence on the Reconstruction period supports anything but the broadest reading of the class-based animus requirement. Thus, the Supreme Court, in construing the word "equal," created distinctions between classes not made or intended by the 42nd Congress. At the same time, the Court ignored an explicit distinction made in the statute itself. In holding that a Section 1985(3) plaintiff must allege class-based animus and also allege violation of an independent, perhaps federal, right,¹⁷² the Court in effect simply combined the "equal protection of the laws" and "equal privileges and immunities" prongs of the section.¹⁷³ As is set forth in Part III, it is this distinction made by the 1871 Congress which is the key to the interpretation of the section.

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[T]he Southern states immediately after the War proceeded to pass legislation, known as "Black Codes," directed specifically at the freedmen with the purpose of organizing them into subservient agricultural laborers. Special labor, apprenticeship, and vagrancy statutes were enacted which resulted in penalizing any Negro who was not continuously industrious, preferably working for a white employer. In some cases the Negroes were forbidden to cross county or parish lines without a permit and were required to be able to show that they were working for a white employer.

Biddle, *Civil Rights and the Federal Law*, in *SAFEGUARDING CIVIL LIBERTY TODAY* 116 (1945).

¹⁶⁷ K. STAMPP, *supra* note 122, at 79–81, 110. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 409–12 (Marshall, J., dissenting).

¹⁶⁸ See generally *RECONSTRUCTION* (K. Stampp and L. Litwack eds. 1969).

¹⁶⁹ See K. STAMPP, *supra* note 122, at 87–97, 213–15.

¹⁷⁰ "It is impossible to separate Klan activities and purposes into exclusive categories or to measure accurately their respective importance." A. TRELEASE, *supra* note 17, at xlvii.

¹⁷¹ C. VANN WOODWARD, *REUNION AND REACTION* 4 (1951).

¹⁷² It is clear that at least Justices Powell and Stevens would require a plaintiff to allege violation of a federal constitutional right. See *Novotny*, 442 U.S. at 378–81 (Powell, J., concurring); *id.* at 381–85 (Stevens, J., concurring).

¹⁷³ Although he differed with the majority on how to treat both the class-based animus and the independent rights issues, Justice Blackmun, in his dissent, did not disagree with the majority's analytical framework. *Carpenters*, 463 U.S. at 839–54.

III. THE USE OF HISTORY TO CONSTRUE SECTION 1985(3)

A correct interpretation of Section 1985(3) must begin with the recognition that Congress intended the "equal protection of the laws" and "equal privileges and immunities" prongs of the section to afford different protections and to create alternative methods of establishing a violation of the section. In the debates on the measure, members of Congress drew a clear distinction between protection of federal rights (privileges and immunities) and state rights (protection of the laws). For example, Representative Garfield, who is credited with being the leader of the Republican moderates, carefully distinguished between protecting the privileges and immunities of national citizenship and protecting citizens from interference with their state-created rights.¹⁷⁴ There was general agreement that the privileges and immunities of national citizenship were personal guarantees which could be protected against the actions of private parties.¹⁷⁵ The central debate was over the degree of state action or inaction required for there to be denial of the equal protection of state laws.¹⁷⁶

Recognizing a distinction between "equal protection of the laws" and "equal privileges and immunities" is also consistent with other portions of the same statute. When addressing conspiracies to interfere with *state* authorities or processes, the statute refers only to denials of equal protection of the laws and makes no mention of equal privileges and immunities. For example, the second clause of Section 1985(3), which makes actionable conspiracies to interfere with *state* authorities, refers only to preventing or hindering states from giving or securing equal protection of laws. Likewise, the Senate amendment to H.R. 320 (now codified as the second part of Section 1985(2)), in addressing conspiracies to impede a *state's* judicial process, refers only to an intent to deny equal protection of the laws. Perhaps the clearest illustration of Congress's intent to afford two kinds of protection from Klan outrages is the language of the Senate's "Sherman Amendment," the precursor to what is now Section 1986. After the passage of H.R. 320 by the House, the Senate added several amendments, the most significant of which was the Sherman Amendment, which attempted to impose liability on municipalities for Klan crimes. The Sherman Amendment applied to crimes committed "to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or deter or punish him for exercising any such right, or by reason of his race, color or previous condition of servitude."¹⁷⁷ Thus, the Senate, in an amendment whose purpose was not to alter the

¹⁷⁴ GLOBE APP., *supra* note 15, at 152-53. See also *id.* at 481-83 (remarks of Rep. Wilson); GLOBE, *supra* note 13, at 485-86 (remarks of Rep. Cook); *id.* at 499-502 (remarks of Rep. Frelinghuysen); *id.* at 505-06 (remarks of Rep. Pratt).

¹⁷⁵ See, e.g., GLOBE, *supra* note 13, at 448 (remarks of Rep. Butler); *id.* at 481 (remarks of Rep. Wilson); *id.* at 486 (remarks of Rep. Cook); GLOBE APP., *supra* note 15, at 46 (remarks of Rep. Kerr); GLOBE, *supra* note 13, at 505 (remarks of Rep. Pratt).

¹⁷⁶ See, e.g., GLOBE APP., *supra* note 15, at 151-54 (remarks of Rep. Garfield); GLOBE, *supra* note 13 at 485 (remarks of Rep. Cook); GLOBE APP., *supra* note 15, at 314-15 (remarks of Rep. Burchard).

¹⁷⁷ This portion of the amendment read in full:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws

cause of action but simply to enlarge the remedy, interpreted H.R. 320 to protect two different groups of people: those attacked because of their exercise or anticipated exercise of federal rights and those attacked because of their race or class.¹⁷⁸

In a similar manner, each of the prongs of Section 1985(3) was meant to protect against a particular harm. The Congressional intent as to each prong is discussed below. Because each of the prongs should be given a broader interpretation than that given by the Court, constitutional questions are raised, and the constitutionality of the interpretations is discussed as well.

A. *Equal Protection of the Laws*

1. The intent of the 42nd Congress

As the legislative history makes abundantly clear and as the Supreme Court held in *Harris*, *Griffin*, and *Carpenters*, Section 2 was intended to reach the conduct of private parties. The crucial question then is how private parties can deny persons the equal protection of the laws. In *Griffin*, the Court explained that Section 1985(3) had to be read to reach conduct beyond the three forms of state action dealt with in other parts of the Ku Klux Klan Act: actions under color of state law; interference with, or influence upon, state authorities; and conspiracies so massive and effective as to supplant state authorities.¹⁷⁹ On the other hand, it was the political nature of the Klan's actions and the consequent effect of those actions on the state and local governments that was the principal concern of the 42nd Congress. Thus, an interpretation of "equal protection of the laws" that would divorce the concept entirely from state involvement is unwarranted.

The Republicans' major concern was the inaction of state local officials in the face of Klan outrages. The Republicans, particularly the moderates, believed it was this inaction that denied equal protection. Representative Garfield commented:

[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe [the fourteenth amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.¹⁸⁰

of the United States, or to deter or punish him for exercising any such right, or by reason of his race, color or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense if living, or to his legal representatives if dead . . .

GLOBE, *supra* note 13, at 704 (emphasis added).

¹⁷⁸ The distinction between "privileges and immunities" as referring to the rights of national citizenship and "equal protection of the laws" as referring to state laws was also made by the contemporary Supreme Court. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Later, in *Harris*, the Court's analysis of Section 2 assumed that "equal protection of laws" referred to state laws. *Harris*, 106 U.S. at 638-640.

¹⁷⁹ *Griffin*, 403 U.S. at 98-99.

¹⁸⁰ GLOBE APP., *supra* note 15, at 153 (remarks of Rep. Garfield); accord GLOBE, *supra* note 13, at 459 (remarks of Rep. Beatty); GLOBE APP., *supra* note 15, at 80 (remarks of Rep. Perry).

The Republicans believed that the Klan deprived persons of equal protection of the laws when it committed criminal or perhaps tortious acts against its victims in a context where the victims were not receiving the protection of state or local officials. Thus, under the "protection of laws" prong of Section 1985(3), Congress intended to provide a remedy for victims of criminal or tortious conspiratorial activity who, because of their membership in a class subject to historic or pervasive animus in the community, were politically powerless and could not anticipate protection.¹⁸¹ While such a definition would, in most cases, include racial and religious minorities, it also would include any group whose characteristics or views were sufficiently unpopular in a particular community.

2. The Issue of Constitutionality

Interpreting Section 1985(3) to reach such private deprivations of equal protection raises constitutional questions. In *Carpenters*, both the majority and the dissent seemed to accept the Fifth Circuit's conclusion that the Section 1985(3) cause of action could be upheld under the Commerce Clause.¹⁸² However, the constitutionality of the equal protection prong of Section 1985(3) should not turn on the coincidence of interstate commercial activity in the particular case. It should be constitutional in all its applications under the fourteenth amendment.

The Supreme Court has not yet explicitly recognized Congress's power under Section 5 of the fourteenth amendment to protect values embodied in Section One of the amendment against private interference. Nevertheless, six members of the Court in the 1966 case of *United States v. Guest*¹⁸³ recognized that Congress possessed power under Section 5 to impose criminal sanctions on private behavior designed to impede the enjoyment of fourteenth amendment rights.¹⁸⁴ As Justice Brennan noted in his concurrence, "[v]iewed in its proper perspective, Section 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."¹⁸⁵ Similarly, in *Katzbach v. Morgan*,¹⁸⁶ the Supreme Court ruled that Congress was empowered under Section 5 to ban English language literacy tests for voting in certain settings despite rulings by the Court upholding such tests against fourteenth amendment challenges. In effect, therefore, the *Katzbach* Court authorized Congress to go beyond

¹⁸¹ In his dissent in *Carpenters*, Justice Blackmun arrived at a similar interpretation, although he appeared to apply it to the Section as a whole rather than just to the "protection of laws" prong: "Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities." *Carpenters*, 463 U.S. at 853 (Blackmun, J., dissenting). Commentators have offered other explanations of how private parties could deprive persons of equal protection. See generally Wildman, 42 U.S.C. Section 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved, 17 SAN DIEGO L. REV. 317 (1980); Comment, A Contruction, *supra* note 11.

¹⁸² 463 U.S. at 833 (majority opinion); *id.* at 849 n.14 (Blackmun, J., dissenting).

¹⁸³ 383 U.S. 745 (1966).

¹⁸⁴ The opinion for the Court in *Guest* construed the indictment in question as alleging state connivance in the scheme. *Id.* at 756. However, Justices Clark, Black and Fortas concurred specially on the ground that Section 5 empowered Congress to punish private conspiracies interfering with fourteenth amendment rights. *Id.* at 762 (Clark, Black & Fortas, J.J., concurring). Chief Justice Warren and Justices Brennan and Douglas concurred in part on the same ground. *Id.* at 781-84 (Brennan, J., concurring).

¹⁸⁵ *Id.* at 784 (Brennan, J., concurring).

¹⁸⁶ 384 U.S. 641 (1966).

the substantive contours of Section 1 in formulating legislation under Section 5 so long as the legislation was designed to effectuate the fundamental purposes of the fourteenth amendment.¹⁸⁷

B. Equal Privileges and Immunities

1. The Intent of the 42nd Congress

Under the equal privileges and immunities prong of Section 1985(3), Congress intended to provide a remedy for members of *any* class deprived of fundamental federal rights by otherwise unlawful acts.¹⁸⁸ Because state action (or inaction) was not seen by Congress as a necessary precondition for the congressional protection of *federal* rights,¹⁸⁹ there would be no reason to assume that Congress intended to limit the application of this prong to classes subject to historic or pervasive animus in the community. The central question concerning this prong of Section 1985(3) is what Congress meant by "privileges and immunities." The legislative history reveals that the 42nd Congress had two main views of the scope of the term.

Under one view, held by many Republicans, including Representative Shellabarger, "privileges and immunities" encompassed the broad spectrum of rights described in *Corfield v. Coryell*,¹⁹⁰ or, more vaguely, those rights fundamental to all free governments.¹⁹¹ Representative Maynard, who was a member of the Congress which adopted the fourteenth amendment, described the rights encompassed in the term "privileges and immunities" as the

¹⁸⁷ *Katzenbach* was recently reaffirmed in *Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980) (plurality opinion); *id.* at 500-01 (Powell, J., concurring).

¹⁸⁸ Although Section 1985(3) does not specify that the defendants' acts have to be "otherwise unlawful," the origin of the Section as a remedy for a specific list of unlawful acts suggests this interpretation, and Section 2 of the Ku Klux Klan Act was so understood at the time of its passage. "[The statute] means that persons guilty of homicide, robbery, arson, mayhem, assaults and the like, may be brought within the jurisdiction of United States courts and be punished by United States authorities: it means this or nothing." 12 NATION 268 (Apr. 20, 1871).

¹⁸⁹ See *GLOBE*, *supra* note 13, at 375-76 (remarks of Rep. Lowe); *id.* at 499-500 (remarks of Rep. Frelinghuysen); *id.* at 691-92 (remarks of Sen. Edmunds); *GLOBE APP.* *supra* note 15, at 85 (remarks of Rep. Bingham).

¹⁹⁰ 6 F. Cas. 546 (C.C.W.D. Pa. 1823) (No. 3,230). See, e.g., *GLOBE APP.*, *supra* note 15, at 67 (remarks of Rep. Shellabarger); *GLOBE*, *supra* note 13, at 334 (remarks of Rep. Hoar); *id.* at 370 (remarks of Rep. Monroe); *id.* at 500 (remarks of Rep. Frelinghuysen); *GLOBE APP.* *supra*, note 15, at 229 (remarks of Rep. Boreman). See generally *id.* at 188-89 (remarks of Rep. Willard). According to Justice Washington, these rights included:

[p]rotection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state. . . .

Corfield, 6 F. Cas. at 551-52.

¹⁹¹ See *GLOBE APP.*, *supra* note 15, at 71 (remarks of Rep. Blair).

highest and best and dearest rights — rights secured under the Constitution; rights anterior to the Constitution and above all constitutions; rights as old and as broad as humanity, the rights of life and liberty, of speech and opinion; the right to go unchallenged from State to State, wherever the interest, inclination, or caprice may take him — ¹⁹²

Under the narrower view, "privileges and immunities" included at least the first eight amendments to the Constitution.¹⁹³ Even Representative Kerr, the Democrats' leading constitutional expert, accepted this narrower view:

I ask the attention of every gentleman on this floor to the first eleven amendments of the Constitution of the United States, and I say that in them, as against the United States and the States and *all the world*, the Constitution guarantees to the people certain great personal rights. It is true these amendments are limitations on the powers of Congress as against the States; but yet they are fundamental guarantees to the people.¹⁹⁴

Under either view, "privileges and immunities" included at least the political rights mentioned in the Constitution, particularly the rights of free speech and association. The Republicans were all of the view that the Klan was attacking people for their political views and actions, so the Republicans' principal concern in enacting Section 1985(3) must have been to protect just those "political" rights — the right to vote, the right to travel,¹⁹⁵ and particularly the rights of speech and association. Representative Barry stated:

The Federal Constitution secures to every citizen the right of emigrating to any portion of our national territory and carrying with him all his sentiments, especially his loyal sentiments, and of ventilating, defending and propagating them by the utmost freedom of speech. But it is assumed by the Democracy that a man may not come into any community and exercise this constitutional right if it is opposed to the feelings and vested interests of that community. Sir, all feelings and vested interests opposed to this freedom of speech are themselves unconstitutional, illegal, and revolutionary.¹⁹⁶

Representative Hawley similarly remarked:

Sir, before the late war it is a matter well known to you and to every man born and reared in this land that throughout the southern States of the Union there was no freedom of speech, no freedom of person, no freedom to express the opinions which were entertained by free men unless those

¹⁹² *Id.* at 311 (remarks of Rep. Maynard).

¹⁹³ See GLOBE, *supra* note 13, at 476 (remarks of Rep. Dawes); GLOBE APP., *supra* note 15, at 81 (remarks of Rep. Bingham).

¹⁹⁴ GLOBE APP., *supra* note 15, at 46 (remarks of Rep. Kerr) (emphasis added). This debate over the meaning of "privileges and immunities" echoes the larger disagreement between Lockean natural law theorists and more modern positivists. Although current legal theory is dominated by positivism, in attempting to ascertain the intent of the Republicans who passed Section 1985(3), one must read the language of the Section and the legislative debates in the context of the natural law theories under which many Republicans appear to have been operating.

¹⁹⁵ While no express provision of the Constitution guarantees the right to travel, the Supreme Court, by the time of the debates on H.R. 320, had recognized the right because of its essential relationship to all political activity. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

¹⁹⁶ GLOBE APP., *supra* note 15, at 265 (remarks of Rep. Barry).

opinions were in consonance and in conformity with the opinions of the dominant class of the southern States

The day was when I could not exercise one of these rights guaranteed to me by this Constitution of my fathers in a southern State, unless I exercised that right in such a manner as might meet the behests or the will of the slave power. Sir, thank God, that day has passed; and as long as there is a love of liberty in this country of ours there will be the power to defend the Constitution of the United States and enforce those guarantees which it gives to every citizen of the United States.¹⁹⁷

The Supreme Court's contemporaneous construction of "privileges and immunities" was consistent with Congress's understanding that the term encompassed speech and association rights. In the *Slaughterhouse Cases*, even while the Court's opinion drastically narrowed the reach of Section 1 of the Ku Klux Klan Act, the majority stated:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. . . . The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.¹⁹⁸

Four years later, in *United States v. Cruikshank*,¹⁹⁹ the Court refused to enforce the 1870 Civil Rights Act, on the ground that the right to peaceably assemble was not granted by the Constitution but was, in effect, derived from natural law. The Court reasoned:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution.²⁰⁰

Much later, in 1908, the Supreme Court rejected the argument that the rights of free speech and association were privileges and immunities of national citizenship.²⁰¹ Then,

¹⁹⁷ GLOBE, *supra* note 13, at 380-82 (remarks of Rep. Hawley). See also *id.* at 414 (remarks of Rep. Roberts); *id.* at 476 (remarks of Rep. Dawes); GLOBE APP., *supra* note 15, at 265 (remarks of Rep. Barry). See also *id.* at 81 (remarks of Rep. Bingham).

¹⁹⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79. The dissenting justices had a much more expansive notion of privileges and immunities. Justice Field, speaking for four members of the Court, stated that "privileges and immunities" referred to "natural and inalienable rights which belong to all citizens." *Id.* at 96 (Field, J., dissenting). Justice Field stated: "The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." *Id.* at 97 (Field, J., dissenting) (emphasis in original). Justice Bradley, in a separate dissenting opinion, stressed that the privileges of speech and assembly would be privileges of citizenship even if they did not appear in the Constitution because they were fundamental. *Id.* at 118-19 (Bradley, J., dissenting).

¹⁹⁹ 92 U.S. 542 (1875).

²⁰⁰ *Id.* at 551.

²⁰¹ See *Twining v. New Jersey*, 211 U.S. 78 (1908).

in *Carpenters*, the Court determined that Section 1985(3) is remedial only²⁰² and thus apparently does not protect speech and associational rights. That the Court long after the enactment of Section 1985(3) construed the term "privileges and immunities" (as used in the Constitution) more narrowly, however, cannot retroactively alter the understanding of the drafters of the statute, and it is their understanding which should be controlling.²⁰³

2. The Issue of Constitutionality

As *Griffin* held, Section 1985(3) is constitutional insofar as it provides a remedy for the violation, by private parties, of at least the privileges and immunities of national citizenship presently understood to be protected by the Constitution. However, the question arises whether Section 1985(3) would be constitutional if interpreted, as the drafters intended, to provide a remedy for the violation by private parties of the political rights assumed to be privileges and immunities by the 42nd Congress, principally the rights of speech and association. In *Carpenters*, Justice White ruled out reliance on the fourteenth amendment as a source of constitutional authority for protection of speech and association rights against the actions of private parties but, at the same time, appeared to accept the plaintiffs' contention that, on the facts of the case, the Commerce Clause could have supported application of the section.

There is another constitutional provision, however, which might support application of Section 1985(3) to protect political rights, including speech and association rights, against the actions of private parties. In discussing possible sources of legislative power for the Ku Klux Klan Act, numerous members of Congress recognized that in addition to, or as an alternative to, the fourteenth amendment, Congress had the authority to deal with Klan outrages under Article IV, Section 4, the Republican Guarantee Clause.²⁰⁴

²⁰² *Carpenters*, 463 U.S. at 833. The *Carpenters* Court cited to its *Novotny* decision for the proposition that Section 1985(3) provided no substantive rights, but the Court in *Novotny* had cited to no authority for this rather important proposition. *Id.* In fact, the 42nd Congress did conceive of the statute as being "remedial," but it appears that Congress meant something different than Justice White by the term. It must be remembered that the original version of Section 2 was drafted to make cognizable in federal court a specific list of what would otherwise be state crimes and torts. The section, as thus conceived, was "remedial" in that it provided a federal remedy for violations of state law.

²⁰³ Justice Blackmun alluded to this point in his dissent. *Id.* at 841 n.3 (Blackmun, J., dissenting). See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980). For much the same reason that Section 1985(3) must be interpreted to encompass violations of the privileges and immunities assumed to exist by the 42nd Congress, the position of Justices Powell and Stevens in *Novotny*, that the Section should not apply to violations of later-enacted federal statutes, is correct. See *Novotny*, 442 U.S. at 379 (Powell, J., concurring); *id.* at 386 (Stevens, J., concurring). Throughout the debates on Section 2, the term "privileges and immunities" was used to refer to only the most fundamental rights, either secured by the Constitution or derived from natural law and therefore antecedent and superior to the Constitution. Nor is there any need to extend the coverage of Section 1985(3) to later-enacted statutes. Federal statutes presumably contain their own appropriate schemes for enforcement, and there would seem to be no reason to apply additional remedies not specifically considered by Congress in enacting the statutes.

²⁰⁴ E.g., *GLOBE*, *supra* note 13, at 333-34 (remarks of Rep. Hoar); *id.* at 370 (remarks of Rep. Monroe); *id.* at 380-81 (remarks of Rep. Hawley); *id.* at 389-90 (remarks of Rep. Elliot); *GLOBE APP.*, *supra* note 15, at 72-73 (remarks of Rep. Blair). See also *id.* at 159 (remarks of Rep. Golladay) (acknowledging, as a Democrat, that the Republicans were relying, in part, on the Guarantee Clause).

Although the Supreme Court has consistently refused to use the Guarantee Clause as an adjudicatory standard,²⁰⁵ it remains a binding directive addressed to the political branches and thus, constitutes a potentially significant source of authority for Congressional action.²⁰⁶ Indeed, in *Texas v. White*,²⁰⁷ the Court explicitly relied on the Guarantee Clause as the source of legislative authority to enact much of the Reconstruction legislation of the 39th and 40th Congresses.²⁰⁸ Thus, although there have been few cases in which the Republican Guarantee Clause has been before the Supreme Court and although these cases have consistently held the clause to be *judicially* unenforceable, the decisions also have recognized that the clause does confer important powers on the federal government, exercisable through its *political* branches. As Professor Bonfield has explained:

The analysis of the guaranty clause in light of contemporary materials demonstrates that it endowed the federal government with great power which was to be used to preserve republican government. As such, it was [prior to the adoption of the fourteenth amendment] the *only* part of the Constitution that afforded the people any protection against abuses in their state governance. And as previously noted, such a check in the hands of the central authority was deemed essential to the continued welfare of the Union.²⁰⁹

The framers of the Constitution recognized the essential role of speech and associational freedoms in a republican government and viewed individual political activity as a requirement.²¹⁰ In adopting the Republican Guarantee Clause the framers not only expected full exercise of individual political rights, but, in effect, demanded it. As Justice Brandeis stated in his concurring opinion in *Whitney v. California*, "[t]hose who won our independence believe . . . that public discussion is a political duty; and that this should

²⁰⁵ See *Baker v. Carr*, 369 U.S. 186, 227-29 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

²⁰⁶ See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142-49 (1912).

²⁰⁷ 74 U.S. 700 (1869).

²⁰⁸ *Id.* at 730-31. More recently, in *Laird v. Tatum*, the Supreme Court noted that the companion "domestic violence" provisions of Article IV, Section 4, authorized the enactment by Congress of 10 U.S.C. Section 331, empowering the President to call out neighboring state militia to suppress an insurrection against a state government. 408 U.S. 1, 3-4 n.2 (1972). Similarly, in *United States v. Josephson*, 165 F.2d 82, 90 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948), *Barsky v. United States*, 167 F.2d 241, 246-47 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948), and *Morford v. United States*, 176 F.2d 54 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 258 (1950), the Guarantee Clause was properly invoked as a source of legislative power by the House Un-American Activities Committee.

²⁰⁹ Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 530 (1962) (emphasis in the original). Professor Bonfield actually contended that this "great power" might appropriately be exercised by any branch of the federal government, including the judicial branch in appropriate cases, while acknowledging that *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), for instance, was not at all an appropriate case. See also generally Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962).

²¹⁰ See G.S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 47 (1969).

be a fundamental principle of the American government."²¹¹ Legislation designed to protect persons from mob violence directed at them because of their speech or associations is undoubtedly an appropriate means of guaranteeing a republican form of government. Thus, the Guarantee Clause can be read to provide Congress with the power, exercised in Section 1985(3), to act against private conspirators whose activities are intended to prevent persons from associating together and forming and expressing the diverse political opinions essential to a republican form of government.

CONCLUSION

Just as the Supreme Court's decision in *Harris* holding unconstitutional the criminal portion of Section 2 of the Ku Klux Klan Act may have been as much a product of the post-Reconstruction political climate of 1883 as the result of a fair reading of the Reconstruction Amendments, so the Court's decision in *Carpenters* implying that only racial, class-based animus comes within Section 1985(3) may have been as much a product of the post-civil rights movement political climate of 1983 as the result of an analysis of the intent of the 42nd Congress. An examination of both the historical evidence specific to the Ku Klux Klan Act and the general historical material on the Republicans, the Ku Klux Klan, and Reconstruction reveals that the core purpose of Section 1985(3) was to restore and preserve an open and democratic political process. The two parts of the section approached this purpose in different ways. On the one hand, with the equal privileges and immunities prong, Congress sought to protect fundamental political rights directly. On the other hand, with the equal protection prong, Congress sought to protect groups which, because of historical or pervasive hostility in the community, were likely to be politically powerless and thus unable to obtain protection under state laws. These strategies for protecting the political process echo the basic themes embodied in the Constitution itself.²¹²

As cases such as *Griffin v. Breckenridge* and *Waller v. Butovich* demonstrate, the problems addressed by Section 1985(3) still exist today. Given the continuing uncertainty in the lower courts over the meaning of *Carpenters* and the application of Section 1985(3), it seems inevitable that the Supreme Court will have to reconsider the section. When it does so, perhaps the Court will again revive Section 1985(3) by interpreting the section according to the language of the section and the spirit of those who drafted it.

²¹¹ *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). See also A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, in *POLITICAL FREEDOM* 27 (1960). Professor Meiklejohn stated:

When men govern themselves, it is they — and no one else — who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that the public issues shall be decided by universal suffrage.

²¹² See generally J.H. ELY, *DEMOCRACY AND DISTRUST* (1980).

BOSTON COLLEGE LAW REVIEW

VOLUME XXVII

SEPTEMBER 1986

NUMBER 5

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