Private Interference With an Individual's Civil Rights: A Redressable Wrong under 5 of the Fourteenth Amendment

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PRIVATE INTERFERENCE WITH AN INDIVIDUAL’S CIVIL RIGHTS: A REDRESSABLE WRONG UNDER § 5 OF THE FOURTEENTH AMENDMENT?

Fourteenth Amendment

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ku Klux Klan Act of 1871

Sec. 3. 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; . . . 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.

I. Introduction

A. Background

Section 1985(3) of title 42, United States Code, purports to provide a right of action for injury resulting from a conspiracy to deprive “any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws.” Liability is based on acts in furtherance of a conspiracy designed to deprive a person or group of persons of these rights. Additionally, the acts must result in injury to the plaintiff’s person or property, or infringe upon his rights of national citizenship. Section 1983 of the same title provides a civil remedy for similar acts performed under color of law.

1 42 U.S.C. § 1985(3) (1970). The parent statute of § 1985(3) is Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. In response to the Ku Klux Klan’s terrorist activities, the Reconstruction Congress passed several laws in 1871 providing both civil and criminal remedies for denial of the constitutional rights of the newly emancipated slaves. The entire statute was popularly referred to as the Ku Klux Klan Act of 1871. However, when Congress compiled the Revised Statutes in 1875, it separated the criminal and civil provisions, with the antecedent of § 1985(3) reenacted as part of Rev. Stat. § 1980 (1875). It has since been codified as 42 U.S.C. § 1985(3) (1970). For a more encompassing history of civil rights legislation, see 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591 (1970); Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment, 11 ST. LOUIS U. L.J. 331 (1967) [hereinafter cited as Avins].

Notwithstanding the absence of "under color of law" language in § 1985(3), the Supreme Court held in *Collins v. Hardyman* that a properly stated § 1985(3) action must include an allegation that the defendants acted under color of state law. Since both §§ 1983 and 1985(3) actions required color of law, the comparative utility of § 1985(3) was severely diminished. Section 1983 requires the plaintiff to allege only that he was deprived of one of his fourteenth amendment rights. Section 1985(3), on the other hand, requires the allegation of a conspiracy, an act in furtherance of that conspiracy, an intent to deprive one of equality before the law, and an injury to one's person, property, or rights of federal citizenship. In *Griffin v. Brekenridge,* however, the Supreme Court brought an end to the relative unimportance of § 1985(3).

The plaintiffs in *Griffin* were black citizens who had been forcibly stopped and beaten on a Mississippi highway. Justice Stewart, in a unanimous opinion, overruled *Collins* to the extent that it had "construed the . . . language of § 1985(3) as reaching only conspiracies under color of state law." The Court considered two principal issues: (1) did Congress intend to include purely private conspiracies within the scope of § 1985(3)?; and (2) if it did, does Congress have the constitutional authority to prohibit the particular conspiracy in question?

The Court answered the first question affirmatively. The clear wording of § 1985(3), the judicial construction of its earlier criminal counterpart, the statutory context of the section, and the legislative history of the statute dictated that the intended scope of § 1985(3) includes purely private conduct.

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3 341 U.S. 651 (1951).
4 Id. at 655.
7 Id. at 92.
8 The Court pointed out that the section simply speaks of "two or more persons in any State or Territory," who "conspire or go in disguise on the highway or on the premises of another." 403 U.S. at 96. Noting that the "approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to 'accord [them] a sweep as broad as their language'" (*citing* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); United States v. Price, 383 U.S. 787, 801 (1966)), id. at 97, the Court held that "[o]n their face, the words of the statute fully encompass the conduct of private persons." Id. at 96.
9 The criminal counterpart of § 1985(3) (previously Rev. Stat. § 1980 (1875)) was Rev. Stat. § 5519 (1875). In United States v. Harris, 106 U.S. 629 (1883), the Court held § 5519 to be unconstitutional because the statute was "not limited to take effect only in case [of state action]," id. at 639, but "was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons." Id. at 637. The Griffin Court also noted, 403 U.S. at 98, that in construing the closest remaining criminal analogue to § 1985(3), 18 U.S.C. § 241 (1970) (which also employs the words "If two or more persons conspire . . . ."), Justice Frankfurter, in United States v. Williams, 341 U.S. 70 (1951), concluded that "if language is to carry any meaning at all it must be clear that the principal purpose of § 241, unlike [18 U.S.C. § 242 (1970)], was to reach private action rather than officers of a State acting under its authority." Id. at 76. "Nothing in [the] terms [of § 241] indicates that color of State law was to be relevant to prosecution under it." Id. at 78 (footnote omitted).
10 Justice Stewart pointed out that "[a]n element of the cause of action established by § 1983 is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into § 1985(3) would thus deprive that section of all independent effect." 403 U.S. at 99 (footnote omitted).
11 The Court found it significant that the House sponsor, Representative Shellabarger, stressed in introducing the original bill that its intent was to enforce the fourteenth amendment against persons as well as states. 403 U.S. at 100, *citing* Cong. GLOBE, 42nd Cong., 1st Sess. 69 (1871).
In answering the second question, the Court avoided the major obstacle which confronted Collins. Because the language of § 1985(3) and § 1 of the fourteenth amendment are so similar, the Collins Court determined that the fourteenth amendment was the constitutional basis for § 1985(3). Since the fourteenth amendment applies only to state action, the Court read a state action requirement into § 1985(3). This construction enabled the Court to avoid the invalidation of the entire statute. The Griffin Court, on the other hand, refused to take such a restricted view of the "equal protection" and "equal privileges and immunities" language of § 1985(3). The Court held that § 1985(3) need not be based on the fourteenth amendment, but that other constitutional sources of congressional power could justify legislation against private conspiracies that deprived persons of equal protection of the laws. In the instant case, the Court found that § 2 of the thirteenth amendment, or Congress' power to protect the right of interstate travel, were adequate sources of congressional power.

B. The Issue

In Griffin, the Court held that Congress intended § 1985(3) to provide a civil remedy for injuries resulting from private conspiracies. The Court further determined that either the thirteenth amendment or Congress' power to protect interstate travel was sufficient constitutional authority for legislation against private conduct. At the conclusion of his opinion Justice Stewart stated:

In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Griffin, then, did not determine whether an aggrieved party may bring an action under § 1985(3) alleging a private conspiracy to interfere with his fourteenth amendment § 1 rights. One possible basis for this action is Congress' power to proscribe private conduct through the implementive powers of § 5 of the fourteenth amendment. A proper response to this unanswered question of Griffin requires an analysis of the conflicting conclusions reached by the various

12 Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875).
13 403 U.S. at 96-97, citing United States v. Harris, 106 U.S. 629, 643 (1883).
14 Id. at 104.
15 The Court pointed out that there has never been any doubt of Congress' power to impose liability on private parties under § 2 of the thirteenth amendment. 403 U.S. at 105. Furthermore, according to Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440.
17 For a general analysis of Griffin, see Comment, Section 1985(3) of Title 42, United States Code Permits Civil Action Against Private Individuals Who Conspire to Deny Another's Constitutional Rights, 40 Fordham L. Rev. 635 (1972); Comment, Section 1985(3) of the Civil Rights Act of 1871: Color of Law Element Eliminated, 1972 U. Ill. L.F. 199.
18 403 U.S. at 107 (footnote omitted).
19 U.S. Const. amend. XIV, § 5.
circuit courts, a treatment of some illusory resolutions, and an educated proposal for the future.

II. The Case Law

A. § 1985(3) Proscribes Private Conduct: § 5 as a Basis

1. The Eighth Circuit: Action v. Gannon

Less than four months after the Supreme Court resolved Griffin, the Eighth Circuit decided Action v. Gannon. Relying on § 5 of the fourteenth amendment, the court held that § 1985(3) provides a remedy for injuries resulting from a private conspiracy to interfere with the first amendment rights of worship.

Twenty-nine members of "Action," an interracial civil rights group, disrupted church services in the St. Louis Cathedral. The disruptions were continued on several successive Sundays, leading the pastor of the Cathedral to obtain an injunction against further demonstrations. Action appealed to the Eighth Circuit. Restricting its analysis to the constitutionality of § 1985(3) and the propriety of injunctive relief, the court, sitting en banc, affirmed.

After deciding that § 1985(3) was applicable to the instant conspiracy

20 450 F.2d 1227 (8th Cir. 1971).
21 Judge Mehaffy, concurring, did not reach the fourteenth amendment issue. 450 F.2d at 1239.
22 For a list of the demands made on the various churches of St. Louis, see 450 F.2d at 1229 n.4.
23 On two occasions demonstrators were forcibly removed from the church by the St. Louis police. For a detailed description of the various demonstrations, see 450 F.2d at 1229-30.
26 The propriety vel non of equitable relief under § 1985(3) is beyond the scope of this Note. Nevertheless, it may be mentioned that the court found injunctive relief to be a proper remedy, relying on the Fifth Circuit decision of Mizell v. North Broward Hosp. Dist., 427 F.2d 466 (5th Cir. 1970). However, the Fifth Circuit effectively overruled Mizell in its recent decision in Trailey v. City of Amarillo, 492 F.2d 1156 (5th Cir. 1974), relying on City of Kenosha v. Bruno, 412 U.S. 507 (1973). The Supreme Court there found equitable relief to be outside the ambit of § 1983; consequently the Fifth Circuit viewed it to be outside the scope of relief under § 1985(3) as well. 492 F.2d at 1157 n.2.
27 For general commentary on the Eighth Circuit's decision in Action, see 52 B.U.L. Rev. 599 (1972); 37 Mo. L. Rev. 525 (1972); 47 N.Y.U.L. Rev. 584 (1972).
28 Seeking to avoid the creation of a general federal tort law by construing § 1985(3) to reach all private conspiracies to violate civil rights, the Griffin Court placed restrictions on the scope of the requisite motivation for conspiracy:

[T]hough the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State" [citation omitted]. The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of equal protection, or equal privileges and immunities means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

403 U.S. at 101-02 (emphasis in original). Hence, it was necessary for the Action court
and that the effect of that conspiracy had been to deny plaintiffs their “First Amendment rights of freedom of assembly and worship,” the court considered the availability of § 5 of the fourteenth amendment as a constitutional source for § 1985(3). The court stated: “It is quite clear that neither the Thirteenth

to determine whether such “racial, or perhaps otherwise class-based, invidiously discriminatory animus” motivated the conspirators in this case. Notwithstanding that the primary motivation of Action seemed to be economic—to channel “white money” into black problem areas—the court was apparently swayed by the bare fact that nearly all demonstrators were black and nearly all parishioners white; it held that the requisite animus existed. Nevertheless, it is one thing for a person to foist his racial concerns on another who is wealthier than he, and who incidentally happens to be of a different race; it is quite another thing to do so because the other person is of a different race. The writer suggests that Action represents the first situation, but that, in light of the above language from Griffin, is only the second which demonstrates the motivation that can give rise to a cause of action under § 1985(3). See Arnold v. Tiffany, 487 F.2d 216, 218 (9th Cir. 1974).

Had the Action court found that the conspiracy was directed at “wealthy” people rather than “white” people, it would have been confronted with another issue left open by the Court in Griffin. In limiting the requisite motivational element of a § 1985(3) action, the Griffin Court stated in a footnote: “We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us.” 405 U.S. at 102 n.9 (footnote omitted). Since Griffin was rendered at least one court has held that § 1985(3) does not extend beyond racially motivated conspiracies. Baker v. Stuart Broadcasting Co. (unreported opinion of Judge Denney of the U.S. District Court for the District of Nebraska), aff’d on other grounds, 505 F.2d 181 (8th Cir. 1974). See also 46 Tulane L. Rev. 822 (1971); 25 U. Miami L. Rev. 780 (1971); 47 Wash. L. Rev. 353 (1971). But cf. 40 Fordham L. Rev. 655 (1972).

However, most courts appear to refuse to so limit the statute’s coverage, and concentrate instead on what is a sufficient nonracial class. Thus the following have been deemed allegations of class status: Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975) (reasonably well-defined group of environmentalists); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of a political campaign); Azar v. Conley, 455 F.2d 1382 (6th Cir. 1972) (sub silentio) (eight-member family); Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974) (women). However, the following were deemed insufficient: Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972) (a “novel” class—physicians who had been allegedly discriminated against because of their testimony in malpractice cases—which was neither “readily recognizable nor unusual”); Akridge v. Industrial Foundation, 456 F.2d 258 (5th Cir. 1972) (a “motivated” group of all constitutional citizens who had filed similar claims for workmen’s compensation). Several courts have held that the injured party need not allege actual membership in a class, but that an allegation of a nexus between plaintiff’s class membership (or the advocacy of the rights of those who are members) and his injury. Specifically, the plaintiff’s injury must have resulted from a conspiracy precipitated by his membership in a certain group. Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1974); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972); Fallis v. Toastmasters International Inc., 467 F.2d 1389 (5th Cir. 1972).

It can readily be seen that the constitutionality of § 1985(3) as an exercise of Congress’ power under § 5 of the fourteenth amendment is not the only unsettled question in the arena of actions under that statute. What constitutes a sufficient “class” for purposes of the requisite “class-based, invidiously discriminatory animus behind the conspirators’ action,” Griffin, 403 U.S. at 102, is also noteworthy; however, discussion of the points is beyond the scope of this Note.

The court in Action made only passing and conclusory statements about the nature of the right allegedly deprived the plaintiffs. “The defendants . . . do not have a right to enter the cathedral and disrupt the church services of the plaintiffs. Such disruption is an intolerable violation of the rights of those engaged in worship.” 450 F.2d at 1233 (emphasis added). At another point the court also spoke of “the plaintiffs’ First Amendment rights of
Amendment nor the Constitutional right to travel interstate can serve as a source of power here. But we think it equally clear that Congress had power to reach this conspiracy under §§ 1 and 5 of the Fourteenth Amendment. 230

While the Eighth Circuit conceded 31 that the Supreme Court decisions during and shortly after the Reconstruction period 32 are frequently cited for the principle that Congress does not have the authority under the fourteenth amendment to proscribe private conduct, 33 it nevertheless chose to rely on two concurring opinions in the Supreme Court’s decision in United States v. Guest, 34 and on the conclusions of many commentators concerning the legislative history and intended scope of the fourteenth amendment. In Guest, 35 the defendants were charged with a violation of 18 U.S.C. § 241, 36 the criminal counterpart to proscription private conduct, 33 it nevertheless chose to rely on two concurring opinions in the Supreme Court’s decision in United States v. Guest, 34 and on the conclusions of many commentators concerning the legislative history and intended scope of the fourteenth amendment. In Guest, 35 the defendants were charged with a violation of 18 U.S.C. § 241, 36 the criminal counterpart to proscription private conduct, 33 it nevertheless chose to rely on two concurring opinions in the Supreme Court’s decision in United States v. Guest, 34 and on the conclusions of many commentators concerning the legislative history and intended scope of the fourteenth amendment. In Guest, 35 the defendants were charged with a violation of 18 U.S.C. § 241, 36 the criminal counterpart

freedom of assembly and worship.” 30 Id. at 1234-35. The court, however, failed to enlarge upon its novel theory that the first amendment protects against private as well as governmental interference.

Broadly speaking, the Constitution confers two spheres of individual rights: those immune from governmental interference (e.g., the second amendment guarantee of the right to lawfully bear arms), and those immune from private as well as governmental interference (e.g., the thirteenth amendment guarantee of the right not to be held in involuntary servitude). The wording of the first amendment leaves no doubt that the rights conferred there come within the sphere of the former: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. I. Consequently, it has long been held that the rights of “freedom of religion,” Reynolds v. United States, 98 U.S. 145 (1879) and “freedom of assembly,” United States v. Cruikshank, 92 U.S. 542 (1875), are guarantees only against federal interference, and as incorporated in the due process clause of the fourteenth amendment, against state infringement. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). About another first amendment freedom, that of free speech, Professor Cox has observed:

We delude ourselves when we speak simpliciter of the “rights of individuals or groups to freedom of speech” as if they were constitutionally protected rights in rem, good against all the world regardless of the source from which they are derived. The commands of the first and fourteenth amendments are directed only to government. . . . The only rights exactly correlative to those duties are rights against government, not against fellow citizens.

Cox, The Role of Congress in Constitutional Determinations, 40 U. CINN. L. REV. 199, 240 (1971) (footnote omitted). Thus, in criticizing the Eighth Circuit’s holding in Action that the defendants had denied the parishioners their first amendment “rights,” one commentator noted: “One looks in vain for judicial pronouncements which lend support to the proposition that the Constitution protects those engaged in worship from private interference.” 52 B.U.L. REV. 599, 607 (1972). The writer went on to suggest that indeed the Action court had asked the wrong question:

Instead of asking whether a citizen of the United States has a right to practice his religion free from private interference, the court asked merely whether the plaintiffs had been prevented from worshipping. Practically speaking, of course, Action prevented the plaintiffs from conducting their religious services. Constitutionally speaking, however, plaintiffs sustained no injury to their first or fourteenth amendment rights.

Id. at 609. Clearly, then, since the plaintiffs had not been denied any “right or privilege of a citizen of the United States,” the § 1985(3) action should have been dismissed as failing to state a cause of action.

30 450 F.2d at 1233.
31 Id. at 1233.
32 See, e.g., Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1875).
33 See, e.g., Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353 (1964).
34 383 U.S. 745, 761 (1966) (Clark, J., concurring); id. at 774 (Brennan, J., concurring in part, dissenting in part).
35 For a general analysis of the Court’s decision in Guest, see 52 CORNELL L. REV. 586 (1967); 20 VAND. L. REV. 170 (1966).

If two or more persons conspire to injure, oppress, threaten, or intimidate any
of § 1985(3), after allegedly causing the arrest of certain blacks by means of false reports. Section 241, like § 1985(3), purports to reach wholly private conspiracies. Nevertheless, the district court read a state action requirement into § 241, failed to find state involvement, and dismissed the indictment for failing to charge an offense under the laws of the United States.

On direct appeal, the Supreme Court determined that the alleged facts, if proven, might show a conspiracy with state officials. The Court was therefore not required to decide the statute's constitutionality in the hypothetical context of merely private action. Nevertheless, six Justices, in two concurring opinions, gratuitously determined that even if the defendants did not conspire with state officials, their conduct would still be prohibited by § 241. The basis of this conclusion was that Congress has power under § 5 of the fourteenth amendment to punish private conspiracies that interfere with the rights guaranteed by that amendment. Thus, in Action the Eighth Circuit concluded that the Supreme Court would not reject the majority views expressed in Guest: "The Fourteenth Amendment and § 1985(3), construed in Griffin, are too closely related with respect to date of passage, authorship, and purpose to permit such a result with consistency."

In addition to the concurring opinions in Guest, the Eighth Circuit relied on the majority of commentators’ position that the legislative history of the fourteenth amendment indicates that § 5 enables Congress to reach private action. The court concluded by noting that "[t]his interpretation of the Amendment..."
would leave to Congress the question of the extent to which it desired to exercise its power under the Amendment.\textsuperscript{243}

2. The Fifth Circuit: \textit{Westberry v. Gilman Paper Co.}.

In \textit{Westberry v. Gilman Paper Co.},\textsuperscript{44} the Fifth Circuit followed the Eighth Circuit’s decision in \textit{Action},\textsuperscript{45} holding that the fourteenth amendment,

\textsuperscript{243} 450 F.2d at 1237. Judge Mehaffy, concurring in the result, expressly rejected the court’s “expansion of the Fourteenth Amendment,” preferring to rest his decision solely on \textit{Griffin}:

“The result in this case is compelled by [\textit{Griffin}], since it is entirely clear that the defendants disrupted the church services and in so doing there was racial invidious discriminatory animus behind the conspirators’ action.” 450 F.2d at 1239.

\textsuperscript{44} 507 F.2d 206 (5th Cir.), vacated as moot, 507 F.2d 215 (5th Cir. 1975) (en banc).

\textsuperscript{45} Id. at 208. The court stated: “Today we hold that the [fourteenth] amendment and the statute [§ 1985(3)] operate in tandem to provide . . . a cause of action. In so holding, we join a unanimous en banc decision [\textit{Action}] by the Eighth Circuit . . . .” However, in this context the characterization of \textit{Action} as a unanimous decision is inaccurate. As pointed out previously, \textit{supra} note 43, while Judge Mehaffy concurred in the result that in that case, relying on \textit{Griffin}, he expressly rejected the court’s fourteenth amendment reasoning. It might also be noted that Chief Judge Matthes did not take part in the \textit{Action} decision. 450 F.2d at 1229.

The Fifth Circuit in \textit{Westberry} also cited a decision from the Third Circuit, \textit{Richardson v. Miller}, 446 F.2d 1247 (3d Cir. 1971), and a case from the Sixth Circuit, \textit{Cameron v. Brock}, 473 F.2d 608 (6th Cir. 1973), as authority for the statement that § 1985(3) is a valid exercise of congressional power under the fourteenth amendment. The reliance on either of these decisions was improper.

In \textit{Richardson}, a Caucasian plaintiff sought recovery under § 1985(3), alleging that a private employer discriminated against him by discharging him for \textit{inter alia} criticizing and opposing what he believed to be racially discriminatory employment practices, and for advocating racial equality in employment opportunities. The district court, in an unreported decision prior to \textit{Griffin}, dismissed the complaint for want of an allegation of state action. The plaintiff appealed. In the interim, the Supreme Court rendered its decision in \textit{Griffin}.

In reversing the district court, the Third Circuit made no explicit ruling regarding the constitutional basis for § 1985(3) as applied to the facts before it. The court simply stated: “The Supreme Court [in \textit{Griffin} . . . has very recently reviewed the requirements for stating a cause of action under Section 1985(3) and has, in effect, eliminated the necessity of state action as formerly required by the narrow judicial interpretation expressed in \textit{Collins}.” 446 F.2d at 1249. Actually, the clue to the \textit{Richardson} court’s sub silentio assumption of a constitutional basis for § 1985(3) on the facts before it lies in its treatment of the requirement of \textit{Griffin} that, to be valid, a § 1985(3) complaint must allege that the conspiracy was motivated by “a racial, or perhaps otherwise class-based invidiously discriminatory animus.” \textit{Griffin}, 403 U.S. at 102.

The question facing this court is whether the allegations of plaintiff’s complaint . . . are sufficient to constitute the “racial, or perhaps otherwise class-based invidiously discriminatory animus” required by \textit{Griffin}. While the question is very close, particularly because unlike \textit{Griffin} the plaintiff is not a member of the class allegedly discriminated against, we have concluded that, in light of the trend in recent decisions to “accord [to the civil rights statutes] a sweep as broad as [their] language,” \textit{Griffin} [403 U.S. at 97], . . . the question must here be answered in the affirmative.

446 F.2d at 1249. Thus, the plaintiff was allowed, by virtue of his advocacy, to stand in the shoes of the racial minorities allegedly being discriminated against. As such, the court’s theory would seem to have been that the thirteenth amendment provided an acceptable source of legislative authority in the present case. The inference that the Third Circuit was relying on the legislative power of the thirteenth amendment, rather than that of the fourteenth amendment, is further supported by the court’s sole reliance on \textit{Griffin}, where the Supreme Court clearly based its decision on the presumptive scope of legislative power under the thirteenth amendment, and expressly declined to rule on the applicability of the fourteenth amendment. The \textit{Richardson} court stated: “[w]e conclude that the \textit{Griffin} decision provides an adequate basis upon which to conclude that plaintiff’s complaint at least states a cause of action under Section 1985(3).” \textit{Id}. While the Third Circuit may well have been expanding certain aspects of the \textit{Griffin} decision, it is suggested that it would be untenable to assume, in the alternative, that a court of appeals was deciding an issue of the constitutional and jurisprudential magnitude of the one left open in \textit{Griffin}, sub silentio.

The Fifth Circuit’s reference to the Sixth Circuit decision \textit{Cameron v. Brock} in holding § 5 of the fourteenth amendment to be an appropriate source of legislative power behind §
in tandem with § 1985(3), affords a civil remedy for a conspiracy to deprive a person of equal protection of the laws or of the equal privileges and immunities under the laws. The court clearly recognized the innovative nature of its holding: "This case pushes us to the frontiers of Fourteenth Amendment interpretation."44 Shortly after Westberry was decided by a three-judge panel, however, the Fifth Circuit, sitting en banc, reheard the case and withdrew the opinion on the ground of mootness.47 Notwithstanding that the original Westberry opinion is without the force of precedent, it was not rejected on its reasoning, and therefore can serve as an aid to understanding the current conflict surrounding the issue under consideration.

In Westberry, plaintiff brought an action under § 1985(3) against a paper company and its agent, counsel, and vice president,48 alleging that the defendants had conspired to murder him and cause his dismissal because of his environmentalist activities. Noting that § 1985(3) requires a "class-based" animus and that Westberry merely alleged a conspiracy directed at an individual, the district court granted the defendants' motions for summary judgement and dismissed the complaint.49

On appeal, however, the Fifth Circuit held that the plaintiff might be able to show that he was a member of a well-defined class of environmentalists;50 therefore, the district court's jurisdictional ruling was improper. The court then proceeded to consider the issue of "whether section 5 of the Fourteenth Amendment allows Congress to pass legislation effective against private parties if Congress believes such legislation is necessary to insure due process and equal protec-

1985(3) is totally unhelpful. In Cameron, the plaintiff, a supporter of an incumbent sheriff's election opponent, alleged that he had been arrested and incarcerated while distributing campaign pamphlets, pursuant to a conspiracy among the sheriff and his deputies to deprive plaintiff of the equal protection of the laws. Like Richardson, the primary, if not the sole, issue on appeal was whether the plaintiff had made a sufficient allegation of "racial or otherwise class-based invidiously discriminatory animus." (For a discussion of the conflicting resolutions of this issue left open by Griffin, see note 28 supra.) Indeed there was no legislative jurisdiction issue at all, as the alleged conspirators were concededly acting under color of state law. Hence, with state action present, § 5 of the fourteenth amendment was a patently obvious source of legislative power to enact § 1985(3) even under the old Collins v. Hardyman test. See text accompanying notes 4 & 5 supra. Cameron was clearly inapposite to the facts before the Fifth Circuit in Westberry.

46 Id. at 207.
47 507 F.2d 215 (5th Cir. 1975) (en banc, per curiam).
48 The district court expressly declined to rule on whether the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway" is satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives, officers, agents, etc., of the same company. Westberry v. Gilman Paper Co., 60 F.R.D. 447, 454 (S.D. Ga. 1973). However, the court took note of Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), where the Seventh Circuit held that [If the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute § 1985(3)]. Id. at 196. Accord, Baker v. Stuart Broadcasting Co., 505 F.2d 181 (8th Cir. 1974); Cohen v. Illinois Institute of Tech., 384 F. Supp. 202 (N.D. Ill. 1974). See generally Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953) (corporation cannot conspire with itself).

In upholding the complaint in Westberry, the Fifth Circuit made no mention of this issue.

50 507 F.2d at 209-10.
tion.” Closely tracking the rationale of the Eighth Circuit in *Action*, the Fifth Circuit sustained the constitutionality of § 1985(3) as applied to the facts, basing its decision on the legislative history of the fourteenth amendment, the separate opinions in *Guest*, and previous decisions upholding judicial power to deal with individual activities which prevent the state from performing its fourteenth amendment duties.

The court in initially addressing the legislative history of the fourteenth amendment relied on the conclusions of various commentators who have analyzed the amendment’s history. While noting opposing views, the Fifth Circuit agreed with the majority of those commentators that “the fourteenth amendment permits Congress to legislate against private actions.” The court recognized that Alfred Avins was primarily responsible for the opposing position; Avins argued in *Katzenbach v. Morgan* that most supporters of the fourteenth amendment did not intend that it apply to private intrusions. Since *Katzenbach* was decided before *Guest*, where six Justices concluded that § 5 of the fourteenth amendment enables Congress to reach certain private actions, the Fifth Circuit inferred that a majority of the *Guest* Court had at least impliedly rejected Avins’ assessment.

The court then reviewed the *Guest* opinions. Like the *Action* court, the Fifth Circuit placed considerable weight on selected quotations from the concurring opinions of Justices Clark and Brennan, the substance of which was that “§ 5 [of the fourteenth amendment] authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment.”

Finally, the court noted that “a long-standing series” of circuit court cases “have upheld judicial power to deal with individual activities aimed at preventing the state from performing its Fourteenth Amendment duties.” Recognizing

51 *Id.* at 211.
52 The court actually stated that it was relying on the legislative history “behind the Act,” but in fact the entire discussion involved the history of the fourteenth amendment. *Id.*
53 *Id.* at 211-12.
54 *Id.* at 212. See list of authorities cited at note 42 supra.
55 *Id.*, quoting from R. Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908); B. Harris, QUEST FOR EQUALITY 53 (1960); J. tenBroek, ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 186-87, 217 (1951); and citing Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353 (1960).
56 *Id.* at 213 n.7, citing Avins, supra note 1. See also, Avins, Federal Power to Punish Individual Crimes Under the Fourteenth Amendment: The Original Understanding, 43 NOTRE DAME LAWYER 317 (1968).
58 In oral argument before the United States Supreme Court in *Katzenbach v. Morgan* ... this author said: “I will say that I think it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince anybody that the original understanding was in accordance with this statute.” Record of Argument, p. 49-50.
59 *Id.* at 212 n.8. The Eighth Circuit had previously made the same observations in *Action*, 450 F.2d at 1236 n.15.
60 383 U.S. at 761 (Clark, J., concurring, joined by Black & Fortas, J.J.); *id.* at 774 (Brennan, J., concurring in part, dissenting in part, joined by Warren, C.J., & Douglas, J.).
61 383 U.S. at 782 (Brennan, J., concurring in part, dissenting in part).
63 *Id.* (footnote omitted).
that these cases rested on judicial rather than legislative authority, the court concurred with Professor Cox who contends that Congress' § 5 powers must be at least as broad as the authority of the court.64

The court admitted, however, that there was a further distinction between this line of cases and the facts before it. In each of the cases involving judicial protection against private invasions of rights normally protected only against state infringement, there was an immediate relationship between the state and the injured party. Nevertheless, the court stated:

A constitutional distinction cannot reasonably rest on the mere presence or absence of a non-injuring state representative if we are to retain the [fourteenth] amendment's focus on protection of the victim. Once it is recognized that private actors may be curtailed to insure equal protection of the laws, Congress has the responsibility to determine at what point along the continuum of private activities it wishes to provide a cause of action.65

The Fifth Circuit also determined that two early Supreme Court decisions established Congress' power to prohibit private action which interferes with fourteenth amendment rights. In United States v. Waddell,66 the Court held that a private party conspiracy aimed at driving homesteaders from their federally bequeathed land could be punished by congressional mandate, on the theory that the conspirators had attempted to frustrate the enjoyment of a federal right. And in Logan v. United States,67 the Supreme Court sustained the prosecution of a private conspiracy to physically harm a prisoner in the hands of a United States marshall. In the view of the Fifth Circuit, Waddell and Logan provided at least inferential support for its holding in Westberry.

B. § 5 of the Fourteenth Amendment Is Not a Basis for § 1985(3) Actions Against Private Conduct

1. The Seventh Circuit: Dombrowski v. Dowling

In Dombrowski v. Dowling,68 the Seventh Circuit held69 that a wholly private discrimination against an attorney practicing criminal law does not deprive him of equal protection of the laws within the meaning of § 1985(3).70 The district court, after finding that the manager of a large office building had conspired with other agents of their common employer to refuse rental of office space to the plaintiff because he practiced criminal law and thereby would in-
crease security risks,72 sustained the plaintiff's §1985(3) action and granted an injunction restraining the defendants from renting the suite in question to anyone other than the plaintiff. On appeal the Seventh Circuit reversed, finding it essential to distinguish between alleged "proscribed conduct" and claimed "protected interest" when considering §1985(3)'s state action requirement.72 The court determined that Griffin's elimination of the state action requirement was limited to "proscribed conduct." Conversely, when the alleged "protected interest" is a right to "equal protection" necessarily based on the fourteenth amendment, "a 'state involvement' requirement must survive Griffin."73 Finding no involvement by the State of Illinois, the court held that §1985(3) could not serve as a basis for the injunction.

The Seventh Circuit construed the Guest opinions differently than did the Eighth and Fifth Circuits. One of the charges in Guest was a conspiracy to deny black citizens their right to equal utilization of public facilities operated by the State of Georgia. The Seventh Circuit emphasized that both Justices Clark74 and Brennan75 were acutely aware that the indictment charged a conspiracy to deny equal benefits to a state-created facility. This action by the state was the dispositive distinction between Guest and the facts presently before the court.76 The court concluded: "Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights."77


In Bellamy v. Mason's Stores, Inc.,78 the Fourth Circuit expressly rejected the Eighth Circuit's extension of Griffin79 and aligned itself with the Seventh Circuit in Dombrowski.

The plaintiff in Bellamy, a former employee of the defendant private corporation, was dismissed from his employment because he was allegedly a member of the "United Klans of America." He brought a §1985(3) action for damages and reinstatement, claiming the dismissal resulted from a conspiracy which interfered with his freedom of political association. The district court dismissed the complaint and held that the right of political association, emanating as it does from the first and fourteenth amendments, is not protected from private invasion.80

On appeal the Fourth Circuit considered the issue "whether the right of association is protected against private interference."81 The court did not refer

71 The opinion of Judge Parsons of the U. S. District Court for the Northern District of Illinois is unreported.
72 Id. at 195.
73 Id.
74 383 U.S. at 762 (Clark, J., concurring).
75 Id. at 780-81 (Brennan, J., concurring in part, dissenting in part).
76 459 F.2d at 196.
77 Id.
78 508 F.2d 504 (7th Cir. 1974).
79 Id. at 507.
81 508 F.2d at 505.
to Dombrowski or to the "proscribed activity-protected interest" dichotomy, yet it did express concern whether allegations of private interference with freedom of association would satisfy § 1985(3)'s requirement for a deprivation of "any right or privilege of a citizen of the United States." 82

Affirming the district court, the Fourth Circuit reasoned that the use of equal protection language by the Reconstruction Congress indicated that private conspiracies to deny a person the right of free association are not actionable under § 1985(3). To hold otherwise would contradict the explicit wording of the first amendment and extend the incorporation doctrine to private persons, a step taken by the Eighth Circuit in Action. 83 After holding that § 5 of the fourteenth amendment enables Congress to prohibit private conduct, the Action court had reasoned that since the first amendment freedom of religion is incorporated into the fourteenth amendment, Congress has the authority under § 5 to reach private conspiracies that interfere with first amendment rights. 84 The Fourth Circuit in Bellamy, however, declined to likewise extrapolate from the statutory language tracking the fourteenth amendment, to the fourteenth amendment itself, to incorporation of the first amendment, and finally to applying the first amendment to private persons without any state involvement. 85

The court concluded that the outer limit of congressional power under § 5 of the fourteenth amendment was to aid the states in fulfilling their § 1 duties: assuring equal enjoyment of state-created rights or facilities. Thus, while recognizing that state action is not always a necessary ingredient under § 1985(3), the Fourth Circuit determined "that some state involvement is necessary in this particular application of the statute in order to maintain a cause of action." 86

III. Criticism

A. Illusory Resolutions

1. The Distinction Between Fourteenth Amendment § 1 Rights and § 1985(3) Rights.

Courts that decide this issue without distinguishing between individual rights under § 1 of the fourteenth amendment and rights conferred under § 1985(3) as an exercise of congressional power under § 5 of the amendment fail to accurately discern the question. The Seventh Circuit ignored this distinction

82 Id. at 506.
83 See note 29 & accompanying text supra.
84 One commentator made the following analysis of this aspect of the Eighth Circuit's decision in Action: "Thus, the Eighth Circuit . . . combined the incorporation doctrine of the due process clause, Griffin's reading of section 1985(3) and Justice Brennan's Guest concurrence to eliminate the 'state action' limitation from the Bill of Rights." Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 516 (1974) (footnote omitted).
85 508 F.2d at 507. Prior to this statement the court had said: "It is perfectly true that the first amendment now speaks to the states by way of the fourteenth amendment, but to say that it also speaks to private persons seems to us an innovation that must come from the Congress or the Supreme Court." Id.
86 Id. at 506.
in *Dombrowski v. Dowling*, holding that "a private conspiracy which arbitrarily denies [a person] access to private property does not abridge his Fourteenth Amendment rights." The court apparently emphasized § 1 of the fourteenth amendment to the exclusion of § 5. While § 1 provisions must be considered in determining the scope of Congress’ implementive powers under § 5, they do not control that scope. Indeed, in one of the most recent references to *Shelley v. Kraemer*’s statement that the fourteenth amendment "erects no shield against merely private conduct," the Supreme Court added this caveat: "This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." Whether or not it is ultimately determined that the § 1 terminology "no State shall . . ." is dispositive of the issue, the constitutionality of § 1985(3) as an exercise of § 5 powers can only be determined by examining the potential scope of the latter section.

2. Improper Use of Prior Cases

In *Griffin*, Justice Stewart made the following observation: "The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to accord [them] a sweep as broad as [their] language." In the original *Westberry* opinion, the Fifth Circuit, referring to § 5 legislative powers, stated: "[T]he Court has accorded reconstruction civil rights statutes ‘a sweep as broad as their language,’ which standard would allow the application of § 1985(3) here." In making the above statement in *Griffin*, Justice Stewart had been considering whether Congress actually intended § 1985(3) to apply to purely private conspiracies. The question still remained "whether Congress had constitutional power to enact a statute that imposes liability . . . ." In its use of the *Griffin* statement, the *Westberry* court confused legislative intent with legislative jurisdiction.

The Eighth Circuit in *Action* offered the following rationale for its holding: "[T]he Court’s decisions in a number of recent cases reveal a purpose to protect the rights of citizens against private invasion by expanding the concept of State action to situations where the showing of such action would, at another time, have been considered insufficient." This trend may be instructive in deciding a case which involves at least indirect state action, but it was singularly un instructive in *Action* where there was no trace of state involvement. It is patently improper to use language which merely indicates a liberalizing of the state action requirement as support for a total circumvention of that requirement.

87 459 F.2d at 196.
88 Id. at 194.
89 334 U.S. 1, 13 (1948).
91 403 U.S. at 97.
92 507 F.2d at 210.
93 403 U.S. at 103.
3. Improper Emphasis on Legislative History

While legislative history is often an invaluable interpretative device, the substantial reliance on the congressional debates in the present context is misplaced. The legislative "intent" underlying § 1985(3) is no longer at issue. After examining the various provisions of the original Ku Klux Klan Act of 1871 and the legislative history surrounding its enactment, the Griffin Court concluded: "It is thus evident that all indicators—text, companion provision, and legislative history—point unwaveringly to § 1985(3)’s coverage of private conspiracies."

The Court has not ruled so unequivocally on the original intent of the framers of the fourteenth amendment. Whether the Reconstruction Congress intended § 5 of the fourteenth amendment to enable Congress to prohibit private interference with § 1 rights is still undecided. There were several factions debating the scope of the amendment’s coverage. The only unimpeachable conclusion is that “the intent of the framers . . . was not clearly expressed in the course of the discussion.” It is improper to contend, then, that the congressional debates clearly demonstrate a solid majority opinion concerning the scope of the fourteenth amendment. Whether Congress may proscribe purely private conspiracies under § 5 of the fourteenth amendment cannot be answered on the inconclusive and speculative basis of the congressional debates.

4. Undue Reliance on Guest

To determine the scope of Congress’ § 5 powers by unduly emphasizing the Guest opinions is inappropriate. Commenting on the Eighth Circuit's decision in Action, one writer noted, “[D]espite the significance of its decision, the Action court rooted its holding on little more than the concurring opinions in Guest.”

As indicated above, Guest involved an alleged violation of § 241, the criminal counterpart of § 1985(3). The indictment alleged that one object of the

96 403 U.S. at 101.
97 See, e.g., R. Flack, The Adoption of the Fourteenth Amendment (1908); B. Harris, The Quest for Equality (1960); E. James, The Framing of the Fourteenth Amendment (1956); S. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (1914); J. TenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955); Boutin, Truth and Fiction About the Fourteenth Amendment, 16 N.Y.U.L. Rev. 19 (1938); Crosskey, Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954); Fairman, A Reply to Professor Crosskey, 22 U. Chi. L. Rev. 144 (1954); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frank & Munro, The Original Understanding of “Equal Protection of the Laws,” 50 Colum. L. Rev. 131 (1950); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1553 (1964); Graham, Our “Declaratory” Fourteenth Amendment, 7 Stan. L. Rev. 3 (1954); Graham, The Early Anti-Slavery Background of the Fourteenth Amendment, 1950 Wis. L. Rev. 479, 610; Graham, The “Conspiracy Theory” of the Fourteenth Amendment, 47 Yale L.J. 371, 48 Yale L.J. 171 (1938).
98 37 Mo. L. Rev. 525, 529 (1972).
100 But see Avins, supra note 1, at 381 n.249.
conspiracy was to bar the exercise of the "right to the equal utilization, without
discrimination upon the basis of race, of public facilities . . . owned, operated
or managed by or on behalf of the State of Georgia or any subdivision thereof."\textsuperscript{102} Since all the defendants were private parties and there was no suggestion that the
State of Georgia was implicated in their conduct, \textit{Guest} might well have been
valid precedent for determining the scope of Congress' § 5 powers. The Court,
however, obviated the necessity of reaching this question by construing the indict-
ment to allege that the conspiracy involved state officials.\textsuperscript{103} The declarations
by the six concurring Justices that Congress had the power to proscribe private interference with fourteenth amendment rights were merely dicta.\textsuperscript{104} Because \textit{Guest} was decided on a theory of state involvement and because the statements
in the concurring opinions were dicta, \textit{Guest} is tenuous precedent for determining Congress' § 5 powers. Furthermore, only two of the six concurring Justices
remain on the Court—Justices Douglas and Brennan. As noted by Professor
Cox, the Court as presently comprised "seem[s] somewhat more cautious than
their predecessors in constitutional innovation."\textsuperscript{105}

To the extent that the Clark and Brennan opinions are specifically employed
as persuasive authority, they must be limited to their scope. Justice Clark viewed
the question to be "whether Congress, by appropriate legislation, has the power
to punish private conspiracies that interfere with Fourteenth Amendment
rights, such as the right to utilize public facilities."\textsuperscript{106} Justice Brennan made
this distinction even clearer: "Whatever may be the status of the right to equal utilization of \textit{privately owned facilities} . . . it must be emphasized that we are
here concerned with the right of equal utilization of \textit{public facilities owned or
operated by or on behalf of the State}."\textsuperscript{107}

It is this qualified conception of the issue which casts suspicion on \textit{Action's}\textsuperscript{108}
and \textit{Westberry's}\textsuperscript{109} reliance on Justice Brennan's statement that "§ 5 empowers
the Congress to enact laws punishing all conspiracies—with or without state
action—that interfere with Fourteenth Amendment rights."\textsuperscript{110} Certainly, both
Justices Clark and Brennan rejected the traditional notion that state participation
is essential to the validity of § 5 legislation designed to protect the enjoyment
of § 1 rights. But neither suggested that affirmative state action in creating those
rights is not a necessary prerequisite of § 5 protection. On the contrary, Justice
Brennan's characterization of the fourteenth amendment right to use state facil-
ities without discrimination emphasizes the importance of state action in the
creation of that right:

\begin{quote}
[\textit{T}he right to use state facilities without discrimination on the basis of race
is . . . a right created by, arising under and dependent upon the Fourteenth
\end{quote}

\begin{itemize}
\item \textsuperscript{102} \textit{Guest}, 383 U.S. at 747 n.1.
\item \textsuperscript{103} Id. at 756-57.
\item \textsuperscript{104} Id. at 761-62, 774-86.
\item \textsuperscript{105} Cox, The Role of Congress in Constitutional Determinations, 40 U. CINN. L. REV. 199, 241 (1971) [hereinafter cited as Cox].
\item \textsuperscript{106} 383 U.S. at 762 (emphasis added).
\item \textsuperscript{107} Id. at 780-81 (emphasis in original).
\item \textsuperscript{108} 450 F.2d at 1235.
\item \textsuperscript{109} 507 F.2d at 213.
\item \textsuperscript{110} 383 U.S. at 762.
\end{itemize}
Amendment . . . The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command.111

Justice Brennan simply maintained, then, that when a state takes affirmative action, such as the construction of public facilities, the fourteenth amendment imposes certain duties on that state and grants its citizens certain correlative rights. Rather than completely abrogating state action as a prerequisite to the creation of fourteenth amendment rights, the Guest opinions simply expanded the type of state activity which gives rise to a protectable fourteenth amendment interest.112 These opinions, therefore, should not be invoked as authority for the broad proposition that § 5 of the fourteenth amendment gives Congress the power to reach private interference with fourteenth amendment rights "with or without state action."113

B. A Rejection of the Eighth and Fifth Circuits' Theories: § 1985(3) Is not a Federal Tort Law

The Eighth Circuit held in Action v. Gannon that the district court had properly construed § 1985(3) to afford injunctive relief against a private conspiracy to disrupt religious services. Prior to its being vacated on the ground of mootness, the holding of the Fifth Circuit in Westberry v. Gilman Paper Co. was that the same statute provides a civil remedy for injury resulting from a private conspiracy to dismiss an employee because of environmentalist activities. As Judge Morgan stated in his dissenting opinion in Westberry: "[The] majority opinion turns 42 U.S.C. § 1985(3) into a 'general federal tort law.'"114

The rationale of Action and Westberry is that any conspiracy motivated by a class-based discriminatory animus which infringes upon a right secured by the fourteenth amendment is actionable under § 1985(3). The logical extension of this rationale is that civil rights statutes formerly used to protect fourteenth amendment rights against state interference can also give rise to a federal tort action against private persons. The Action and Westberry decisions effectively

111 Id. at 780.
112 One commentator has summarized the limited scope of the Guest opinions as follows: It is thus reasonable to conclude that while these justices were willing to reject the traditional notion that Congress can act only to remedy or prevent positive discriminatory action by the state, both Justices Clark and Brennan recognized the need for at least some connection between the individual and the state before the fourteenth amendment powers of Congress can come into play. In Guest, this necessary "connection" arose once the state had taken the sort of action which gave rise to governmental duties and correlative individual rights under the fourteenth amendment, that is, the construction of public facilities [footnote omitted]. The separate opinions, therefore, can be understood to have gone no further than to assert that this type of state action is all that should be required before Congress is allowed to exercise its section 5 powers. This position, however, though substantially lessening the restrictive impact of the state action theory in relation to Congress' section 5 powers, does not remove the "state action" element entirely.
113 This is, of course, the broad interpretation placed on the Guest opinions by the Eighth Circuit in Action, 450 F.2d at 1235-36, and by the Fifth Circuit in Westberry, 507 F.2d at 213.
114 507 F.2d at 216.
eliminated the "state action" requirement from the Bill of Rights. The Eighth and Fifth Circuits contended that since the first amendment was incorporated in the fourteenth amendment, the only issue was the potential limiting effect of the fourteenth amendment's state action requirement. The courts completely ignored the state action requirement which inheres in the first amendment as well. Consequently, unless some arbitrary distinction is drawn between the first amendment "rights" allegedly violated in Action and Westberry and other rights secured by the Bill of Rights, this theory dictates that every right secured in the Bill of Rights which has been incorporated into the fourteenth amendment may be protected from private interference by federal law enacted pursuant to § 5.

This construction has far-reaching ramifications. Since it is the due process clause, and not the equal protection clause, that is being enforced, there is no "racially or perhaps otherwise class-based, discriminatory animus" requirement. Furthermore, since Congress' powers under § 5 of the fourteenth amendment are the "same broad powers expressed in the Necessary and Proper Clause," Congress could enact a comprehensive civil code designed to provide civil relief for private deprivation of all rights inhering in the basic concept of due process. Indeed, since § 1985(3) and its criminal counterpart § 241 have been interpreted as a unit, a very reasonable extension of the Action-Westberry theory is that § 5 of the fourteenth amendment permits Congress to enact a national criminal code to ensure that no person is deprived of his life, liberty or property without due process of law, so long as Congress makes the requisite specific intent an element of the crime.

This conceptual test of Action and Westberry illustrates the impropriety of those decisions. Indeed, the Supreme Court in Griffin has already impliedly rejected such a construction of Congress' § 5 powers. Justice Stewart, after concluding that the Reconstruction Congress intended to include private conspiracies within the ambit of § 1985(3), stated:

That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress

115 Katzenbach v. Morgan, 384 U.S. 641, 650 (1966). U.S. Const. art. I, § 8 gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers vested in it by article I. The broad scope of this authority was established in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), where Justice Marshall stated: Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421.

116 Of course, whether Congress would ever enact such a code is another matter. As Professor Cox has stated, the "possession of congressional power should not be confused with its exercise." Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 119 (1966) [hereinafter cited as Foreword].


has a right to punish an assault and battery when committed by two or more persons within a State."\textsuperscript{120}

It is doubtful, then, that the Court would adopt the Eighth and Fifth Circuits' novel interpretation of Congress' fourteenth amendment jurisdiction.\textsuperscript{121}

This denunciation of Action and the original Westberry opinion must not be inferred to be an acceptance of Dombrowski and Bellamy. The times will not permit, and the Constitution does not require, that § 1985(3)'s fourteenth amendment jurisdiction be limited by the traditional, restrictive requirement of positive state involvement. Professor Cox comments that the need for flexibility in our constitutional efforts to ameliorate racial tensions is equally applicable to the protection of fourteenth amendment rights in general:

Of [long]-range significance is the force of the idea that modern government has affirmative duties to its citizens in the realm of human rights. . . The conditions and philosophy of modern society are different from those of 1868. The first requires and the second encompasses affirmative state action to provide both material welfare and human rights.\textsuperscript{122}

It is necessary to strike a balance between a strict constructionist approach which stiffens our political and social development and the Action-Westberry approach which virtually ignores the wording of the provisions it purports to construe.

\textsuperscript{120} Id. at 101-02, quoting CONG. GLOBE, 42d Cong., 1st Sess. 485 (1871).

\textsuperscript{121} In a footnote to Westberry, the Fifth Circuit suggested an equally untenable and far-reaching alternative theory in support of legislative jurisdiction to protect the "rights" of speech and association from private interference:

We note in this context that legislative jurisdiction in this case may not even require a Fourteenth Amendment basis. In [Griffin], the right to interstate travel was used as an alternative basis for the Court's holding. Justice Stewart noted that "the 'right to pass freely from state to state'" has been explicitly recognized as "among the rights and privileges of national citizenship." [403 U.S. at 106.] Many commentators agree with the Court that such a right is an aspect of the fundamental liberties to be guaranteed all Americans. But no theory which has come to our attention holds that such a right is more "fundamental" than the rights guaranteed in the First Amendment or explains why that principle should apply against "private" actions where First Amendment principles should not. Thus we conclude that the rationale the Supreme Court relied upon to support this conception of the right to travel—as a kind of basic interest protected against all—should be applicable to the rights of speech and association as well. 507 F.2d at 211 n.7 (citation omitted). Accord, Jewish War Veterans v. American Nazi Party, 260 F. Supp. 452 (N.D. Ill. 1966). However, while the Supreme Court may well have deemed the right to travel to be an "exceptional [freedom] uniquely requiring complete and absolute protection," Bellamy, 508 F.2d at 508 (Judge Morgan concurring in the result), it would not seem wise to extend that reasoning to first amendment guarantees and eliminate thereby the express governmental limitations on those rights by redefining them as "fundamental." The problem is the same as that with the fourteenth amendment theory above; it has the potential effect of eliminating the "state action" requirement from the entire Bill of Rights. If we accept the proposition that the rights of association and speech are no less fundamental than the right to travel and should therefore be protected against private as well as governmental interference, who is to say that freedom of religion is any less fundamental? And what of the right to be free from unreasonable searches and seizures? It is suggested that if followed and logically extended this novel theory encourages a disruption of the constitutionally defined federal-state relations to an extent that should only be brought about by constitutional amendment.

\textsuperscript{122} Foreword, supra note 116, at 114.
IV. A Resolution

In cases similar to Guest, where the state has provided public facilities, Congress should not be required to distinguish between state and private interference when fashioning a civil remedy like that provided in § 1985(3). Indeed, this principle could be extended to all situations in which there is at least indirect state involvement, for while it enlarges the scope of state action it does not abrogate its requirement. Many writers maintain that this is precisely the rationale employed by Guest.\(^{123}\)

It must be emphasized that the critical issue of this discussion is whether § 1985(3) is within the permissible scope of Congress' § 5 implementative powers. The theory espoused here is that the restrictive provisions of § 1 should not ipso facto dictate or delimit Congress' § 5 jurisdiction to ensure equal protection of the laws. While it would be improper to read out the express limitations of § 1 entirely, it is reasonable to assert that a lesser degree of state involvement is required when Congress invokes its § 5 powers to protect § 1 guarantees.\(^{124}\)

An "indirect state action" theory abolishes the traditional requirement of state involvement in the actual discriminatory conduct.\(^{125}\) Just as sensitive 20th century Justices have found state action in increasingly attenuated situations,\(^{126}\) Congress should not be obliged to comply with a strict state action requirement when enacting legislation pursuant to § 5. When a state takes affirmative action such as constructing a public facility, the fourteenth amendment imposes certain duties on that state and concomitantly grants certain correlative rights to those who use that facility. It is this affirmative, albeit indirect, state involvement which should be deemed sufficient to enable Congress to enact legislation such as § 1985(3) pursuant to its § 5 powers.

V. Conclusion

As Justice Frankfurter often noted, proof of a wrong is not by itself sufficient to justify judicial, still less constitutional, intervention.\(^{127}\) Certainly there are many valid arguments which would support a constitutional amendment proscribing wholly private interferences with rights and freedoms now protected only from state interference. But until the adoption of such an amendment, it would be usurpatious, and jurisprudently unwise, for the courts to write the amendment by judicial decree. There is unquestionable truth in the words of Judge Goldberg in Block v. Westberry:


\(^{124}\) The Supreme Court has held that such congressional findings are entitled to great deference. See generally Katzenbach v. Morgan, 384 U.S. 641 (1966).

\(^{125}\) See, e.g., Civil Rights Cases, 109 U.S. 1 (1883).


Constitutional viability is not a theorem, it is a fact in our volatile jurisprudence, without which the past would stultify the present and the heavy hand of history would stunt our ethical growth and enervate our powers to meet governmental responsibilities.128

There is, however, a fine line between sensitive activism and sheer disregard for the very words of the law being construed. The decisions made by courts in cases like *Action* and *Westberry* (if followed), which go far afield of express constitutional provisions, are decisions to be made by the body of people who originally bound themselves to those provisions. As Judge Learned Hand once observed, it is they who must decide the issue:

A society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save; . . . in a society which evade its responsibilities by thrusting upon courts the nurture of that spirit, that spirit in the end will perish.129

*Virgil L. Roth*
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