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The Activist Insecurity and the Demise of Civil Rights Law

John Valery White

Civil rights law is today moribund. An impressive edifice, built upon the ruins of Jim Crow, with the blood and sweat of the civil rights movement, and intended to both dismantle that system and ensure the civil liberties that Jim Crow illustrated were all too easily lost, civil rights law was to be the lasting monument of the civil rights struggle. Fortified by this legacy, civil rights law retains a symbolic value, implying that there are formidable forces working to protect citizens from abusive state action, to ensure a broad anti-discrimination ethic, and to fix the wrongs of Jim Crow. The body of civil rights law promises much indeed. Only, today, it crumbles when one reaches for it, it disappoints when one seeks its solace, it disappears when it is needed most. It is a great ruin, a magnificent display of rotting grandeur.¹

When, over twenty years ago, Critical Legal Scholars argued that civil rights law promoted false consciousness,² they could not have imagined how quickly what they criticized would be lost. Ten

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¹ The allusion is to the opening line of Gabriel Garcia Marquez, The Autumn of the Patriarch (Gregory Rabassa trans. 1976):

Over the weekend the vultures got into the presidential palace by pecking through the screens on the balcony windows and the flapping of their wings stirred up the stagnant time inside, and at dawn on Monday the city awoke out of its lethargy of centuries with the warm, soft breeze of a great man dead and rotting grandeur.

Unlike Marquez’s general, an amalgamation of Latin American and Caribbean dictators, who finally dies after a nearly four century long regime of avarice, evil, and duplicity, the demise of civil rights law is the more typical tale of a short lived period of hope, grace, and liberty, collapsed by the weight of criticisms over the “form” of its efforts and the supposed contradictions of its results.

years ago, when Critical Race Theorists complained about the dismantling of that law, they could not have imagined how complete the gutting of the field would be. Distracted, perhaps, with the important questions of understanding race, identity, and being and the law's intersection with these notions, critical theorists paid inadequate attention to the doctrinal background for all these debates. Indeed, both critical movements have been

3. See, especially, Crenshaw, supra note 2. Crenshaw notes that the central role of race in American history is a crucial and missing component of neo-conservative and critical critiques of rights. Id. at 1369–87. Taking this perspective reveals that

Rights discourse provided the ideological mechanisms through which the conflicts of federalism, the power of the Presidency, and the legitimacy of the courts could be orchestrated against Jim Crow . . . . Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped create the political controversy without which the state's coercive function would not have been enlisted to aid Blacks.

Id. at 1381.


5. Many Critical Race Theory articles talk of the inadequacies of civil rights law, see, e.g., E. Christie Cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 Conn. L. Rev. 441(1998) (critiquing employment discrimination law as overly dependent on essentialist categories), problems with scholarly development of constitutional issues related to civil rights law, see, e.g., Richard Delgado, The Imperial Scholar:
criticized for exaggerating the inadequacies of civil rights law. There are in fact many commentators who reasonably contend that civil rights law remains vibrant. These defenders of the current state of civil rights law can note that few central civil rights cases and statutes have been invalidated. And, in every controversial reexamination of civil rights precedent of the last two decades, save affirmative action, the important civil rights precedent under review has been upheld. In fact, in 1989 when the Supreme Court cast doubt on several significant civil rights doctrines, it did so by leaving the doctrines intact but imposing onerous requirements on their use. Even then, Congress quickly reaffirmed the original


9. The controversial 1989 term saw the Court, for example, cast doubt on the continued existence of the disparate impact method for proving discrimination in
constructs.\textsuperscript{10} As a consequence it is difficult to say that civil rights law is dead,\textsuperscript{11} much less to explain what brought on that death.

One easy explanation of the demise of civil rights law focuses on changes in the political temperament of judges in the federal judiciary since the election of President Reagan in 1980.\textsuperscript{12} This argument holds that conservative judges, hostile to civil rights, have simply undercut civil rights law.\textsuperscript{13} This is surely an accurate and compelling explanation, possessing the additional advantage that conservative politicians have been candid in their goal of "reigning in" civil rights law.\textsuperscript{14} While this explanation is accurate, it seems \textit{insufficient} to tell

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\textsuperscript{10} \textit{See} Civil Rights Act of 1991.

\textsuperscript{11} \textit{But see}, John Valery White, \textit{Foreword, Symposium: Is Civil Rights Law Dead?} 63 La. L. Rev. 609 (2003) (arguing civil rights law has been made a form of equity).

\textsuperscript{12} The following passage by Lucille Renwick in \textit{The Nation}, discussing the ascendent resegregation of public schools, conveys this argument succinctly:

\begin{quote}
Sudden as it seems, the end of desegregation has been coming for quite some time. It began during the Reagan and Bush administrations, with the ascent of conservative judges who viewed desegregation orders with suspicion. Together, Reagan and Bush appointed more than 60 percent of the country's district court judges, nearly 70 percent of appellate judges and five of the nine Supreme Court Justices. This set the stage for a series of Supreme Court rulings between 1992 and 1995 easing the way for school districts to protest court mandates and to be declared free of judicial scrutiny. The rulings allow judges to end judicial oversight if a school board has made a "good faith" commitment and has succeeded "to the extent practicable" in establishing racial balance, even if it has come nowhere close to achieving it.
\end{quote}


\textsuperscript{13} \textit{See}, \textit{e.g.}, Michael Selmi, \textit{Why are Employment Discrimination Cases So Hard to Win?} 61 La. L. Rev. 555 (2001) (arguing courts are biased against employment discrimination cases); William N. Eskridge, Jr., \textit{Reneging on History? Playing the Court/Congress/President Civil Rights Game}, 79 Cal. L. Rev. 613 (1991) (commenting on the 1989 civil rights decisions limiting civil rights recovery).

\textsuperscript{14} \textit{See} Mark Kozlowski's description of the "imperial judiciary" argument of conservative legal commentators. Mark Kozlowski, \textit{The Myth of the Imperial Judiciary: Why the Right is Wrong About Courts} (2003).
the story of civil rights law's demise. In civil rights law there is a troubling absence of landmark reversals of cornerstone decisions as

The efforts to create an alternative vision of civil rights law is the product of an overt political strategy which has consisted of replacing civil rights rhetoric with the rhetoric of supply side economics and promoting that rhetoric through the creation of a new class of conservative black leaders in order to circumvent the then established black leadership of veterans of the civil rights movement. Of course, there were then, as now, problems with self-appointed black leaders whose questionable political accountability strained leadership claims, see Adolph Reed, Jr., The Jesse Jackson Phenomenon 4–5 (1986), and there have always been black conservatives; however, the Reagan administration initiated an overt effort to create anti-civil rights black leaders, in order to facilitate the abandonment of civil rights and the welfarist policies in which civil rights were embedded. "The Chicago Tribune's Clarence Page . . . says that 'there have been conservative blacks around for a long time; black conservatism was invented in the basement of the Reagan White House in 1980.'" Doug Ireland, Alan Keyes Does the Hustle—Black Conservative Republican Presidential Candidate for 1996, The Nation, Oct. 30, 1995, at 500.

. . . Adam Myerson, editor of the Heritage Foundation's Policy Review . . . puts [black conservatism's] beginnings at the so-called Fairmont Conference in San Francisco in December 1980. The conference . . . was sponsored by the Institute for Contemporary Studies, a California think tank created by Ed Meese, Reagan's first Attorney General and political hatchetman. While the meeting's speeches were collected in a book . . . this was but intellectual veneer for a conference that seems to have been more of a jobs fair for blacks during the post-election Reagan transition.

*Id.* While the Reagan administration focused on "job creation rather than enforcement of civil rights laws," that plan depended on the presence of black advocates like Robert L. Woodson to advance the plan. See Dick Kirsch, *White House Weighs Whether to Reach Out*, The Nation, Dec. 29, 1984, at 2452. The Reagan administration, for example, made it a point to meet with a group of black leaders in early 1985 to celebrate the Martin Luther King, Jr. holiday. The group, calling itself the "Council for a Black Economic Agenda" consisted on business men and educators, "none of whom [was] generally recognized as a prominent national leader of black America" and included "[n]one of the heads of such black leadership groups as the Urban League, or the NAACP and none of the members of the Congressional Black Caucus." Jack W. Germond & Jules Witcover, *Blacks Still Find Few Reasons to Cheer Reagan*, The National Journal, Jan. 26, 1985, at 224. The concerted effort has created numerous, recognized black figures, including Clarence Thomas, Thomas Sowell, Armstrong Williams, and Alan Keyes, as well as creating a justificatory rubric for a watered down civil rights law. For a discussion of black conservatives, see Martin J. Kilson, *Anatomy of Black Conservatism*, 1993 Transition 4.


fueled and financed by an array of conservative interest groups, of which there are, today, almost too many to keep straight . . . . These groups spend money in various ways to push a right-wing agenda on campuses . . . . Through these coordinated activities, these groups have embarked in the last three years on a concerted campus recruitment drive to turn temperamentally conservative youngsters into organized right-wing activists.

*Id.*
well as a dearth of new, conservative landmark decisions. Again, with the exception of newly articulated limitations on affirmative action there have been few reversals of settled law.\textsuperscript{15} And, excluding the affirmative action-like decisions on electoral reapportionment\textsuperscript{16} and the recent sovereign immunity decisions,\textsuperscript{17} there have been few landmark decisions pointing civil rights law in a distinctly conservative direction. The troubling aspect of the "conservative judges" explanation, then, is that conservative judges have themselves continued to celebrate the central importance of civil rights law in the post-civil rights world.\textsuperscript{18} Louis Henkin's declaration that we live in the "age of rights"\textsuperscript{19} holds, even if it is a conservative age. Under these circumstances we might doubt that civil rights law is dead at all.

The following pages articulate a supplemental theory (explaining the demise of civil rights law) and illustrate the operation of that theory in the demise of 42 U.S.C. § 1985(3). The theory is that civil rights litigation has been plagued from the beginning by an "activist insecurity" which has undercut civil rights law even during the


\textsuperscript{18} While it is surely the case that conservative commentators and judges argue for a limited judiciary, such as described by Kozlowski, \textit{supra} note 14, this is distinct from the view advanced briefly by conservatives, that rights were an inappropriate means of thinking about law and justice. \textit{See} Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991). Rather it is probably more accurate to say that the current conservative view of civil rights accepts their legitimacy, but regards appropriate civil rights law as quite limited in scope.

\textsuperscript{19} Louis Henkin, The Age of Rights (1990).
"revival" period when courts were self-consciously seeking to expand civil rights causes of action in the name of an age of rights. When the orientation of the courts changed—circa the Supreme Court’s 1977 and 1978 terms—the judicial style along with the legal precedents created under the influence of the activist insecurity made civil rights law particularly vulnerable. And, since about 1978 that law has been eviscerated, leaving a seemingly untouched carcass hanging trophy-like in the halls of conservative retrenchment.

The activist insecurity is a judicial unease with affecting social change. It is not based on legal or constitutional principle; rather, it is a mostly unstated notion that courts should not change the social status quo ante, absent extraordinary reasons for doing so. It is, thus, a substantive restriction on judicial decisions that operates irrespective of existing legal doctrine. As such, it is the motivation behind the manipulation of legal doctrine, procedural and substantive, in the fulfilment of relatively conservative outcomes. Judges simply do not believe in social change, even when the law seems to require it of them. Consumed with the activist insecurity, judges leap at restrictions in the law that quell the prospects of change while stonewalling, defraying, and avoiding applicable legal doctrine when it demands social change. Consequently, civil rights law has been less the rule of law than the rule of men, frightened men (and women).

The activist insecurity takes two general forms: first, judges require that parties seeking social change assiduously comply with prerequisites, restrictions, and limitations in extant law. Second, judges themselves escape extant law if it requires social change, usually by generalizing the legal question presented (and ignoring the narrow legal requisites to which they held the civil rights plaintiffs).

These forms operate in opposite directions. The former points toward ever narrower conceptions of legal questions. Plaintiffs are required, for example, to focus on the narrowest cause of action under which they might proceed. Under the latter form, however, judges faced with a statutory right which requires social change flee to the first broader principle which might block it.

The first, narrowing form characterizes the revival period in civil rights law. Concerned that the need for social change (called for by the civil rights movement) placed improper demands on constitutional law, the Courts sought narrower grounds for the civil rights law they were creating. Consequently such a law is today rooted in statutes from the Reconstruction Era (given new life by an antsy judiciary) and more recent legislation inspired by the civil rights movement. The latter, generalizing form predominates today, with

a restrictive judiciary eager to constitutionalize every question in order to pre-empt discomforting state and federal legislation.

The following discussion will proceed in three parts. Part one will define the revival and limiting periods of civil rights law. This definition is key to understanding the limitations of the “conservative justices” theory of civil rights law’s demise. Part two will define the activist insecurity in some detail. Part three, finally, will illustrate the role of the activist insecurity in the demise of 42 U.S.C. § 1985(3).

I. DEFINING REVIVAL AND LIMITING PERIODS IN CIVIL RIGHTS LAW

The story of civil rights law is conventionally told in three parts. First, there is a glorious period of revival, beginning with Brown v.

21. The revival period is that era which, just after Brown, C. Vann Woodward deemed the “second reconstruction.” See C. Vann Woodward, The “New Reconstruction” in the South, 21 Commentary 501 (1956). See also, C. Vann Woodward, From the First Reconstruction to the Second, Harpers, Apr. 1965, at 127. Social historian Manning Marable compares the two reconstructions (and implies their similar demise):

During two brief moments in history, the United States experienced major social movements which, at their core, expressed a powerful vision of multicultural democracy and human equality. The first was developed before the seminal conflict in American history, the civil war (1861–65), and came to fruition in the twelve-year period of reunion, reconstruction, and racial readjustment which followed (1865–77). Almost a century later, a “Second Reconstruction” occurred. Like the former period, the Second Reconstruction was a series of massive confrontations concerning the status of the African American and other national minorities . . . . Both movements brought about an end of rigid racial/caste structures . . . . Both elevated articulate and charismatic black leaders . . . . Both were fought primarily in the southern U.S . . . . In both instances, the federal government was viewed as a “reluctant ally” of the blacks and their progressive white supporters . . . . Both movements pressured the federal courts and Congress to ratify and to validate legislative measures which promoted greater racial equality . . . . Finally, both movements eventually succumbed to internal contradictions, loss of northern white support, and the re-emergence of the South’s tradition of inequality and racial prejudice . . . .

Manning Marable, Race, Reform, and Rebellion: The Second Reconstruction in Black America, 1945–1990 4–5 (2nd ed. 1991). The frame of a second reconstruction was also salient for segregationists. Historian Neil McMillen highlights that this notion animated the segregationist White Citizens’ Council’s view of Brown and the assault on Jim Crow, allowing them to link derogatory views of the first reconstruction among white citizens with the second and inspiring their members to believe that “the white South won a total victory in Reconstruction by showing its determination to fight and by organizing from one end of the region to the other . . . . [and that] desegregation was not inevitable; it had been evaded once, and it could be evaded again.” Neil R. McMillen, The Citizens’ Council:
Board of Education and coinciding with the civil rights movement and the term of Chief Justice Warren. Second, there is a period of limitation which is usually dated to coincide with the term of Chief Justice Burger. And, in recent years, a separate period of conservative retrenchment is said to follow, beginning with the election of Ronald Reagan as president and the elevation of William Rehnquist to Chief Justice.22 Each stage of the story tells a tale of law and politics turning on the significant question: how could so much change have occurred without undercutting the legal traditions which give law its power and distinguish it from raw politics? Throughout, it is the tale of judicial activism versus judicial restraint. Whether civil rights is activist or restrained is usually taken for granted today, because of the role judicial restraint has played in the right’s assault on the Warren and Burger courts,23 but really activism turns heavily on one’s perspective.24 That is, depending on one’s perspective, one part of the conventional story of civil rights law is bound to be viewed as the triumph of raw politics over law; other parts in turn mixed and redemptive. Thus any assessment of the history of civil rights law triggers discussion of political perspectives on each period.

Progressives view the revival period as one in which the Supreme Court rediscovered constitutional values long sacrificed during the destruction of Reconstruction and the emergence of Jim Crow rule.25 The Supreme Court of the fifty years beginning in the 1870s, and which celebrated states rights and disregarded notions of equality, is viewed as destroying the legal regime produced by the Civil War, except insofar as it transformed those rights into protections of gilded age corporations from government regulation.26 The revival of civil rights law is seen as restorative and urgently needed, even revolutionary, given the horrors of the Jim Crow period which by 1960 was under grass roots attack from everyday black citizens in the


26. See id. at 1357–58.
South. In this light, the period of limitation of the Burger Court is viewed quite critically and the civil rights jurisprudence of the Rehnquist period judged a grave injustice. The latter is regarded as a return to the end of Reconstruction and a manifestation of raw politics. Professor Cheryl Harris has recently remarked:

Many progressive advocates assert that as a result of the highly conservative ideological commitments of these judges, the foundation of antidiscrimination law has been undermined and the doctrinal framework has been reshaped in key areas of concern to social justice advocates including education, employment, and protection from police abuse and other civil rights violations.

Professor Mark Tushnet offers a slightly less acerbic version of the progressive vision in his contribution to the popular progressive book, *The Politics of Law.* Tushnet argues that the Warren Court was the product of the liberal New Deal coalition and was an "unusual and brief instance in which the Court happened to come under control of progressive interests to a somewhat greater extent than those forces sustained elsewhere in the political system." The Burger court represented the end of that coalition's dominance on the Court, but not the emergence of a clear replacement; thus the Burger Court produced mixed results. "By the end of the 1980s the Supreme Court appeared

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31. *Id.* at 228–29.
32. *Id.* at 230. Lawrence Friedman is in accord:
The Supreme Court, from the Civil War on, usually represented forces and ideas which we, today, would identify as on the right rather than the left. The Court that struck down civil rights laws, that upheld segregation and labor injunctions, that refused to allow Congress to ban from commerce products made with child labor, that voided big hunks of the New Deal — this was not a court that was popular with progressives of various stamps. From this standpoint the Warren Court was the aberration and the Rehnquist Court is simply regressing to the mean.
33. *Id.* at 229.
to have taken a definitive turn in the conservative direction,\textsuperscript{34} according to Tushnet.

Conservative versions of this story tend to turn on the damage wrought to the national balance by what is regarded as a politicized Warren Court.\textsuperscript{35} Any politicization of the judiciary is said to have occurred then and any such charge against the current court, regarded as necessary to restore legal order.\textsuperscript{36} For conservatives, the Burger court, while an improvement on Warren's reign, is dismissed as similarly problematic.\textsuperscript{37}

Liberals have struggled with the civil rights period. From the onset, liberal legal scholars were uneasy with the civil rights

\textsuperscript{34} Id.


\textsuperscript{36} Judge J. Harvie Wilkinson, III, has argued that the Rehnquist Court was justifiably “activist” in its invalidation of reapportionment and affirmative action plans:

I believe the controversy over the nondiscrimination principle can be traced to one overriding concern. When a Rehnquist Court majority invoked the principle, it did so in an activist fashion. The principle of race neutrality... was generally summoned to strike down the enactments of the democratic branches of government... The Rehnquist Court's judicial activism in support of the nondiscrimination principle stands in contrast to the Burger Court's more passive stance...

... [T]he Burger Court was more apt than the Rehnquist Court to invoke maxims of judicial restraint to uphold the exercise of race-based action.


\textsuperscript{37} Conservatives wanted nothing less than a comprehensive rollback of Warren Court precedents in as many areas as possible, probably most of all in criminal procedure. What they got instead was a [Burger] Court that “not only maintained its commitment to most of the major Warren Court constitutional innovations, it continued to extend the range of its scrutiny of majoritarian legislation, venturing into areas where the Warren Court’s review posture had been cautious...”


For example, the Burger Court's school desegregation decisions are received especially poorly by Lino Graglia, in Graglia, Disaster by Decree, supra note 35.
movement and the legal decisions it produced. Brown v. Board of Education is generally judged a correct outcome earned at the expense of fidelity to legal principles. The Warren Court’s subsequent decisions in the area of civil liberties and civil rights are grudgingly conceded to be “activist” exercises of judicial power, but again regarded as usually achieving just outcomes. The Burger court, operating under the assumptions of the liberal critique of the Warren period, is regarded as valiantly struggling to discover a balance between civil rights and fidelity to legal principle. On this ground, liberals judge the Rehnquist court badly for it too seems to have abandoned legal principle in order to achieve “just” conservative results. This is to say that the liberal view of civil rights law is that it has always been politicized and that the role of legal scholarship is to discover another way to achieve the ends of civil rights protection without undercutting judicial values that separate law from politics.


39. See Bickel, Original Understanding, supra note 38; Weschler, Neutral Principles, supra note 38; Bickel, The Least Dangerous Branch, supra note 38.


42. See especially the “counter-revolution that wasn’t” theory as articulated in the essays in The Burger Court: The Counter-Revolution That Wasn’t (Vincent Blasi, ed., 1983). This theme has dominated liberal scholarship on the Burger Court. See, Richard Y. Funston, Constitutional Counterrevolution? The Warren Court and the Burger Court: Judicial Policymaking in Modern America (1977). But see, Kahn, supra note 47. This view of the non-revolutionary Burger Court is also present in conservative visions of the Court. See Graglia, The Rehnquist Court, supra note 36 (adopting frame to describe both Burger and Rehnquist Courts).


This vision of civil rights law is as unconvincing as it is widely accepted. First, it is cast in such general terms that none of the partisans need actually confront counterfactual evidence challenging their vision. Second, each version of the story casts law and politics as irreconcilably distinct. This either/or construction forces one to accept that law is "just politics" perhaps in a different form, or that "true law" is immune from political considerations. Neither is a persuasive view of public law and civil rights law where in each case the political legitimacy of the state is in question and where that legitimacy turns precisely on what the relationship between the state and its citizens should be.

The conventional tale of civil rights law transforms any assessment of the civil rights law's vitality into an assessment of the political performance of the respective Courts. While civil rights law, like all public law, is inherently related to political debates over the role of government, this lens on civil rights law transforms relatively empirical questions into relatively normative ones. Judging whether civil rights law is vibrant comes to turn on agreement with various partisan visions of specific policy more than on whether the rights, causes of action, and remedies which constitute civil rights law are available to those for whom they were designed. Though the former is a valid ground for judging law, it distorts both whether that law is degraded and how it came to be so.

Ronald Kahn argues that assessments of the performance of different Supreme Courts are distorted by a similar focus. Kahn's main concern is on how the performance of the Burger Court has been sullied by "political" or "instrumental" analyses which "emphasize that judges use polity and court principles, and all constitutional theory, instrumentally, as a means to achieve their

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46. This is a central tenant of the conservative, "imperial judiciary" argument. See Kozlowski, supra note 14, at 20–24.


48. He addresses four main theories of constitutionalism which he views as variants of the instrumental approach: (1) the Election Returns theory associated with Robert Dahl and Richard Funston; (2) the Policymaking approach attributed to Martin Shapiro and others; (3) the Safety-Valve theory of Anthony Lewis and Archibald Cox; and (4) the Biographical Approach of G. Edward White. See id. at 5, 7–18, for definitions and works representative of each approach.
policy objectives.”49 Critiquing various constitutional theories, he concludes that a better lens through which to analyze the Court is a "legalist" or "constitutive" approach. Such judicial behavior "emphasizes the place of developing policy and rights principles, precedent, and constitutional theory as significant to the Court’s constituting constitutional law and principles" while recognizing that political and social developments affect the Court.50 Kahn’s careful analysis of the writings of contemporary constitutional theorists highlights the risks and limitations of judging courts through predominately political approaches. In accord with Kahn, I believe a focus on the political aspirations and messages of various Courts presents a distorted picture, at least as an explanation of the demise of civil rights law.

Ultimately, however, the conventional, highly politicized tale of civil rights law (and its demise) is unsatisfactory because it overlooks the consistent practice of judges throughout the civil rights era.51 Seeking to adhere to principles of judicial behavior while avoiding politics, judges have consistently undercut the rule of law at all three stages of civil rights law’s history.52 The defiling of the rule of law has occurred quite apart from the partisan ideological splits that have animated civil rights law. Rather, it has occurred in response to an "activist insecurity" which has de-legitimized the very idea of a legal regime which can (much less should) promote social change. In consequence, every stage of the development of contemporary civil rights law has been framed by the desire to avoid social change through the law, even when the law itself prescribes such change. This avoidance is crucial because it trumps the normal frame offered to explain the shifts in civil rights jurisprudence.

A. A Revival of Reconstruction Values

Civil rights law and the Civil Rights Movement are parallel developments which ushered in a transformation of American life.53

49. Id. at 3–4.
50. Id. at 4.
51. “[M]any of the current Court’s so-called conservative cases and doctrines are direct descendants of Warren Court cases and doctrines.” Suzanna Sherry, All the Supreme Court Really Needs to Know It Learned From the Warren Court, 50 Vand. L. Rev. 459 (1997).
52. In an earlier work, I demonstrated the birth of the activist insecurity at the beginning of the civil rights period. White, Activist Insecurity, supra note 24. This work demonstrates its operation during the Burger Court years, when the limiting period began.
53. The Civil rights movement was the product of a coalition . . . comprised of a broad array of groups—liberal Democrats, moderate Republicans, the
Civil rights law is the jurisprudential response to the Civil Rights Movement in two important ways. First, it is the direct product of the legal strategy of the NAACP. Second, it is the corpus of law developed in response to the grass roots action of black Americans and others to end Jim Crow and guarantee civil liberties.

The NAACP's strategy for addressing Jim Crow injustice is represented in contemporary civil rights law. That strategy was threefold: a mostly legislative attack on lynching, a judicial strategy to enforce the "equality" component of "separate but equal," and the ultimately successful frontal assault on the separate but equal policy. The attack on lynching—consisting largely of careful reporting of lynching episodes, a publicity campaign aimed at building public opposition to lynching, and various lobbying efforts to encourage anti-lynching legislation—was largely unsuccessful as no anti-lynching statute was ever enacted and lynching persisted unabated until the emergence of the civil rights movement in the 1950s. These efforts, nevertheless, successfully characterized the horrors of Jim Crow and helped build the organizational linkages that would transform into the civil rights movement.


national organizations of the black and Jewish communities, organized labor and others—that succeeded in invalidating de jure segregation and passing far-reaching legislation in support of the rights of blacks, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965.


55. See National Association for the Advancement of Colored People, Thirty Years of Lynching in the United States, 1889–1918 (1969); Zangrando, supra note 54.

56. This is dramatized by the interrelationship between American Communist Party efforts to publicize the Scottsboro Trials and the way that trial convinced many blacks to embrace the Communist Party as an aid to organizing against Jim Crow. See James E. Goodman, Stories of Scottsboro 74–82 (1994). On the Communist Party's efforts in Jim Crow Alabama, see, Robin D. G. Kelley, Hammer and Hoe: Alabama Communists During the Great Depression (1990); Theodore Rosengarten and Nate Shaw, All God's Dangers: The Life of Nate Shaw (1984); and Nell Irvin Painter, The Narrative of Hosea Hudson: His Life as a Negro Communist in the South (1979).

57. See White, Vindicating Rights, supra note 22.

58. See id. at 181–93, 216–43.
recently, perhaps in response to the demise of § 1985(3) as an effective basis for civil rights enforcement, hate crimes statutes have emerged as a version of the anti-lynching campaign (although the underlying concern is different in both degree and type).  

The NAACP's efforts to enforce the "equality" component of Plessy, focused most heavily on severe inequalities in public benefits. Most dramatically in the areas of public teacher pay, educational opportunities, and access to government and public programs and facilities, the NAACP plan reflected the chorus of


61. See, e.g., Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S. Ct. 232 (1938) (equal protection requires that state provide black citizen facilities for graduate legal education within its boarders); Pearson v. Murray, 182 A. 590 (Md. 1936) (scholarships for black students to attend graduate school out of state violates Fourteenth Amendment, but integration inappropriate remedy).

62. See, e.g., attacks on segregated transportation, Morgan v. Virginia, 328 U.S. 373, 66 S. Ct. 1050 (1946). Cases like this one were to inspire bus boycotts in Baton Rouge (1953), Montgomery (1955–56), and Tallahassee (1956–57), that were to signal the beginning of the civil rights movement. See Adam Fairclough, The Preachers and the People: The Origins and Early Years of the Southern Christian Leadership Conference, 1955–1959, 52 J. Southern Hist. 403 (1986). They contradict the notion that Supreme Court decisions were counterproductive because they ignited white resentment, see Michael J. Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81 (1994), and violence by showing that the very origins of the civil rights activity which prompted change was encouraged by federal court decisions questioning segregation. Klarman's thesis is that Brown is overestimated as a catalyst of civil rights activity which he persuasively argues is connected to social and economic changes in the South. Id. at 91. Brown, he argues, is ironically responsible for 1960s civil rights legislation, because it ignited massive resistance, destroyed moderate forces in the South, and forced the federal government's involvement in civil rights matters. Klarman's thesis, like conservative arguments that Brown should not have been decided because change would have come at a "natural" pace, overlooks the fact that the quite little change was coming to the South, and that "moderate"
voices duplicated in the 1944 publication *What the Negro Wants*\(^{63}\) demanding economic and educational opportunities for black Americans. This strategy came to be reflected in the civil rights laws' underlying goals of opening economic opportunities, narrowing income disparities, and, recently, addressing continuing severe wealth disparities. Unfortunately, it is this goal that has, recently, come to be most severely criticized\(^{64}\) and restricted.\(^{65}\)

Most familiarly, the NAACP strategy came to focus on attacking Jim Crow's formal separation. In a series of decisions culminating in *Brown v. Board of Education*,\(^{66}\) the organization succeeded in undercutting the doctrinal pillars that had buttressed Jim Crow and that had steeled the system against rising grass roots protests. It is this strategy that became most clearly reflected in the corpus of contemporary civil rights law. In part because of the clarion call of *Brown's* rejection of segregation, but as much because of the force of the civil rights movement's protests, civil rights law sought to ensure protection of individual liberties from strategies of government suppression that had long existed and had been previously applied against unions, political parties, and ordinary citizens, as well as black people resisting Jim Crow. Civil rights law became a law of

southerners worked affirmatively to preserve segregation in order that "radical" segregationists would not be inflamed. This "moderation," amply demonstrated in the events leading to the Baton Rouge bus boycott, held black citizens hostage to the threats of retribution of white employers and others, leaving black citizens with no avenue to channel their post-World War II aspirations for social change. See Mary J. Hebert, Beyond Black and White: The Civil Rights Movement in Baton Rouge, Louisiana, 1945–1972 (1999) (Ph.D. dissertation, Louisiana State University). In Baton Rouge a modification of bus rules that preserved segregation while allowing the bus company to fill more seats with the black riders who constituted more than 80% of the bus company's customers prompted a strike by white bus drivers who saw segregation threatened. The city responded by rescinding the ordinance. In response black bus riders, emboldened by decisions like *Morgan*, boycotted and succeeded in extracting a reversal from the city. While the boycott was prompted by agitation by black World War II veterans and occurred in a town filled with urbanized and relatively well educated and wealthy black citizens, it is not clear that the numerous workers who risked their jobs and futures by participating in the boycott would have done so in the first place without the encouragement of Supreme Court decisions.

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anti-discrimination and civil liberties in no small part because the civil rights movement was a grass roots protest movement challenging entrenched government power where the electoral process provided no receptive hearing.\textsuperscript{67}

Civil rights law developed in response to the civil rights movement in at least two significant ways. First, the courts crafted a system of enforcing civil liberties which provided an opportunity to develop substantive constitutional rights.\textsuperscript{68} The central aspect of this system was \textit{Monroe v. Pape} and the revival of 42 U.S.C. § 1983 as a tool for rights enforcement. Following its precedent in \textit{Monroe}, the Court eventually revived 42 U.S.C. § 1982,\textsuperscript{69} 1985(3),\textsuperscript{70} and 1981.\textsuperscript{71} Each of these “revivals” gave force to a statute which had been dormant for decades. The Court’s efforts to divine the meaning of these 100 year old statutes generated much controversy.\textsuperscript{72} In any case, the revivals can be seen as an effective response to the civil rights movement which avoided constitutional issues and respected congressional intent (albeit 100 year old intent).\textsuperscript{73}

These revivals were controversial beyond the fact that they rested on perhaps shaky readings of ancient legislative purpose. Many viewed the Court as being activist, reaching out to participate in the civil rights movement and as using the statutes as mere pretexts for that participation.\textsuperscript{74} Significantly, those critics argued that the Court should have waited for the sitting Congress to respond to civil rights

\textsuperscript{67} This is the construction, of course, of \textit{Carolene Products}’ footnote 4. United States v. Carolene Products, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 784 n.4 (1938). These protests, and the suppression of them, heightened the importance of civil liberties in dismantling Jim Crow as well as highlighted the necessity of civil liberties protections in a large, federal state. See, e.g., N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163 (1958) (privacy and associational rights); Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248 (1961) (right to fair proceedings); Georgia v. Rachel, 384 U.S. 780, 86 S. Ct. 1783 (1966) (removal right necessary to ensure fair proceedings).


\textsuperscript{69} \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409, 88 S. Ct. 2186 (1968)


\textsuperscript{73} See White, \textit{Vindicating Rights}, supra note 22, at 160–93.

\textsuperscript{74} See, e.g., Robert A. Burt, The Constitution in Crisis 308–09 (1992) (discussing the court’s activism in deciding \textit{Jones}).
activism. This criticism is buttressed by the fact that Congress did respond in almost every area which the Court revived Reconstruction-era statutes. Congress enacted the omnibus Civil Rights Act in 1964, duplicating and exceeding the Court’s decisions on § 1981 and the Equal Protection Clause of the Fourteenth Amendment. It passed the Voting Rights Act of 1965 surpassing the Court’s gerrymandering and one-man-one-vote decisions under the Fourteenth Amendment. And, Congress adopted the Fair Housing Act of 1968, providing a more detailed enforcement scheme than developed by the Court under § 1982 and its constitutional decisions on restrictive covenants. Each of Congress’ enactments were express responses to the civil rights movement, the often violent suppression of that movement, and the violence associated with the frustration growing out of the limited success of the movement in achieving its goals.

The “revival” of Reconstruction-era civil rights law became symbolic of the expansion of civil rights law generally. Thus, the revival period in civil rights law emerged in direct and indirect response to the Civil Rights Movement. The question, then, is not whether there was a revival, but rather how do we define the limiting period and what do we make of it.

B. A Limiting Period

The notion of a limiting period has considerable intuitive force. The notion underlies conservative and liberal discussion of civil rights. Progressives see the emergence of a limiting period as unjustified and, sometimes, malicious; rights conservatives view the period as necessary to correct judicial excesses, especially of the Warren court. Both sides, nevertheless accept the notion that the last few decades have witnessed the restriction of rights developed during the revival period.

Indeed, almost from the time Monroe was decided, opposition to the revival interpretations was heard. It is, nevertheless, difficult to

75. Id. See also Samuel Estreicher, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 474–77 (1974) (reconciliation between revival of reconstruction era statutes and recent civil rights statutes needed.)
79. See White, Vindicating Rights, supra note 22, at 195.
80. This opposition, focusing on the deleterious effect of civil rights on federalism, is vigorously voiced in Monroe itself, in Justice Frankfurter’s dissent.
locate a limiting period as the Court issued decisions significantly expanding the reach of the Reconstruction-era acts well into the 1970s.\(^1\) But as with other issues, a review of the decisional law only tells part of the story. The beginning of the limiting period can be fairly located at the Court’s invalidation of a medical school affirmative action admissions program in *Regents of the University of California v. Bakke.*\(^2\) Though couched in the language of balancing, *Bakke* represented a shift in the conception of the goal of civil rights law.\(^3\) Applying a “color-blind” requirement in Fourteenth Amendment interpretation, the court re-affirmed an “equal treatment” over equal results approach to addressing racial discrimination and disparities in contemporary American society. *Bakke* symbolized and gave effect to a growing hostile reaction to the civil rights movement.


and to judicial attempts to dismantle our segregated society. Whatever the motivation, the shift represented the view, still prevalent, that the civil rights movement occasioned special treatment for some at the expense of others.

The volatile issue of race and race equity, the subtext of Bakke, gave new life to old arguments over the proper powers of federal courts in vindicating rights and the content of those rights themselves. Bakke was thus at once (1) an attempt to reconcile the view that same treatment was mandated by law with the broad equity powers used by federal courts to remedy injustice and (2) an attack on the specific race-conscious remedies used voluntarily and pursuant to court order to remedy years of Jim Crow. The highly controversial use of broad remedial authority to desegregate public schools, which had already bred resentment, were at once threatened by an equal treatment limitation. Rights discourse's implicit reference to "oppression," subtly assumed in early desegregation cases as well as the revival cases, was by then the subject of considerable debate. In the years that followed, the broad commerce clause based approaches such as the disparate impact proof of Griggs v. Duke Power were attacked for punishing unintentional (and therefore, presumably, non-discriminatory) action. The private action reach of §§ 1981 and 1982 was criticized as not supported by the statutes’

84. See, e.g., Raoul Berger, Government by Judiciary, supra note 35; Lino Graglia, Disaster by Decree, supra note 35.
86. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186 (1968) ("In this setting [the local outcroppings of a spirit of hostility toward Negroes] it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws.").
legislative history and purpose. And, § 1983 cases were often denounced for treating mere torts as constitutional violations.

In 1989 several limiting decisions left revival supporters disenchanted and angry. City of Richmond v. Croson ended much speculation on the meaning of Bakke for voluntary affirmative action plans undertaken by state governments, imposing the strictest scrutiny to allow such plans only when specific discrimination was identified and only if other “less discriminatory means” were unavailable. Wards Cove Packing v. Antonio announced several limitations on the Griggs proof formula, prohibiting inter-workforce comparisons and requiring sophisticated correlations between an employer’s workforce and the available pool of qualified employees. And, in Patterson v. McClean Credit Union, the Court limited the reach of § 1981 to the formation of contracts, after threatening to reverse the revival decision in Runyon outright.

93. Professor William N. Eskridge, Jr. captures the frustration of many with the 1989 Supreme Court decisions. Describing the Court's rejection of Brenda Patterson's racial harassment claim under § 1981's guarantee to all persons of the same rights as white citizens to make and enforce contracts, Patterson, 491 U.S. 164, 109 S. Ct. 2363 (1989), Eskridge says:

The Court . . . reasoned, in part, that interpreting section 1981 to cover claims of on-the-job racial harassment would interfere with the operation of Congress' more recent regulation of workplace discrimination in title VII . . . .

Ironically, however, the Court was giving title VII a narrow construction. [T]he Court in Wards Cove Packing Co. v. Atonio [490 U.S. 642, 109 S. Ct. 2115 (1989)] held that in discriminatory impact cases under title VII, the employee must prove not only a disparate impact, but also that the employer has no reasonable business justification for its discriminatory practices. [A] Court divided on other issues indicated in Price Waterhouse v. Hopkins [490 U.S. 228, 109 S. Ct. 1775 (1989)] that employment decisions motivated in part by prejudice do not violate title VII if the employer can show after the fact that the same decision would have been made irrespective of the intentional discrimination.

Following the trend . . . the Court held in Martin v. Wilkes [490 U.S. 755, 109 S. Ct. 2180 (1989)] that white employees who were not parties to the original litigation could nonetheless challenge court-approved consent decrees providing for affirmative action to remedy past violations of title VII and the fourteenth amendment. [It also held] in Lorance v. AT&T Technologies [490 U.S. 900, 109 S. Ct. 2261 (1989)], that title VII's statute of limitations for challenging seniority plans begins to run when the plan is adopted [and limited attorneys fees awards against
These decisions brought congressional reversal\(^{94}\) but only after a reenactment of the debate surrounding the Revival. After one presidential veto, the resulting Civil Rights Act of 1991 pleased few.\(^{95}\) Revival advocates continued to smart from the narrowing decisions and felt the act offered only the barest salvation.\(^{96}\) Opponents of the revival decisions saw the Act as well as the 1989 decisions it remedied as perpetuating the revival decisions they disdained.\(^{97}\) This hottest of recent political maelstroms notwithstanding, Title VII continues to be a powerful, if limited tool for remedying workplace discrimination and, ultimately, achieving racial equity in the workplace. Sections 1981 and 1982 retain the full force and power of their revival incarnations. Indeed, § 1981 has been statutorily buttressed with new, more explicit language, extending it to terms and conditions of contracts.

Section 1983 cases, also limited to some degree in 1989 by the court’s restrictive view of municipal liability for failure to train its officers in *Canton v. Harris*,\(^ {98}\) continue to proliferate in legion.\(^ {99}\)

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96. See, e.g., id.


99. Section 1983 has been limited in two distinct ways. First, pursuant to its direct approach, the Court has limited the rights remediable in § 1983 litigation. Constitutional rights have been “limited” in *Bakke*-like cases through the identification of conflicts between rights recipients. Courts are thus charged with anticipating conflicts between individuals’ rights, *compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989) (plurality opinion) (invalidating voluntary affirmative action plan) and *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) (allowing challenge to facially neutral but apparently race-based reapportionment plan), or hearing challenges to remedial orders by non-parties who feel deprived. *See Martin v. Wilkes*, 490 U.S. 755, 109 S. Ct. 2180 (1989) (allowing challenge to consent decree by aggrieved non-parties). Constitutional rights have also been limited through the direct limitation of the rights recognized. In procedural due process cases this takes place at three stages: (1) when an injury is a deprivation of rights, *see Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976) and *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972); (2) when an actor “deprives” a plaintiff of a right, *compare Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981) with *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1983); and (3) whether there are adequate post-deprivation remedies available, *see Parratt*, 451
Only the equality approach of § 1985(3) was fundamentally changed in the limiting period, the promise of a powerful tool for vindicating rights survived to the 1990s with only the narrowest scope (apparently that of the facts of Griffin). When the Alexandria Women’s Health Clinic invoked the statute against an abortion protester alleged to have conspired to deprive the clinic’s patients of the right to travel and the right to an abortion, the outcome was by no means certain, notwithstanding the clinic’s duplication of the Griffin language. The complete death of § 1985(3) will be shown later; however, it remains to be seen why this statute fared so badly when its 1871 counterpart, § 1983, appears to have suffered the limiting period with little effect (indeed, among the several approaches, the fewest). In any case, § 1985(3) appears to be an especially promising ground for studying the processes that undercut all of civil rights law while leaving these other statutory causes of action apparently available.

U.S. 527, 101 S. Ct. 1908. Constitutional rights, finally, have been limited through inquiry into against whom may an injured party claim deprivations of rights. See Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989) (no state protected right against third party actions). Although conceptually distinct from those procedural due process cases that have had a limiting effect, the incorporation doctrine has also operated to restrict the constitutional rights remediable under § 1983. Compare Twining v. State of New Jersey, 211 U.S. 78, 29 S. Ct. 14 (1908) (establishing limited incorporation doctrine: “it is not so because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law”) and Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672 (1947) (Black, J., dissenting) (“[I] would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights.”).

For federal statutory rights Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502 (1980), appeared to have extended the reach of § 1983, despite some contrary legislative history; however, subsequent cases have limited the reach of this holding, perhaps undercutting it. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1, 101 S. Ct. 2615 (1981) (requiring intent of congress to allow private right of action).

The second, indirect limiting approach in § 1983 cases has been the attack on the statute as inconsistent with federalism. While this concern has informed the Court’s recognition of rights deprivations, e.g. Paul v. Davis, supra, it is most prominent in the attack on the lack of an exhaustion of state remedies requirement in Younger abstention cases. See Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). Although the application of Younger to cases requesting only compensatory relief is unclear, the Court’s reading of Younger to require state resolution of civil suits, in the absence of an argument that the civil action is in furtherance of the criminal law, see Trainor v. Hernandez, 431 U.S. 434, 97 S. Ct. 1911 (1977), appears to undercut the view that § 1983 changed the federal relationship. See Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151 (1972) (“legislative history makes evident that Congress clearly conceived that it was altering the relationship between the states and the nation with respect to the protection of federally created rights”).
C. Defining a Limiting Period

If some support for a limiting period can be noted in the cases, the more significant question remains: how particularly is a limiting period defined? At least three rough bases are immediately apparent: the intent of the courts, the outcomes in the cases, or the structure imposed on recovery (that is, the legal process of vindication of rights). The limiting period is here defined in terms of the third criterion.

Intent, like the notion of a limiting period itself, possesses considerable intuitive appeal as an explanation. However, intent is very difficult to support. While commentators may possess insight into the proclivities of jurists, especially perhaps when the commentators are former clerks, divining an aggregate of a court’s intent is an inherently suspect enterprise. It is all the more difficult to transfer assessments of any single court’s “intent,” however well founded, to the entire legal system. Perhaps more importantly, a focus on the courts’ intent seems to presuppose that courts are incapable of manifesting hostility to social change or anti-discrimination without also abandoning its allegiance to rights. Indeed, this appears to have been precisely what courts have been able to do in response to the Second Reconstruction.100

A second tempting method for testing the existence of a paradigm shift in the judiciary is a focus on outcomes. This approach is especially appealing because, unlike the intent basis, a focus on outcomes is amenable to empirical tabulation. Cases can be read and the courts’ position on various social conditions, moral positions, or specific groups can be collected. Courts can be characterized as pro-abortion, anti-business, or pro-plaintiff in the clear (if hollow) way that only scientific positivism can offer. All manner of forecasts, from optimism to gloom and doom, can be attached to trends attributed to the judiciary. Indeed, it is all too easy today to have the on-line computer databases generate all the cases on affirmative action and determine, for example, that most court decisions today uphold challenges to such plans. In this manner a limiting period might be “proved;” however, such a method of identifying a limiting period is troublesome.

In the absence of a consensus on what justice means, such tabulations possess little that is truly revealing; in a very important way they only condense or index what is in the database: litigation

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100. Indeed, black students remain in poor schools despite the promise of Brown, not because the court has rejected the notion of rights, but because it has proclaimed that the rights of others or limits on its powers preempt most remedies that might have fulfilled Brown’s promise.
results. To say that the court has cut back on rights, even if shown by
data documenting some absolute reversal in outcomes, says little
about whether the alleged reversal is unjust, improper, or even
constitutes abandonment of "rights" as opposed to particular rights or
extension of rights, or recover in particular fora.

Furthermore, if the categories are group-based they suffer the
additional problem that the limitation may be explained as justified
by externalities. So employment differentials that were readily
explained as the product of discrimination prior to the mid-1960s,
today are attributed by some to choice, qualification disparities, and
even innate disabilities.\textsuperscript{101} In the face of such explanations, it is not
sufficient to say only that the explanations inaccurately describe the
existence of discrimination, much less whether the courts have cut
back on rights. Such a response distorts any assessment of the
judiciary's performance. Of course any legal system must be judged
by its ability to respond to and resolve social problems and atrocities
and preserve the generalized equality of the citizenry. However,
evaluation of such a system on the terms of its performance relative
to particular groups or issues ignores that, in pluralistic societies,
groups and their visions of normatively acceptable outcomes are often
in irreconcilable conflict. Evaluation of a judiciary on the basis of
outcomes can give no instruction on resolving these conflicts and, as
importantly, places no checks on power. By merely insisting that a
legal system respond to one crisis or another, without more, the rule
of law is hung on the whims of the day. When the climate changes,
the powers of government, enhanced to fix a problem now maligned,
will be ushered to the aid of enhancing those problems. Indeed, any
analysis of a judiciary limited only to outcomes becomes dependent
on the whims of the institutions' constituent members; there is no rule
of law there.

Any limiting period need be determined by an analysis of changes
in the courts' allegiance to a priori structural commitments of the
system itself. Such an approach not only permits analysis of sea
changes in institutions but allows for critique of the fidelity of judicial
institutions to the rule of law. Further, such an approach is the only
way to determine shifts in the quality, as opposed to the content, of a
legal system.

\textsuperscript{101} Consider, for example, EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th
Cir. 1988) (disparity in female commission salespersons attributed to women's
desire for security of flat salary). See also Kingsley R. Browne, Statistical Proof
that central assumption of statistical proofs of discrimination— that non-
discriminating employer's workforce would roughly duplicate the qualified
population— is false).
Accordingly, what distinguishes the limiting period from the revival period is that the justices of the limiting period courts abandon their allegiance to structural commitments, albeit in order to correct perceived defects in the rights vindication formulae established during the revival period. (Their claim that the revival period judges abandoned those commitments is insupportable in the case of federalism and civil rights statutes.)^102 The following pages show something far more troubling, however—judges in the limiting period escaping all institutional restraints in order to interpret statutes (either conservatively or progressively) as they believe they should. In the case of § 1985(3), these rejections of institutional restraint prove merely restrictive, notwithstanding the often sympathetic origin of the diversions.

II. DEFINING THE ACTIVIST INSECURITY IN CIVIL RIGHTS LAW

The activist insecurity^103 is an alternative explanation of judicial behavior on civil rights questions. It operates across revival and limiting periods and applies to all the post- Brown Courts. It is a supplement to the "conservative judges" explanation (and similar political explanations) of the demise of civil rights law. It is, however, a proposed replacement for the predominant vision of the dilemma of civil rights law: rather than asking how to reconcile civil rights law with notions of judicial restraint, it asks how must civil rights law be conceived to remain true to rule of law notions?

The conventional vision of civil rights law turns on the role of judicial activism.^104 Fidelity to principles of appropriate judicial

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102. While the balances struck in the development of rights vindication models and substantive conceptions of rights may be characterized as excessively interfering with state prerogatives, it is not accurate to suggest that those judges did not factor concerns with federalism into their analyses. Indeed, in the case of the various NAACP membership list cases, Professor Tushnet provides evidence that was the primary consideration on the Courts' mind.

103. See this author's description of the birth of the activist insecurity in the Supreme Court's treatment of Brown. White, Activist Insecurity, supra note 38.

104. Judicial Activism is a chameleon-hued notion, defined vaguely and mostly in the negative. That is, it is usually regarded as a departure from tenants of judicial restraint such as those offered by Charles Lamb: (1) judges should be reluctant to exercise judicial review; (2) judges should avoid constitutional questions where possible; (3) judges should adhere to the record below; (4) judges should issue no advisory opinions; (5) judges should not resolve "political questions"; and (6) judges should decide cases based on law rather than opinion. See Charles Lamb, Activism and Restraint, in Supreme Court Activism and Restraint 7, 15–20 (Stephen C. Halpern & Charles M. Lamb eds., 1982). See also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345–48, 56 S. Ct. 466, 482–484 (1936) (Brandeis, J., concurring) (seven cannons of judicial behavior).

For a discussion of the charge of activism against the Warren Court, see White,
behavior means avoidance of judicial activism. This vision is embraced across the political spectrum. The Progressive version of this vision argues that activism was a necessary antidote to the conservative judicial activism that ended Reconstruction. Progressives currently decry the conservative activism of the Rehnquist court. 105 Conservatives decry the activism of the Warren Court and, recently admitting the activism of the Rehnquist court, argue it is necessary to put things right. 106 Liberals have consistently argued against activism, but have struggled to discover how civil rights law can be reconciled with principles of judicial restraint.

In cases involving social change, however, activism itself has not been the formative principle in judicial behavior as much as concern over being regarded as activist. That is, courts have not decided to abandon principles of judicial restraint so much as they have formed those principles to conform with the demands of the legal issues with which they are confronted and their view of how those issues ought be resolved. Judicial restraint suggests that courts, as bodies of limited democratic legitimacy, ought defer to the political branches in resolving normative disputes: courts should judge; legislatures should legislate. Activist judges disregard the political branches and the structural implications of the Constitution to achieve normative policy results they find attractive. This article maintains that this sort of activism is exceedingly rare. Rather the courts have generally adhered to notions of judicial restraint in each of its major shifts in civil rights law.

But courts have consistently avoided being the agent of social change, even if the law in question requires it, by modifying judicial principles in accordance with two moves: the "narrowing move" and the "generalizing move." The former includes both the avoidance of jurisdiction actually granted through manufacture of sharp limitations on its exercise and the requirement of strict compliance with most narrow and strict requirements of recovery. The latter consists of the abandonment of the narrow requirements when plaintiffs have complied with them in favor of general principles of law on which to rest recovery.

The activist insecurity is a radical rejection of Cohen v. Virginia's injunction that the Supreme Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 107 In cases involving social change, courts

105. See, e.g., Dershowitz, supra note 43.
106. See, e.g., Wilkinson, supra note 36.
influenced by the activist insecurity commit "treason to the constitution"\textsuperscript{108} by avoiding decision. When required to decide, these courts sully the \textit{Siler} doctrine\textsuperscript{109} by generalizing the question in search of weighty commands to provide an escape or to buttress the narrow legal command that required decision in the first place.

The narrowing move is seen in courts’ requirement that plaintiffs meticulously comply with all extant procedural rules (as well as newly created limitations like "heightened pleading")\textsuperscript{110} while identifying specific, narrow legal grounds for their recovery. That is, the Court has been generally unimpressed with generalized legal claims. And, where there is both a general and specific ground for action, the courts have usually required reliance on the more narrow. The procedural and substantive components of the narrowing move compliment each other. A civil rights plaintiff is not free to rely on notice pleading and develop her cause of action as discovery and motion practice proceeds. Rather she must state her claim with particularity and connect it to particular statutory or constitutional violations, selecting from among them the most narrow.\textsuperscript{111} Though it can be argued that these requirements have been extended to onerous degrees by conservative courts, these requirements are generally consistent with the longstanding federal court practice and are independently justifiable.

However, when plaintiffs have complied with the foregoing requirements and still seem to present a claim requiring social change, judges have generally sought to escape the requirement of ordering social change by generalizing the claim. Typically these judges find sanctuary in more general principles found in the constitution, the common law, the inherent structure of government. This generalizing move, following the particularizing requirements

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\textsuperscript{108} \textit{Cohens}, 19 U.S. (6 Wheat.) at 404.


\textsuperscript{110} \textit{See} White, \textit{Foreword}, supra note 11, at 618-21, note 28 and text accompanying note 28.

\textsuperscript{111} This remains the case even in jurisdictions rejecting so called "heightened pleading" requirements as the normal operation of individual immunity law demands that plaintiffs show the defendants’ behavior violated clearly established law. \textit{See} \textit{Saucier v. Katz}, 533 U.S. 194, 121 S. Ct. 2151 (2001). \textit{Saucier} pointed courts to examine the facts of the case from the onset to determine if a constitutional right alleged could be established, \textit{id.} at 201, and, if a claim could be established, determine, "in light of the specific context of the case," \textit{id.}, if the claim could be supported. The Court recognized that this second inquiry would require development of the facts surrounding the incident, but the Court emphasized that courts must not allow this process to undercut the goals of immunity law – to wit, limiting defendants’ engagement in proceedings like discovery.
the courts have generally imposed, amounts to a bait and switch. Plaintiffs are asked to prove particular requirements only to have their claim subject to a general requirement.

To be sure, this generalizing does not always result in denial of the plaintiff's claim. It is as likely that judges consumed with the activist insecurity will resort to the general ground to buttress a decision for social change as to defeat it. The key is that the activist insecurity undercuts the idea that civil rights law is law which can stand on its own. If social change is required, the more general precepts add to the view that what mandates change are principles of equity. This generalizing is also troubling on its own as it has reflected a tendency to undercut the very notions of judicial restraint that animate it in the first place. The courts avoid the requirements of binding constitutional precedent by resorting to general notions of law, common law principles and the sort. Legislation is eviscerated by placing it in a constitutional context or reading its terms as pregnant with common law notions. The apparent restraint of the courts is revealed a farce.

While it is likely the case that these judicial moves are available to courts in cases that do not implicate social change, their application to civil rights cases is unique in two respects. First, the application of the narrowing move is in tension with the general goal of civil rights law to ensure citizens' rights and with its more particular role in eliminating the vestiges of Jim Crow. Insofar as the courts choose to focus claims narrowly, its ability to address either of the goals of civil rights law is automatically prejudiced. Second, the generalizing move tends to undercut the legal character of civil rights law. While the application of the generalizing move defeats most claims, it is perfectly suitable to upholding, supporting, and justifying a civil rights claim. In either case, this use of generalization undercuts the value of civil rights precedent, makes the law vulnerable to being subverted by hostile judges, and makes civil rights litigation expensive and uncertain.

A. Requiring the Narrowest Legal Grounds

The first aspect of the activist insecurity is courts' insistence that plaintiffs seeking social change identify the narrowest grounds upon which to rest their claim. This requirement is not the same as a court

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112. This is reflected, for example, in the Court's past practice of giving Title VII, the employment discrimination statute enacted as part of the Civil Rights Act of 1964, a liberal construction consistent with its remedial purposes. See, e.g., Griggs v. Duke Power, 401 U.S. 424, 91 S. Ct. 849 (1971). For a defense of this approach in Griggs, see Blumrosen, supra note 87, at 73–74.
resting its decision on the narrowest ground available. Rather it is a resort to narrower legal grounds as a limit-defining rule occupying the whole of the field. So if there is a narrower ground for recovery, it implicitly excludes broader grounds that might, otherwise, appear to be alternative or complementary grounds for recovery. This doctrine does place on plaintiffs seeking social change a heavy burden to frame their claim as narrowly as the situation will allow. In effect, this aspect of the activist insecurity amounts to a fact pleading requirement, one which is compounded by specific heightened pleading rules in some jurisdictions.\textsuperscript{113}

For civil rights teachers, the obvious and longstanding example of this narrowing approach is in the special context of prisoner litigation. In \textit{Preiser v. Rodriguez},\textsuperscript{114} the Court held that a prisoner could not use § 1983 to challenge a deprivation of liberty as a procedural due process violation because it went to the fact or duration of his confinement. Such challenges, the Court noted, duplicated habeas corpus claims. As such, prisoners challenging prison action that touched on the fact and duration of confinement were required to pursue their claims under habeas. In 1994 the Court underscored \textit{Preiser}, ruling that, even in cases which were framed to avoid challenging the fact or duration of confinement – cases praying only for damages – the plaintiff did not have a § 1983 cause of action because a decision in his favor would amount to challenging the propriety of his confinement.\textsuperscript{115}

This approach is most dramatically evident in the Court’s decisions in \textit{O’Shea v. Littleton}\textsuperscript{116} and \textit{Rizzo v. Goode}.\textsuperscript{117} In \textit{O’Shea} a class of plaintiffs claimed that they had been subjected to discriminatory enforcement of the criminal law. They argued that at every stage of the criminal process in their small city, black citizens were treated more harshly. They were more likely to be stopped by police, arrested for offenses, charged with a crime, denied bail, tried for the crime, convicted, and sentenced to longer sentences. The nature of their claim focused on the uniform and interrelated nature of this process. The Court rejected their general attack on the operation of the criminal justice system.

\textsuperscript{113} For example, the Fifth Circuit’s revival of heightened pleading requirements in post \textit{Leatherman} cases. See White, \textit{Foreword, supra} note 11, at 618-21, note 28 and text accompanying note 28.
\textsuperscript{114} 411 U.S. 475, 93 S. Ct. 1827 (1973).
\textsuperscript{115} Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994) (Section 1983 claim does not arise until prisoner found innocent or cleared of charges for which he was convicted). See also Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 2364 (1997) (extending \textit{Heck} to case challenging only \textit{procedures} for deducting good time credits).
\textsuperscript{117} 423 U.S. 362, 96 S. Ct. 598 (1976).
The plaintiffs in *Rizzo* were also a class which claimed that widespread illegal and unconstitutional police conduct was aimed at minority citizens. Theirs was a claim that the city ran a system that supported illegal police brutality. The court applied *O'Shea* to their complaints and rejected their claims as not stating a justiciable injury.

In *O'Shea* and *Rizzo* the Court comes to perhaps defendable outcomes on rather strange doctrinal grounds. Both decisions are built upon the prohibitions in standing law against suits by parties with generalized injuries. In taxpayer and citizen suits, the taxpayer or citizen, whose interest in the litigation is nominal and diffuse, is denied standing. The problem is that their injury is insubstantial. In *O'Shea* and *Rizzo*, the Court turns this view on its head. The plaintiffs' claims fail in those cases because the plaintiffs are challenging multiple parties and general practices. In these cases as well as in the citizen suits the claim can be said to be generalized, but there is little in common between these notions of generality. In the citizen standing suits, it is the injury that is general; in *O'Shea* and *Rizzo* it is the claim of illegality that is general. Nevertheless, the *O'Shea* and *Rizzo* Courts' opinions do not really turn on the generality of the claims, despite the criticism thereof. Instead, the cases are transformed into standing suits.

Both decisions eventually refer to the particular plaintiffs' inability to speak for others or to claim that they will be subject to mistreatment in the future.

Although it was claimed . . . that particular members of the plaintiff class had actually suffered from alleged unconstitutional practices, [the *O'Shea* Court] observed that “[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects . . .” Past wrongs were evidence bearing on “whether there is a real and immediate threat of repeated injury . . .” But the prospect of future injury rested “on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners.”

Of course, courts have allowed plaintiffs to show that, having been subject to illegal action and planning to continue that behavior they have shown cognizable injury. Consequently, *O'Shea* and *Rizzo*

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119. In Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209 (1974), the Court found that a protester threatened with arrested for handing out handbills did state
must hold, as the Court ultimately reaffirms in *Los Angeles v. Lyons*,\(^{120}\) that it cannot take cognizance of a claim based on a future expectation of violating the law. Presumably, the court means to limit this to future expectations of violating ordinary criminal law and does not mean to apply this to otherwise protected speech which might violate a criminal ordinance.

This is not to say that *O’Shea, Rizzo, and Lyons* were necessarily wrongly decided. Rather, it is to point to the Court’s aversion to generalized claims. Even where those claims seem to overcome the limitations of general canons of constitutional practice or justiciability requirements, the Court remains adverse to such claims.

The narrowing requirement of the activist insecurity is more apparent in cases like *Schweiker v. Chilicky*\(^{121}\) and *United States v. Stanley*.\(^{122}\) In *Schweiker* the Supreme Court denied a *Bivens* damages action to plaintiffs who claimed improper denial of social security benefits. The Court reasoned that the existence of the statutory scheme made a *Bivens* action inappropriate even though the statute did not provide a cause of action for damages. In *Stanley* the Court denied a *Bivens* action against the military which had tested LSD on the plaintiff. The Court held that Congress’ decision to exempt the military from the Federal Tort Claims Act required that it deny a *Bivens* cause of action.\(^{123}\) Of course the *Bivens* cause of action is one implied by the Court, providing a ready explanation for the Court’s reluctance to allow the plaintiff to proceed on the more general ground.\(^{124}\) That the claims involved in *Stanley* were constitutional also lends support to the Court’s decision to avoid recognizing the *Bivens* claim, in an effort to comply with the *Siler* doctrine.

The Court recently reaffirmed its *Schweiker* and *Stanley* approaches in *Correctional Services v. Malesco*.\(^{125}\) In *Malesco*, the Court pointed potential *Bivens* plaintiffs to narrower statutory grounds when available. The decision comes close to abandoning *Bivins* claims altogether, by focusing the question on whether Congress has acted in any way in the field from which the question

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120. 461 U.S. at 105–06, 103 S. Ct. at 1667.
123. Id. at 683, 107 S. Ct. at 3063–64.
124. *Accord* Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404 (1983). *Bush* was a First Amendment retaliation claim by government employee. Although the court agreed that the civil service remedy available to the plaintiff was incomplete, the court saw that system as extent of remedy provided by congress. *Id.* at 373, 380–88.
comes. This question was always lurking in the background of *Bivens* suits. As such, the implication of *Malesco* is an extension of the Court’s narrow view of the “and laws” language in § 1983 and the Court’s restrictions on recognizing implied rights of action.

These efforts at limitation pale in comparison with *Graham v. Connor*. The *Graham* Court memorialized the specificity requirement in civil rights cases. The plaintiff in *Graham* was suffering from “low sugar” related to his diabetic condition. After running into a store to purchase juice and returning when the line was too long, he caught the attention of a police officer who stopped him to investigate the suspicious activity. The officer ignored his claims of illness, precipitating a series of events culminating in his release with severe injuries. He challenged the standard under which the trial court issued a directed verdict for the defendants. The Supreme Court vacated and remanded.

The lower courts had analyzed Graham’s claim under the four part, substantive due process test developed in *Johnson v. Glick*, which included the requirement that plaintiff show that excessive force was inflicted “maliciously or sadistically.” In holding that the claim should have been analyzed under the objective reasonableness test of the Fourth Amendment, the Court made it easier for Graham to prosect his claim against the officers he encountered. This easing of the requirements for Graham made more difficult the litigation of civil rights claims generally as the Court expressly endorsed the specificity requirement in § 1983 cases.

The *Graham* Court correctly recognized that “§ 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’” The Court saw the departure from this fact as the source of error in the courts below: “many courts have seemed to assume . . . that there is a generic ‘right’

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126. *See* Carlson v. Green, 446 U.S. 14, 18, 100 S. Ct. 1468, 147 (1980) (*Bivens* action available unless (1) defendant demonstrates specific factors or (2) “Congress has provided an alternative remedy”).
to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence.'\textsuperscript{132} Having framed the problem below as deriving from courts which ascribe to § 1983 substantive content, the Court did not restrict itself to correcting that error, but instead articulated a new and severe rule for § 1983 litigation: a requirement that plaintiffs rely on the most specific rights applicable.\textsuperscript{133}

Section 1983 "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application."\textsuperscript{134} Quoting from Baker the Court reemphasized its position: "The first inquiry in any § 1983 suit is 'to isolate the precise constitutional violation with which [the defendant] is charged.'\textsuperscript{135} The Court then intimates that 'in most instances' this requirement means that the narrower Fourth and Eighth Amendments, rather than the broader due process clause, will govern the litigation.\textsuperscript{136} It is fair to view this injunction as pointing in the same direction as Stanley; that is, it implies that rights that fall outside the protection of the Fourth and Eighth Amendments ought not be protected by the more general constitutional grounds away from which the court points plaintiffs. This view is supported by the court's summary declaration:

Today we make explicit . . . that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than the "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.\textsuperscript{137}

\textsuperscript{132} Graham, 490 U.S. at 393, 109 S. Ct. at 1870 (quoting from Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987) (en banc) ("There are . . . certain basic principles in section 1983 jurisprudence as it relates to claims of excessive force that are beyond question [,][w]hether the factual circumstances involve an arrestee, a pretrial detainee or a prisoner."). As if unsatisfied that the point is clear, the next paragraph includes a third reference to specificity. "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right." Id. at 394, 109 S. Ct. at 1871.

\textsuperscript{133} Id. at 393–94, 109 S. Ct. at 1870–71.

\textsuperscript{134} Id., 109 S. Ct. at 1870 (emphasis added).

\textsuperscript{135} Id., 109 S. Ct. at 1870 (quoting from Baker, 433 U.S. at 140, 99 S. Ct at 2692) (emphasis added).

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 395, 109 S. Ct. at 1871 (first emphasis in original, second added).
Notwithstanding the constitutional context of *Graham*, there is nothing limiting its specificity requirements to constitutional tort cases. Indeed, *Graham* reflects the Court's activist insecurity-based tendency to allocate cases among grounds for decision. Where the choice is between statutory and constitutional grounds for decision, it has been the court's longstanding practice to avoid decision on constitutional issues.\(^{138}\) Moreover, this approach, known as the *Siler* doctrine, has been used by the Court to point toward the narrower ground for decision in a choice between statutory grounds\(^ {139}\) and to justify resolving a constitutional case on the ground that the jury verdict was reasonable.\(^ {140}\) In general, it should be noted, the narrowing effect of the activist insecurity operates to the advantage of the judicial system. However, this narrowing comes with significant costs.

First, the narrowing approach throttles the development of law. It is clearly a device for limiting the volume of cases the courts hear, if not also providing a device for affirmatively avoiding cases.\(^ {141}\) In

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Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.


This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. This same rule should guide the lower courts as well as this one. We believe that the structure of the problems before the Circuit Court of Appeals required the application of the rule to this case.


141. This is the overt call of some, from Bickle's argument in *The Least Dangerous Branch* to today. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,*
certain constructions, this is precisely what the practice of narrowing the inquiry should do.\textsuperscript{142} Cases undecided leave the law underdeveloped. Second, the narrowing tendency fragments the law into seemingly mutually exclusive bases for recovery. This second problem is open for manipulation by courts seeking to defeat plaintiffs’ claims. It might also produce inefficiencies in litigation that raise the costs of civil rights enforcement. But the predominant cost of the narrowing tendency is the derogation of civil rights law that occurs through its own operation.

This derogation is discussed by Professor Elizabeth Iglesias in her compelling study of the intersection of labor and employment discrimination law.\textsuperscript{143} Professor Iglesias argues that limitations in the protections of Title VII and the NLRA are often obscured . . . because legal interpretation is practiced in and operates through a strategic fragmentation of doctrinal and institutional domains. This fragmentation is, to some degree, inherent in the practice of case by case adjudication, but it has also been significantly exacerated and strategically manipulated by judicial decisions which intentionally separate doctrinal and institutional domains in order to promote specific interests and policies . . . .\textsuperscript{144}

The law of both statutes is degraded “by establishing boundaries between Title VII and the NLRA and invoking the fact of the DFR \textsuperscript{145}—that is, invoking its existence as an alternative avenue of recourse.”\textsuperscript{146} Thus in the allocation of cases between the statutes, the requirement that plaintiffs employ the more specific protection as a means of determining the appropriate statutory protection, the law becomes relatively ineffective for, in Professor Iglesias’ argument, women of color who exist at the intersection of gender, race and employment status.\textsuperscript{147}


\textsuperscript{142} “The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” \textit{See Ashwander}, 297 U.S. at 346, 56 S. Ct. at 482 (Brandeis, J., concurring).


\textsuperscript{144} \textit{Id.} at 399.

\textsuperscript{145} Duty of Fair Representation under the NLRA.

\textsuperscript{146} \textit{Id.} at 406–07.

\textsuperscript{147} Professor Iglesias’ discussion of Emporium Capwell Co. v. Western
The costs of this prong of the activist insecurity might derive "naturally" from the nature of litigation. Moreover, they may be justifiable in any case. Indeed, it may be that in cases involving social change, judges are merely more attuned to the precarious nature of the judicial power. So focused, the narrowing behavior of the activist insecurity-inspired judges is perhaps best understood as those judges' assiduous compliance with the rules and norms of judicial behavior described above. Judges, attuned to their role as judges by the social change possibilities of civil rights law, carefully comply with notions of judicial restraint. The hurdles for plaintiffs are high, but perhaps, where social change is involved, that is as it should be. But what courts tend to do next is less easily justified.

B. Generalizing from the Narrow

The second trait of activist insecurity-infused legal decision making arises only when the first has not operated to abort the social

Addition Community Organization, 420 U.S. 50, 95 S. Ct. 977 (1975), is a nice illustration of her larger analysis. Commenting on the Supreme Court's reading of the issue, she exposes the Court's fragmenting and narrowing behavior.

Analytically, the Court's first and perhaps most significant move was to separate Title VII and the NLRA, or more precisely, to fragment the national labor policy across two doctrinal domains. In rejecting the D.C. Circuit's argument that the mandate of Title VII compelled both the employer and the union to bargain with black workers demanding non-discriminatory employment policies, the Supreme Court distinguished the substantive rights established by Title VII from those established by the NLRA, most specifically, the right to engage in collective action to apply economic pressure in support of collective demands.

* * *

According to the Court, the fact that a particular conduct (like employee opposition to race discriminatory practices) might be protected under Title VII does not mean that it should be protected under the NLRA.

28 Harv. C.R.-C.L. L. Rev. at 422.

Her analysis highlights that the boundary maintenance behavior of the Court is one of identifying mutually exclusive grounds for recovery.

The Court's decision did not simply distinguish the substantive rights established under Title VII and the NLRA. It also held that the substantive rights created under one legal regime would not be enforced through the procedural mechanisms of the other (or at least, that Title VII substantive rights would not be enforced through NLRA procedures, which includes the protection of concerted action). The black workers objected to this result on the grounds that Title VII procedures were "inadequate to effectively secure the rights conferred by Title VII."

Id. at 423. "[T]he Court's decision in Emporium Capwell ensured that the policy promoting the resolution of industrial conflict would be articulated and enforced in one procedural framework and doctrinal domain, while the policy prohibiting race and gender-based discrimination would be articulated and enforced in a very different framework/domain." Id. at 424.
change implications of the litigation. When the risk of social change persists, judges search for reasons to avoid the social change implications in more general principles of law. Failing in that effort, they subvert the law they are required to create by obscuring the narrow legal grounds for the social change they are asked to order, by clothing their decisions in general, imprecise principles. That is, they undermine the legal force of the narrow law with which they insisted plaintiffs comply. This generalizing of civil rights law takes several forms.

First, courts generalize to cover up, and often to subvert, the law which demands social change. This author has argued that the activist insecurity was born in Brown v. Board of Education as a Supreme Court infused with Realist sensibilities sought to cover up the formalist grounds for its reconsideration of Plessy.148 Early in the opinion, the Court reveals the true basis for its opinion: the precedent of Plessy had been undercut by intervening decisions (and perhaps changed social understandings).149 It was required by these facts to reaffirm Plessey or abandon it.150 The choice to abandon Plessy is surely animated by the social science and other considerations which followed, but the necessity of a decision by the Court was not.151 On formal legal grounds, Brown was necessary. But, a realist court could never be comfortable with resting its decision on this ground alone. Concerned with potentially violent objections to the decision, the Court sought to conceal the formalist grounds of its decision in arguments that were appealing to the then dominant Realist sensibilities.152 Almost immediately, this cover subverted the force of the opinion, providing a hook for critics of the outcome who spoke vaguely about correct outcomes but bad law.153 While the Court's resort to the general in Brown was not aimed at subverting the law, the decision sets the framework for obscuring or subverting social change decisions that become readily accessible in subsequent years.

Second, resort to general law is used to limit broad civil rights causes of action. Although § 1983 causes of action are conceived as limited by the need to establish an underlying constitutional violation,154 experience has shown that even severe limitations on

148. See White, Activist Insecurity, supra note 24.
150. White, Activist Insecurity, supra note 24, at 373.
151. Id. at 374.
152. Id. at 374–80.
153. See, e.g., Weschler, supra note 38; Bickel, Segregation, supra note 38. See also White, Activist Insecurity, supra note 24, at 365–68.
154. See White, Vindicating Rights, supra note 22, at 166–176.
constitutional rights do not sufficiently limit the scope and reach of the § 1983 cause of action.\textsuperscript{155} In this light, the Court's recognition of individual immunities can be understood as a resort to the general principle, superimposed on the more narrow statute, to achieve additional limiting effects.\textsuperscript{156} Though not found on the face of § 1983, individual immunities were imposed on the statute because immunities were firmly established in common law at the time the statute was enacted.\textsuperscript{157}

This approach can also be noted in the Court's treatment of Title VI claims, especially the question of whether such claims can be established using evidence of disparate impact. Initially, the Court, in \textit{Lau v. Nichols},\textsuperscript{158} extended the Title VII-based approach to the analogous Title VI. By the time the Court decided \textit{Bakke} in 1978,\textsuperscript{159} five justices held that Title VI was remedial only. In other words, it

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\item \textsuperscript{155} Marshall Shapo anticipated this problem as early as 1965, arguing that restriction of the growth of § 1983 litigation could be accomplished only by limiting recovery to cases where the defendants conduct is "outrageous." Shapo, \textit{supra} note 80 at 317. This seems to be the Court's view of the problem in its controversial decision in \textit{Paul v. Davis}, 424 U.S. 693, 96 S. Ct. 1155 (1976). On the other hand, certain recent substantive limitations might be more than adequate to foreclose a wide variety of civil rights claims. \textit{See}, e.g., \textit{DeShaney v. Winnebago County Dept. of Soc. Services}, 489 U.S. 189, 109 S. Ct. 998 (1989).
\item \textsuperscript{156} \textit{See}, e.g., \textit{Saucier v. Katz}, 533 U.S. 194, 121 S. Ct. 2151 (2001). Resort to the common law as a source of content in § 1983 cases has been criticized in Michael Wells, \textit{Constitutional Law and Civil Rights Symposium, Part I: Constitutional Remedies, Section 1983 and the Common Law}, 68 Miss. L.J. 157 (1998). Wells points out that the use of common law in the interpretation of § 1983 is complicated and multi-faceted. \textit{Id.} at 160–76. He determines that the Court's use of common law in this area is misdirected, however, and proposes that it break from subordinating constitutional tort litigation to common law and develop a more independent jurisprudence. \textit{See id.} at 159–60, 222–23. His criticisms reveal, I believe, the kind of use of common law principles to blunt the social change implications of civil rights law generally.
\item \textsuperscript{157} \textit{See} \textit{Pierson v. Ray}, 386 U.S. 547, 87 S. Ct. 1213 (1967). This proposition, a cornerstone of civil rights jurisprudence, turns out to be largely inaccurate. Randy Block has shown that absolute judicial immunity was recognized in only 13 of 37 states at the time § 1983 was enacted. J. Randolph Block, \textit{Stump v. Sparkman and the History of Judicial Immunity}, 1980 Duke L.J. 879, 899. It was not applied to prosecutors until 1896. Compare Griffin v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896) \textit{with} Imbler v. Pachtman, 424 U.S. 409, 421, 96 S. Ct. 984, 990 (1976) (citations omitted). On these points, I am indebted to my student, Alexandra White (no relation), whose excellent class paper discusses these issues. Alexandra White, \textit{The Case for Limiting the Scope of Prosecutorial Immunities Under § 1983: Where Has All the "Well Grounded Historical Reasoning" Gone?} (Paper submitted in fulfillment of requirements of Civil Rights Litigation Course, Spring 2003) (on file with author).
\item \textsuperscript{158} 414 U.S. 563, 94 S. Ct. 786 (1974) (disparate impact available because regulations providing for disparate impact proof are reasonable under the statute).
\item \textsuperscript{159} 438 U.S. 265, 98 S. Ct. 2733.
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lacked substantive content and disparate impact was precluded by the Court's view that the substantive issue in the case was found in the equal protection clause (which it had read to preclude disparate impact in *Washington v. Davis*). The implication of *Lau* that the regulations administering Title VI could add the broader disparate impact proof, was called into question. In *Guardians Assoc. v. Civil Service Comm. of New York*, the court expressly raised these concerns, rejecting an implied right of action for disparate impact under Title VI, but reserving the question of whether regulations providing such a proof could be enforced via a private right of action. Finally, the court barred disparate impact proofs altogether in *Alexander v. Sandoval*. Significantly, by first constitutionalizing Title VI jurisprudence, the Court succeeded in foreclosing a proof that it had initially approved, all the while remaining true to precedent (by avoiding overruling *Lau*).

Third, courts called on to change the social status quo ante often resort to constitutional principle where the narrower legal ground points to social change. In these cases, the goal is precisely to avoid affecting social change. An example of this is found in the 1974 Supreme Court decision in *Mayor of Philadelphia v. Educational Equality League*. *Mayor of Philadelphia* involved a challenge to a complicated state scheme for nominating members to the Philadelphia School Board. The District Court denied plaintiffs' claims under the equal protection clause, but the Circuit Court reversed, arguing that the District Court had ignored probative evidence. The Supreme Court reinstated the District Court decision. Partly, the Supreme Court decision turns on its view that the Circuit Court should not have second guessed the trial court's findings of fact; partly, it turned on the narrowing view that an injunction should not run against a successor officeholder where there is no specific evidence against him. This second, narrowing approach could be seen as anticipating *Lyons* 'limitation on injunctions. But the decision also turned on the generalization of the case, transforming it into a constitutional case on two grounds. First, the

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160. *426 U.S. 229, 96 S. Ct. 2040 (1976).*
161. *453 U.S. 582, 103 S. Ct. 3221 (1983).*
162. *Id. at 645 n.18, 103 S. Ct. at 3255.*
163. *532 U.S. 275, 121 S. Ct. 1511 (2001) (no private right of action exists to enforce disparate impact regulations under Title VI).*
164. The Court distinguishes and limits *Lau* but does not overrule it. *See id.* at 285, 121 S. Ct. at 1519.
166. *Id. at 616–21, 94 S. Ct. at 1331–33.*
167. *Id. at 621–23, 94 S. Ct. at 1333–34.*
Court refers to a vague "separation of powers" issue in the case.\textsuperscript{169} Second, the Court's very decision on the constitutional ground was probably unnecessary.\textsuperscript{170}

The Court acknowledges that "the Mayor's reliance on federal separation-of-powers precedents is in part misplaced, because this case, unlike those authorities, has nothing to do with the tripartite arrangement of the Federal Constitution."\textsuperscript{171} The Court nevertheless relies on this notion to establish that the courts should not interfere with elected officials' exercise of state statute-granted discretion.\textsuperscript{172} Ultimately, the Court holds that its view of the facts in the case makes it unnecessary for it to resolve these issues,\textsuperscript{173} but clearly it is influenced by its view that it ought not interfere with the Mayor's decisions.

More troubling, however, is the Court's eagerness, in the view of Justice White's dissent, to reach the constitutional issue.\textsuperscript{174} The record revealed that the Mayor had, in fact, failed to comply with numerous requirements of the statute in question.\textsuperscript{175} More importantly, the plaintiffs had presented the argument below that the statute itself required affirmative steps to ensure racial diversity on the commission in question.\textsuperscript{176} This requirement, if it were believed,\textsuperscript{177} would have provided a substantial legal ground for plaintiffs to prevail. Justice White argued that the Court should have followed the \textit{Siler} and \textit{Ashwander} doctrines and remanded the case.

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\item 170. The Court defends its focus on constitutional issues by arguing that the state issues were insubstantial. \textit{Id.} at 623–29, 94 S. Ct. 1334–37.
\item 171. \textit{Id.} at 615, 94 S. Ct. at 1330–31.
\item 172. \textit{Id.}
\item 173. \textit{Id.}
\item 175. \textit{Id.} at 624, 94 S. Ct. 1335. The Majority dismisses these departures as unsubstantial, but as White notes in dissent, competing arguments were made below on the import of these departures; the departures must be viewed in the context of competing views of the requirements of the statute, and the trial court refused to rule on either ground. \textit{See id.} at 638–39, 94 S. Ct. 1341–42 (White, J., dissenting).
\item 176. \textit{See id.} at 634, 94 S. Ct. 1339–40.
\item 177. Although the [trial] court did not directly reach the state claim, it though that the legislative history of the Educational Supplement "serves as the background for the facts of which plaintiffs complain," particularly the evidence that the chairman of the Educational Home Rule Charter Commission, which drafted the Educational Supplement, contemplated that the composition of the Panel would 'constitute a balanced representation or cross-section of the people of the entire community — all of the community's ethnic, racial, economic, or geographic element and segments.' \textit{Id.} at 635, 94 S. Ct. 1340 (citations omitted).
\end{itemize}
for proceedings on the state issues. The Majority responded that those issues were insubstantial.

The generalization in Mayor of Philadelphia takes place at the District Court where the judge refused to consider the state law questions and framed the case as solely a constitutional one. As Justice White noticed, this move undercut the plaintiff’s claim, pointed the Supreme Court toward deciding an unnecessary constitutional issue, and, if the plaintiffs had prevailed, would have rooted their victory in the more vague, more difficult to enforce idea of discrimination (as opposed to the statute’s affirmative duty to ensure that the selection commission was representative of the Philadelphia community).

Fourth, courts sometimes generalize by creating general doctrines to superimpose on all civil rights cases. Prominent among these is what has been called “civil rights abstention,” but this approach might also be used to explain the court’s invigorated sovereign immunity law, and especially its reading of congressional power under § 5 of the Fourteenth Amendment.

Civil rights abstention is a mutation of Younger abstention into a broad basis for denying statutorily established access to federal courts on the grounds of comity and federalism. It is rooted in the Court’s extension of Younger to civil cases in Huffman v. Pursue, Ltd. and is related to a shift in the Court’s focus from the “adequacy

178. Justice White though that the Siler doctrine should apply here, noting that Siler, like the case at bar, involved appeal of a constitutional claim. The Court, there also “without benefit of a construction of the statute by the highest court of Kentucky” nevertheless chose to resolve the claim on the state law grounds. Id. at 637, 94 S. Ct. 1341 (citations omitted). The Siler doctrine was reviewable by the court, according to White, despite not having been raised below. “[T]his Court clearly has the power to notice a ‘plain error’ though it is not assigned or specified . . . .” Id. at 642, 94 S. Ct. 1344 (citations omitted). See also Alma Motor Co. v. Timken Co., 329 U.S. 129, 136, 67 S. Ct. 231, 233–34 (1946).


of the state interest to the adequacy of the state forum” in cases where there is state litigation and potential or actual federal litigation. It is also consonant with the Court’s reading of procedural due process, excluding from coverage cases where post-deprivation state proceedings exist. In all cases, the broad notions of federalism, unmoored from the equitable bases for Younger abstention, are invoked to avoid potential social change implications of § 1983 litigation.

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In the following Part, the activist insecurity is shown in operation. Tracing the revival and demise of 42 U.S.C. § 1985(3), the section shows a powerful but narrowly defined right recognized in an opinion. Lower courts which are forced to confront the powerful social change implications of the statute apply it to several cases which arise under the statute, but generalize the statute’s basis. By locating the root of the statutory force in constitutional principle, these lower court decisions set up the statute’s demise. In a series of Supreme Court decisions following these lower court developments, the statute is transformed into a “remedial statute” without substantive force. Finally, the court invokes the language of the revival decision, understood in light of constitutional provisions to finally destroy any force in the statute.


This Part illustrates the operation of the activist insecurity in the demise of 42 U.S.C. § 1985(3). Section 1985(3) is an especially promising focus for illustrating the activist insecurity’s operation, because it involves a unique revival decision, Griffin v. Breckenridge, and because the subsequent Supreme Court decisions completely destroy Griffin’s reading of the statute without ever overruling it. Substantively, Griffin read § 1985(3) in a way that promised to provide a balanced and effective response to ethno-violence and hate crimes. In the wake of the statute’s demise, the hate crimes legislation meant

185. Baird, supra note 179, at 540–42.
188. Id. at 235–43.
to replace it has been the subject of heated debate. Those statutes are normatively inferior to the *Griffin* construct, and point civil rights law in a conservative or at least reactionary direction. Section 1985(3) is a promising focus for an additional, important reason: the *Griffin-* right was destroyed by liberal judges who were trying to apply the statute to uphold plaintiffs’ claims several years before the limiting period can fairly be said to have begun. What is shown below is a statutory right destroyed as insecure judges seek broader support in other statutes and the Constitution for what § 1985(3) seems to require of them.

A. The Paradox of *Griffin* and *Bray*

The transformation of civil rights law can be illustrated through the demise of § 1985(3). This transformation is evident in a comparison between the revival decision, *Griffin v. Breckenridge*,¹⁸⁹ and the Supreme Court’s rejection of § 1985(3)’s applicability to the claims in *Bray v. Alexandria Women’s Health Clinic*.¹⁹⁰ Both cases involve attacks on citizens for what they are incorrectly perceived as doing and representing. They are attacked in an effort to send the message to those engaging in the political behavior attributed to the victims that their behavior is unwanted. In both cases the violence used against the victims is meant to restrict them to what the perpetrators regard as the victims’ appropriate social role. Terror is employed in each case as a tool in a very contentious political debate. Yet § 1985(3) provides a remedy in 1971 to the black men mistaken for civil rights workers while withholding that remedy to the women taken for “abortionists” and beaten during the height of the abortion wars of the 1980s and early 1990s.

*Bray* leaves the unmistakable impression that, had the *Griffin* plaintiffs sued in 1993 rather than 1971, they too would have lost. However, *Griffin* has not been overruled; nor has any part of the decision been criticized or called into doubt in the three Supreme Court decisions since *Griffin*. Quite the contrary, *Griffin* is confidently cited in *Bray*, *Great American Federal Savings & Loan Ass’n v. Novotny*,¹⁹¹ and *United Brotherhood of Carpenters & Joiners v. Scott*¹⁹² for the very doctrines employed to deny recovery in those three cases.

Yet, *Griffin’s* § 1985(3) right did not die because a conservative court set out to reign in civil rights law.¹⁹³ Rather, *Griffin* is undercut

¹⁹³. Although it is a mostly conservative coalition of Justices who decided *Bray*,

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because federal courts are reluctant to give the statute and Griffin their natural meaning. It dies because federal courts are afraid to be employed as agents of social change. Overwhelmed by the activist insecurity, federal judges generalized Griffin's right. In doing so they disturbed Griffin's careful balance of rights vindication and federalism preservation, the repair of which obliged them to gut the statute, conceiving of it as a redundant, narrower basis for § 1983 recovery.

Section 1985(3) was enacted as Section 2 of the Ku Klux Klan Act of 1871. Its principal provision provides recovery where:

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 . . . .

This language vexed courts that might have intended to revive the statute. Consequently, the section was the last of the Reconstruction Era statutes to be revived by the Supreme Court and has apparently never fully overcome the troubling implications of its terms.

Ten years before Monroe v. Pape initiated the Revival period, the Supreme Court confronted 1985(3) in Collins v. Hardyman. In Collins, the Court refused to recognize a claim under the section by members of a political club whose meeting was disrupted by adherents of opposing political views. Central to the Court's decision in Collins was its concern that extending § 1985(3) to private action would transform all conspiracies to commit torts into federal actions, a transformation the Court viewed as without adequate constitutional authority.

and the 6–3 decision was written by Justice Scalia, the majority included Justice White and a partial concurrence by Justice Souter. Mostly conservative justice O'Connor was in dissent. Similarly, the conservative result in Scott was reached in an opinion by the moderate-liberal Justice White commanding a bare majority that also included the liberal Justice Stevens along with Chief Justice Burger, and Justices Rehnquist and Powell. The Scott dissent by the liberal bloc of Blackmun, Marshall and Brennan was also joined by Justice O'Connor. In Novotny the Court's conservative justices achieved a conservative result in a broad coalition that included moderately liberal justices Stewart, Blackmun, Powell and Stevens. Indeed, the unanimous Griffin decision was undone by a Novotny opinion penned by the same justice, Justice Stewart. This article is, in part, a tale of how Stewart is convinced to change his view of § 1985(3) in a mere seven years.

198. Id. at 653–54, 71 S. Ct. at 938.
199. Id. at 661, 71 S. Ct. at 941–42.
In *Griffin*, twenty years after *Collins* and ten years after *Monroe*, the Court determined that its concerns with potential constitutional problems had been exaggerated.\(^{200}\) *Griffin* involved the beating of several black travelers on a northern Mississippi highway by a group of white men who mistook one of the black travelers for a civil rights worker.\(^{201}\) *Griffin*’s facts resemble very closely the all too frequent terror against voting rights organizers, civil rights workers, and ordinary black citizens by staunch segregationists in the South during the Civil Rights Movement. The difference between *Collins*’s and *Griffin*’s facts might alone explain the different results. However, the Court had also already moved toward recognizing civil rights protection against private acts.\(^{202}\) Together these elements produced a forceful and unanimous decision.

But in *Great American Federal Savings & Loan Ass’n v. Novotny*,\(^{203}\) the Supreme Court eviscerated the statute. Section 1985(3), the Court noted, “provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.”\(^{204}\) Since the “manner defined by the section” included the showing that the conspiracy was motivated by “racial, or perhaps otherwise class-based, invidiously discriminatory animus,”\(^{205}\) the Court in *Novotny* had effectively combined the competing teachings of *Griffin* to require the identification of a class basis in the facts (gender in *Novotny*) and an underlying right deprivation, the reach of which may or may not cover private action.

Just what classes were covered and whether the underlying right required state action (although § 1985(3) did not) were questions raised in *United Brotherhood of Carpenters & Joiners v. Scott*.\(^{206}\) In

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200. The *Griffin* Court stated:

Whether or not Collins v. Hardyman was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist.

*Griffin*, 403 U.S. at 95–96, 91 S. Ct. at 1795.

201. *Id.* at 89–91, 91 S. Ct at 1792–93.


204. *Id.* at 372, 99 S. Ct. at 2349.


Scott the Court rejected the claims of a construction company owner and his non-union employees. They had been beaten by union workers protesting the non-union shop in a union county. The plaintiffs argued that their political association and speech rights were violated. The Court found that animus based on union membership did not constitute the kind of class-based animus necessary to invoke the section's protection. The Court went further, emphasizing the obvious, that violation of First Amendment association rights required state action. Because the section had been read as requiring independent constitutional justification for its application to a given set of facts and because it was deemed a remedial statute only, the Scott Court needed only to resolve whether the Constitution authorized use of the section to enforce associational rights against private actions; the Court determined it did not. The Scott Court's recognition that § 1985(3) applied to private action could not remove the state action requirement from a case aimed at protecting associational rights.

In 1993, in Bray v. Alexandria Women's Health Clinic, the Supreme Court addressed 1985(3) in the context of a health center's suit against abortion protesters blockading its clinic. The plaintiffs in Bray confronted several requirements under 1985(3). First, they needed to show the existence of a conspiracy aimed at depriving them of rights because of "racial, or perhaps otherwise class-based, invidiously discriminatory animus." Second, they needed to show the deprivation of some right by that conspiracy. And third, if that right could be violated only by state action, they needed to show state action or action under color of state law. The plaintiffs sought to satisfy these requirements by modeling their allegations on Griffin's facts. They alleged, inter alia, a conspiracy against women seeking abortions in violation of a woman's right to interstate travel.

For the Court, Justice Scalia found the plaintiffs' allegations were insufficient to invoke the protection of the statute. They failed, he argued, to satisfy either the "class-based" animus requirement or the

207. Id. at 834–36, 103 S. Ct. at 3359–61. The animus in question was said to be "political." Id. at 846, 103 S. Ct. at 3365.
208. Id. at 832–33, 103 S. Ct. at 3358 (First Amendment violation requires state action, which is therefore an essential element of a § 1985(3) claim alleging violation of association rights).
210. Id. at 266–67, 113 S. Ct. at 758.
211. Id. at 268, 113 S. Ct. At 758–59 (citing Griffin v. Breckenridge, 403 U.S. at 102, 91 S. Ct. at 1798).
212. Bray, 506 U.S. at 268, 113 S. Ct. at 758 (citing Scott, 463 U.S. at 833, 103 S. Ct. at 3358).
213. See Bray, 506 U.S. at 278, 113 S. Ct. at 764.
214. Id. at 274–75, 113 S. Ct. at 762.
requirement that the right violated be one which protects against private action.215 While Justice Scalia’s opinion perhaps goes beyond what is necessary to dispose of the case,216 it is not inconsistent with the Court’s precedent.

This anomaly, Bray in the shadow of Griffin, is the direct result of the Court’s characterization of the section as “remedial.”217 By reading the section as remedial only, the Court not only eliminates any practical differences between this section and 1983, but also imports the problems and jurisprudence of 1983 to the related but distinct 1985(3). It is the move from Griffin’s substantive right to the “remedial” statute design adopted by Novotny and Scott that demands explanation. On inspection, lower federal courts are shown to have bungled the Griffin right as they were consumed by the activist insecurity. To understand this fully, a more detailed discussion of Griffin’s right is needed.

B. Section 1985(3) and the Griffin Right

In Griffin v. Breckenridge, the Supreme Court tacitly overruled its earlier decision in Collins v. Hardyman,218 and interpreted § 1985(3) to reach private conspiracies to deprive persons of the “equal protection of the laws” and “equal privileges and immunities under

215. Id. at 268, 113 S. Ct. at 758.
216. Justice Scalia equates “racial, or perhaps otherwise class-based, invidiously discriminatory animus” with the specific intent requirement in Fourteenth Amendment equal protection cases: “‘Discriminatory Purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” Bray, 506 U.S. at 271–72, 113 S. Ct. at 760 (quoting from Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296 (1979)). This becomes the basis for Justice Scalia’s argument that animus aimed at pregnancy-related conditions does not constitute animus against women. Id. at 271, 99 S. Ct. at 2292. See Geduldig v. Aiello, 417 U.S. 484, 494–95, 94 S. Ct. 2485, 2491 (1974) (holding that excluding pregnancy for covered disabilities not invidious discrimination based on sex in violation of Fourteenth Amendment equal protection clause).
217. As Professor Banks noted:

The characterization in Novotny of section 1985(3) as remedial is without question the greatest limitation that the Court has placed on the statute. Requiring plaintiffs to invoke some independent right whose denial section 1985(3) is suppose to remedy practically emasculates the provision since most federal statutory rights have their own exclusive administrative and judicial remedies and very few constitutional provisions apply against private persons.
the laws."219 Section 1985(3), enacted as § 2 of the 1871 Civil Rights Act, is the third act codified under the heading "Conspiracy to interfere with civil rights" as 1985 of Title 42.220 Subsection 3 creates an action for injuries resulting from acts in furtherance of four separate conspiracies: (i) conspiracies to deprive persons of equal protection of the laws or equal privileges and immunities under the laws; (ii) conspiracies to prevent authorities of a State or Territory from securing equal protection of the laws; (iii) conspiracies to prevent entitled citizens from exercising their right to vote; and (iv) conspiracies to injure supporters or advocates of the underlying rights protected by the section.221 The central prohibition, and the subject of both Collins and Griffin, is the first conspiracy: to deprive persons of "equal protection of the laws, or equal privileges and immunities under the laws."

The Griffin Court easily rejected Collins' concerns with private deprivations of equal protection of the laws, or equal privileges and immunities under the laws, stating, "in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived

220. Section 1985(1) prohibits conspiracies aimed at preventing "any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof . . . ." 42 U.S.C. § 1985(1). Section 1985(2) prohibits obstructions of justice and intimidations of parties, witnesses, and jurors. 42 U.S.C. § 1985(2).
221. 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985(3)). The full text provides, in full:

(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; 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 may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

simply do not exist."\textsuperscript{222} The difficulty recognized in \textit{Collins}, nevertheless, led the Court to give meaning to the section by constructing a distinct right to equality from its face. The Court went on to argue:

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 . . . "that Congress has a right to punish an assault and battery when committed by two or more persons within a State."\textsuperscript{223}

The \textit{Griffin} Court avoids these potential problems "by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . [T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."\textsuperscript{224}

The "right" is internal in this construction. The \textit{Griffin} Court's limitation of the statute to an injury that infringes freedom from invidious discrimination serves a broader purpose than the intentional discrimination corollaries in §§ 1981 and 1982 cases.\textsuperscript{225} Without the internal substantive limitations of 1981 (limited to contracts) and 1982 (limited to property contracts), this furtive limitation not only prevents a deluge of tort actions in federal courts, it provides substantive coverage. Its location and purpose in the \textit{Griffin} opinion implies that it is an independent right to be free of offensive treatment when such treatment, related to the victim's vulnerability to subjugation by her fellow citizens, deprives that victim of meaningful citizenship—in other words, it contains a right to substantially meaningful citizenship.

This is the key construct in \textit{Griffin}, one which the Court drew fully formed from the Solicitor General's argument on brief:

[I]t was precisely to overcome the objection that the bill encompassed all ordinary torts and crimes that [§ 1985(3)] was amended to confine its reach to deprivations of equality, rather than any deprivation of rights . . . . Nor was this a

\textsuperscript{222} \textit{Griffin}, 403 U.S. at 95–96, 91 S. Ct. at 1795.

\textsuperscript{223} \textit{Id.} at 101–02, 91 S. Ct. at 1798 (quoting Cong. Globe, 42d Cong., 1st Sess. 485 (1871) (statement of Rep. Cook)).

\textsuperscript{224} \textit{Griffin}, 403 U.S. at 102, 91 S. Ct. at 1798.

\textsuperscript{225} For a discussion of the intent requirements in those statutes, see White, \textit{supra} note 22, at 176–81.
meaningless change of words . . . . We fully accept the statement in Collins v. Hardyman, that there is no deprivation of "equal protection" or of "equal privileges and immunities" within the meaning of Section 1885(3) "to assault one neighbor without assaulting them all, or to libel some persons without mention of others."226

Under the Griffin model, 1985(3) creates a self-limiting right, internal to the statute and independent of other statutes which, as the Solicitor General noted, would be "wholly superfluous in light of section 1983" if read to require state action.227

Contrary to Griffin's construction, subsequent readings of the statute locate the "right" protected by 1985(3) outside the statute and require invidious intent in order to limit the statute's reach.228 Section 1985(3) speaks of conspiracies aimed at depriving both "equal protection of the laws" and "equal privileges and immunities under the laws." "Equal protection of the laws"—plurals—is consistent with the view that deprivation of underlying rights trigger the section. However, the additional concern of 1985(3) is deprivation of "equal privileges and immunities under the laws."229 The section's reference is not designed in terms of corollary duties of state and citizen, but rather a general guarantee to all persons under the power of the authority of state and federal laws.230 The reference to "equal

227. "Since the plaintiffs in Griffin . . . were Negro citizens of Mississippi and charged harassment on racial grounds, the Court expressly reserved the question whether conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1885(3). Since then the task of defining the scope of the private conspiracy cause of action under § 1885(3) has been going forward in the lower federal courts."

Id (citations omitted).
228. See Novotny, 442 U.S. at 372, 99 S. Ct. at 2349 (following Griffin).
229. This language is significantly different from its Fourteenth Amendment analogue, which the Slaughter-House Cases read as lacking practical consequence. The section refers to "equal privileges and immunities" of "laws," plural and general, while the amendment refers to "privileges and immunities of citizens of the United States," singular and specific.
230. Representative Poland's statement is illuminating:
I do agree . . . if a state make[s] proper laws and ha[s] proper officers to enforce those laws, and somebody undertakes to step in and clog justice . . . then I do claim that we have the right to make such interference an offense against the United States; . . . we have a right to say that anybody who undertakes to interfere and prevent the execution of that state law is amenable . . . to the law that we may make under [the Fourteenth Amendment] declaring it to be an offense against the United States.
privileges and immunities under the laws,” thus, suggests (1) a person’s benefit under all laws, and (2) without regard to the person’s citizenship status.\(^{231}\)

Again the reading of the Solicitor General is compelling:

[In our view, the attempt to particularize the rights affected is both unreal and unnecessary in a case like the present one. . . . Indeed, in the typical instance of this kind, the conspirators have no more specific object than to deter black citizens from asserting a claim to equality in civic life . . . . It is enough under the statute, we believe, if the evidence reveals a conspiracy to prevent Negroes from equally enjoying their legal rights generally . . . .

In most contexts, that comes to the same thing as alleging a purpose to terrorize or otherwise intimidate black citizens on account of their race.\(^{232}\)

As this reading emphasizes, the Griffin model prohibits terror.

The Griffin model protects a person’s equality under the laws from deprivation de facto through the conspiracies of her fellow citizens. Conceived as a limiting provision, the “invidiously discriminatory” requirement establishes an internal, self-limiting right to equality. Such a right supplants state tort law only when the injury is invidiously discriminatory. It supersedes state tort actions only when a citizen’s equal protection of the laws and equal privileges and immunities under the laws are threatened—when the value of a person’s full citizenship, the value of living under a legitimate system of laws, is at risk.

Griffin does more than articulate a unique approach to vindicating “right.” The opinion establishes an altogether unique conception of “right.” This Griffin-right fundamentally differs from more familiar

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\(^{232}\) Section 1985(3)’s protection of the benefits of the laws—general—is buttressed by the section’s coverage of conspiracies that deprive persons of equal privileges and immunities under the laws “directly or indirectly.” The language of the section does not mandate any difference between intentional and incidental deprivations of equal protection or equal privileges and immunities. A reasonable, if not necessary, understanding of these words is that § 1985(3) focuses on the effect of the conspiracy on the person’s enjoyment of the privileges and immunities of the laws, no matter the substance and no matter whether state or federal in origin.

Significantly, the section is not limited to citizens, except in the clause prohibiting conspiracies involving voting. The enjoyment of a legal system’s privileges and immunities thus extends most broadly to all who might benefit from the existence of the rule of law, rather than the particular injunctions of specific laws.

\(^{232}\) Brief of the United States as Amicus Curiae at 16–18, Griffin, 403 U.S. at 88, 91 S. Ct. at 1790 (1971) (No. 70–144).
conceptions of "right," vindicated under §§ 1981 & 1982, § 1983, or Title VII. Compared to the substantive manifestations of those
divisional approaches, the distinctive nature of the Griffin right is readily apparent.\textsuperscript{233}

Griffin, although in no way as influential as Brown v. Board of Education\textsuperscript{234} or Roe v. Wade,\textsuperscript{235} presents a third model for the
vindication of rights that transcends the tension inherent between
Brown and Roe. While Roe juxtaposes the individual and state, and
Brown the individual and institution, with the consequent broad-
prospective protection of rights for formal and informal groups of
individuals, Griffin focuses on the consequences of actions on the
relation of persons to the state, regardless of whether they belong to
a formal group, and regardless of whether the action is actually
initiated by, or attributed to, the state or its institutions. This third
model, perhaps more importantly, transcends the psychological injury
requirement that underlies both Roe and Brown and commits each to
the unbounded individualist bias that ultimately dismantled the
Brown regime and left only Roe.\textsuperscript{236} The linchpin of the Griffin
approach, and the basis of its own unfortunate demise, is its focus on
the consequences of actions on contextualized persons.

This new conception of rights was not to survive long. Griffin
was fundamentally about finding a way to give § 1985(3) its apparent
scope and effect while limiting it to avoid supplanting state law. This
balance is achieved in Griffin by focusing the cause of action on
protecting the value of equal citizenship, violated when conspirators’
behavior (1) is aimed at undermining the citizenship of identifiable
classes of citizens (the racial or perhaps other class-based animus)
and (2) which has the effect of doing so (the animus is invidiously
discriminatory). Because these are interrelated, the balance they
struck was easily disrupted. And, when lower courts confronted the
post-Griffin cause of action, they proceeded to remove the limiting
components of the formula, sending them on a desperate search for
additional limitations that ultimately spelled the end of the section’s
viability.

C. Griffin and Bray: Problem of Precedent and Intervening Cases

It is not uncommon for precedent to change meaning as
subsequent cases put it in a new light. The issue is whether precedent
of any type can be said to preserve any particular meaning which

\textsuperscript{233} See White, supra note 22, at 160–205.
\textsuperscript{234} 347 U.S. 483, 74 S. Ct. 686 (1954).
\textsuperscript{235} 410 U.S. 113, 93 S. Ct. 705 (1973).
\textsuperscript{236} For this discussion, see White, supra note 22, at 206–16.
must be preserved if we are to say it is precedent. If some core meaning must be preserved, some view of the case itself and how it is transformed is necessary to determine what the core meaning is and if it has been abandoned. In *Griffin* the prior decision in *Collins* is disregarded. The *Griffin* Court argues expressly that *Collins* was limited to its facts and impliedly overrules its broader implications.\(^{237}\) In *Bray*, by contrast, *Griffin* is neither criticized, nor overruled. Rather it is cited for propositions that seem to run against its own reasoning and outcome.\(^{238}\) But it must still be asked whether this distinction is one with a difference.

The force of precedent is a subject well beyond the scope of this article. However, it is clear that there are accepted norms permitting the disregarding of “binding” precedent in certain circumstances thus allowing for substantial growth in the law. As Duncan Kennedy has shown, the restraint “the law” as it is placed on “how-I-want-to-come-out” is less severe than usually assumed.\(^{239}\) Judges are only relatively restrained by precedent according to the tightness of the precedent\(^{240}\) and the energies of the judge:

[W]e might hypothesize that the probability that a judge will move the law so as to achieve any given result is smaller in proportion as the work and the credibility risk involved are greater, and that the total quantity and quality of work available from the judicial labor force limit the total amount of legal movement we can expect in any given direction.\(^{241}\)

This process is heavily dependent on context, meaning that a “rule may at any given moment appear objective; but at the next moment it may appear manipulable. It is not . . . essentially one thing or the other.”\(^{242}\) It is not so much the shift from *Griffin* to *Bray* that

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237. “Whether or not *Collins* v. Hardyman was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist.” *Griffin*, 403 U.S. at 95–96, 91 S. Ct. at 1795.

238. The opinion opens, for example, with the statement, “Our precedents establish that in order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, *inter alia*, (1) that ‘some racial, or perhaps otherwise class based, invidiously discriminatory animus lay behind the conspirators’ action,’ *Griffin* v. Breckenridge, 403 U.S. 88 (1971) . . .” *Bray*, 506 U.S. at 267–68, 113 S. Ct. 758.


240. Id. at 526–30.

241. Id. at 559.

242. Id. at 562.
demands explanation, then, so much as the nature and propriety of that shift. What is going on between Griffin and Bray can be compared and contrasted with a few lines of cases with the effect of highlighting the true paradox of the situation. This paradox is what is explained below.

First, as was the case between Collins and Griffin, courts might distinguish and limit the facts of the prior case from the latter. This is, after all, the practice that defines the use of precedent. For sure, this process is less definite than it appears. Jan Deutsch’s Precedent and Adjudication demonstrates the ways in which, in a single line of decisions, fact findings are often misunderstood or manipulated with the result of clouding just what precedent is. Nevertheless, this is not the case between Griffin and Bray. Indeed, it seems that there is a transformation of the law or the role of certain legal findings and rules in Griffin that transform the context in which the facts are understood in Bray.

Second, the application of law to new factual circumstances and in new contexts, might expose the limitations of the prior precedent. From Plessy to Brown this seems to be what happens. The social context of Plessy lent force and support to the assumptions of Plessy which allowed Plessy to be used to justify applications of its separate but equal rule that went far beyond the limits of its facts. As the anthropological and social beliefs underlying the decision changed, its assumptions were put to test in cases which exposed them as generally false. Bit by bit the false equality of separate but equal was exposed. Eventually the question of separation was raised in circumstances implying that equality was impossible with separation. Brown, then represented more the demise of Plessy as precedent than it did the abandonment of Plessy. While the Court did not necessarily have to abandon the Plessy rule, it would have had to reaffirm the opinion if it was to preserve the, by then, frayed precedent.

Griffin to Bray might be understood in this light, consistent with the “conservative judges” theory of civil rights law’s demise. That is, one could argue that the social context of Griffin, in the immediate aftermath of the civil rights movement, where white violence was becoming to be widely condemned, dictated its result. Bray, on the other hand, occurring outside that time and involving a different political dispute (one which a majority of the Court perhaps has a preferred side), simply cannot benefit from the Griffin precedent.

This story, however, is not a story of precedent, but of raw politics. The compatibility of the “conservative judges” explanation with this vision of Griffin and Bray is not at all a useful explanation of the operation of law. Rather, it says only that there is no law (in the sense that law is distinguishable from raw politics).

Moreover, Griffin’s precedent, unlike Plessey’s was never shown to have fallen apart in operation. Unfortunately, as shown below, Griffin is never given a chance to operate on its own terms. That is, in some respects Griffin is never treated as precedential. Its holdings and implications are ignored in favor of the lower court’s more general vision of the role of civil rights law. By Bray, Griffin is not viewed as binding the Court so much as it is viewed as the repository of general constitutional principles—to wit, the Constitution is not a font of general tort law. In none of the intervening cases is Griffin’s application to new facts shown to undercut the decision’s assumptions; instead, the assumptions of Griffin are simply ignored.

Third, the Griffin/Bray paradox can be viewed as representative of the Court’s approach to precedent in civil rights and related cases. That is, in several areas it seems that the Court has simply disregarded the precedential background in its move to a fundamentally different regime. These transformations, like that from Griffin to Bray, do not require the invalidation or even the criticism of the prior precedent. Rather, the prior precedent is generalized and thus subverted, creating room for narrower holdings to undercut the law in question. This move might be identified in the Supreme Court’s cases applying procedural due process to property and liberty deprivations from Goldberg v. Kelly through Mathews v.

245. “We have noted the ‘constitutional shoals’ that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101–102 (1971); a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law.” Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160.

246. It might also be explained in the Court’s state action cases from Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948) (enforcement of private restrictive covenants by courts constitutes state action, triggering Fourteenth Amendment coverage) and Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856 (1961) (state financed and owned parking authority is public entity subjecting its restaurant tenant to requirements of Fourteenth Amendment), to Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972) (reducing Burton to factual determination and refusing to extend to private club which holds liquor licence from state), to Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804 (1973) (state aid to discriminatory private schools is illegal state action), and on to Jackson v. Metro Edison, 419 U.S. 345, 95 S. Ct. 449 (1974) (Burton reduced to case where factual nexus establishes state action, a test not met by action of heavily regulated utility providing public services under at least de facto monopoly), Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729 (1978) (state law authorizing creditor’s sale does not take action of private entity conducting such a sale state action) and NCAA
Eldridge and Paul v. Davis. In six short years the radical implications of Goldberg were completely subverted. The decision has never been overruled but is substantially compromised. Goldberg recognized a liberty interest in social entitlements, the deprivation of which required notice and an opportunity to be heard. The key finding was that even temporary deprivations of welfare payments for the poor compromised their life chances. Consequently, Goldberg came quite close to either establishing social welfare as a fundamental right or recognizing poverty as a suspect classification. In any case, Goldberg represented the Court’s recognition of the “new property” as a basis of constitutional rights. These implications of Goldberg were qualified soon after in Rogers v. Rush where the Court explained that Goldberg’s due process rights were rooted, not in the Constitution but the general law—liberty and property were subject to due process requirements because they are established in state or other law. In Mathews, the Court then established that post-deprivation process would satisfy procedural due process in most instances. The Court had transformed and neutered Goldberg’s broader implications by initially narrowing the basis of the right and then generalizing the right itself to include procedures available in other regimes. Goldberg’s death was then confirmed in Paul v. Davis, where the court held that listing a person on a flyer containing the names of “known shoplifters” with neither notice nor a trial did not constitute deprivation of due process. Rather, the Court sought to distinguish between constitutional rights and “mere torts” deciding that the common law tort of slander did not, without more, state a constitutional claim.

The key finding in Paul makes no sense without the prior holdings of Rogers and Mathews. With the right rooted in state law (the narrowing move) and the remedy disconnected from a particular federal-law mandated response, the Court’s line between constitutional and state rights seems clear. The plaintiff’s right is not the right to be free from punishment without a trial (a right that would

v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454 (1988) (private entity made up substantially of state actors and which compelled state actor to act is not itself a state actor).

In this line, the broad statements of Shelley and Burton are initially reduced to statements on the unique facts of the cases, then generalized into a rule that private entanglement with state entities does not, normally, constitute state action. So that by Tarkanian, the private entity’s entangled action is viewed as presumptively private.

251. 408 U.S. 564, 92 S. Ct. 2701 (1972)
transcend state law), but the right to be free from slanders to his reputation (a state law right). Because the state law undoubtedly has procedures to address deprivations of the right which it defines, it is unnecessary to provide constitutional protection without showing more.

What more must be shown is established by the cases which the Paul Court struggled to distinguish. In *Wisconsin v. Constantineau* the Court had found that deprivation of the right to buy alcohol by having one's name placed on a list of "known alcoholics" did violate due process. This was a Goldberg-like holding that could be explained by a "conservative judges" theory: by the time of Paul the Court was uncomfortable with broad procedural due process protections. And so it was. But the legal innovations of the intervening years that made the distinction work were the narrowing and generalizing moves. While it still seems strange that one can be punished for shoplifting without a trial (Paul) but one cannot be called an alcoholic and limited in one's right to purchase alcohol without notice and an opportunity to be heard, the innovations of Rogers and Mathews power the distinction. Per Rogers the right to buy alcohol is a state granted privilege, ordinarily restricted only according to age. Deprivation of that right is equivalent to the taking of "old property," that established by the common law. And, while it is not clear today what process would be due, it was clear in 1976 that post-deprivation process would not be adequate to resolve this "old property" problem.

With the shift from Goldberg to Paul, the Court could continue to develop the Goldberg "new property" approach to due process, without the radical implications Goldberg suggested. In *Ingraham v. Wright* the court could recognize a liberty interest in freedom from paddling without disrupting state corporal punishment regimes (since the right was based on state law) and, in any case without providing a federal cause of action (since post deprivation process was deemed adequate). In *Vitek v. Jones* the Court could recognize a liberty interest in not being transferred from prison to a mental institution, despite its earlier holding in *Meacham v. Fano* that there was no liberty interest implicated by transfer from a medium to maximum security prison. The determinative factor was whether there was a residual expectation of liberty held by prisoners that was implicated by the transfer to the mental institution. And, in *Owen v. City of*

Independence, the Court could require a name-clearing hearing for an at will employee dismissed under circumstances sullying his reputation. These changes amounted to tinkering with the basic distinction in Paul between real constitutional rights and mere torts. Yet all were undertaken under the umbrella of the now moribund Goldberg.

D. Anti-Formalism and the Destruction of § 1985(3): Novotny and Scott

"Since the plaintiffs in Griffin . . . were Negro citizens of Mississippi and charged harassment on racial grounds, the Court expressly reserved the question whether conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3). Since then the task of defining the scope of the private conspiracy cause of action under § 1985(3) has been going forward in the lower federal courts."

If my argument in parts III, A & B is believed, Griffin revived a rights warrior from the grave to which the state action requirement of Collins v. Hardiman had banished it. An alternative approach to rights, § 1985(3) was readied to banish from the social landscape conspiracies depriving individuals of meaningful equality of citizenship. In a series of decisions that prompted far too little controversy for its significant disruption of this interesting balance, the Supreme Court transformed the Griffin-informed statute into no more than a very limited means of enforcing rights declared elsewhere. Having been transformed into a mere corollary of § 1983, this potentially magnificent defender of rights hobbled into obscurity, defending only what in changed times were the rare and insubstantial rights inherent in the Griffin facts.

The destruction of the Griffin construct proceeded in three stages. In Novotny the Court declared the statute "remedial only." This was the most consequential holding for future interpretations of the section. As Professor Taunya Lovell Banks noted,

The characterization in Novotny of section 1985(3) as remedial is without question the greatest limitation that the Court has placed on the statute. Requiring plaintiffs to invoke some independent right whose denial section 1985(3) is suppose [sic] to remedy practically emasculates the provision since most federal statutory rights have their own exclusive administrative and judicial remedies and very few constitutional provisions apply against private persons.

256. 445 U.S. 662, 100 S. Ct. 1398 (1980).
Next, in *Scott*, the Supreme Court ruled that if the underlying rights alleged to have been violated required state action, the § 1985(3) plaintiff must prove state action to prevail. *Scott* also held that the classes of citizens protected by the section were limited. These determinations were merely extensions of *Novotny* since, by *Scott*, the right of action created by the section was distinct from the 1871 act corollary, § 1983, only in its application to the rare cases resembling the *Griffin* facts. In the third stage any hope that cases resembling *Griffin*'s facts might state a § 1985(3) cause of action was dashed in *Bray*. In *Bray* Justice Scalia’s opinion for the court applied Fourteenth Amendment-based specific intent requirements to the class based animus requirement and located an independent specific intent requirement for the underlying rights alleged violated by the conspiracy.

Thus, by *Bray* the unique response to the plaintiffs’ allegations in *Griffin* had been jettisoned. It no longer matters that both federal and state created laws and rights were violated by the *Griffin* defendants or that the *Griffin* opinion spent no time discussing specific intent to violate such rights. Nor is it any longer of consequence that the *Griffin* Court did not concern itself with whether the invidious animus of the defendants was aimed at the plaintiffs (as opposed to the persons for whom they were mistaken), or that the defendants assaulted both the mistaken activists and hangers on alike. If anything survives of *Griffin* it seems that black citizens beaten by white men in civil rights-era Mississippi raises a cause of action. The inevitable question, treated below, is how did this happen? The answer, in short, is that the Courts have evidenced a troubling lack of allegiance to law—the very kind of legal formalism that rights advocates generally disdain and rights conservatives celebrate, but which here is abandoned by both in ways that force questions which the Supreme Court is lead to believe it must answer. This is less the

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259. Of course, such an argument for the section’s appropriateness in the context of similarly acrimonious abortion controversies such as alleged in *Bray* is very powerful. Nevertheless, it is troubling that the undeniable complexities of *Griffin* are reduced to such a trite metaphors as “the ‘60s” or “the civil rights movement.” Indeed such an approach – however potentially useful it may have been in theory to the *Bray* plaintiffs – is exposed by the *Bray* opinion to be a means of confining legal doctrine to “special times” – that is to say, denying that legal doctrine was created and characterizing the developments of the period as abandonments of the rule of law to cope with emergencies. It is submitted that such a view of civil rights law, however popular, is an outrage, legitimizing the terrorism and lawlessness that necessitated lawsuits like *Griffin* by imbuing the racism of the period with ostensibly reasoned defenses of the very rule of law absent throughout Jim Crow and disregarded by overt and subtle white supremacists while casting the defenders of law as naive firebrands responsible for their own subordination.
story of "conservative judges" hell-bent on destroying civil rights law. Instead it is the revealing tale of liberal judges sullying the Griffin construct in an activist insecurity related effort to buttress the cause of action.

1. Disarming the Warrior: Novotny and the Requirement of Externally Defined Rights

Novotny is best known for declaring that Title VII's administrative procedures were exclusive. However, that question arises in Novotny because the case also presented a substantial § 1985(3) issue. The presence of these two legislative regimes, one specific and detailed with complex administrative procedures, the other general with apparently broad scope, no doubt affected the Supreme Court's resolution of the case. Consistent with the first move of the activist insecurity, the court favored the narrower, more specific cause of action, over the broader, more general cause. However important this fact may have been and however reasonable the Court's final resolution may, therefore, seem to the casual reader, the Supreme Court's rulings on § 1985(3) were particularly devastating to the Griffin construction and the future viability of § 1985(3). The root of the section's ultimate demise, planted firmly in Novotny, is not an antagonistic judiciary. Rather, as the following pages document, the section's demise resulted from largely sympathetic lower court decisions that failed to embrace the implications of Griffin in favor of more familiar but ultimately more restrictive constitutional equal protection jurisprudence. It is Griffin's reception in the lower courts, then, that is closely examined below.

a. Novotny Below: (Re)equipping the Warrior for Battle

In January of 1975 the board of directors of Great American Federal Savings and Loan Association (GAF) voted to terminate the employment of John R. Novotny, a fellow board member and "undesignated" employee. Novotny alleged that, in the course of his 24 odd years of employment, he had come to understand that his fellow board members "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny

260. The district court in Novotny found that the plaintiff was not the proper party to raise Title VII discrimination claims. See Novotny, 442 U.S. at 369 n.5, 99 S. Ct. at 2347. That court also dismissed the plaintiff's Title VII retaliation claims, which were subsequently revived by the Third Circuit. Id. at 370 n.6, 99 S. Ct. at 2348.

261. See Novotny, 584 F.2d 1235, 1238 (1978).
female employees equal employment opportunity." Novotny further alleged that in the summer of 1984 he "took up" the cause of Betty Batis before the board. Batis was a female employee whom Novotny claimed experienced sex discrimination in the company. In response to his advocacy of Batis' cause, Novotny claimed he was fired. Novotny brought actions under Title VII and § 1985(3), alleging the board conspired to deprive him of his rights in retaliation for "his advocacy of the cause of equal rights for women in the corporation."264

(1) The District Court

The U.S. District Court for the Western District of Pennsylvania dismissed Novotny's suit.265 It had little difficulty with the fact that Novotny was not a member of the class alleged to be protected,266 simultaneously extending the act to cover the invidious class of women.267 It nevertheless found no conspiracy, citing the Seventh Circuit's decision that there was no § 1985(3) conspiracy where the agents of a single business entity participated in a decision to commit a single act.268

262. 584 F.2d at 1237. The complaint, as quoted in Novotny, lists eight specific practices alleged to limit the opportunities of women at GAF. Id. at 1237 n.1.
263. See Novotny, 584 F.2d at 1238.
264. Novotny, 584 F.2d at 1238.
266. Id. at 229 ("Novotny is not barred from bringing this suit [for discrimination against women] under § 1985(3) simply because he is a male since he alleges suffering a sex-based discrimination.").
267. Id. at 229, citing Pendrell v. Chatham Coll., 386 F. Supp. 341 (W.D. Pa. 1974) ("We realize that Pendrell, as a woman, was a member of the protected class."). This issue is more contentious than the district court gave it credit for, as would become clear in Bray, see supra text accompanying notes 209–16. The question of what constitutes a protected class, central to the Griffin balance, remained unaddressed in that case: "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." Griffin, 403 U.S. at 103 n.9, 91 S. Ct. at 1798.
268. Id. at 229–30, citing Domrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972):

... [I]f the challenged conduct is essential 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. Cf. Morrison v. California, 291 U.S. 82 . . .

In this case we believe the evidence fails to establish this element of a § 1985(3) action.

Domrowski involved a corporate landowner's refusal to rent office space to an attorney when it discovered that many of the attorney's clients were black.
(2) The Third Circuit

The Third Circuit reversed the District Court, authorizing Novotny's suit. Nevertheless, its more detailed and careful examination of the issues exposed the chink in the Griffin armor that would ultimately begin the felling of § 1985(3). Rejecting the District Court's use of the Seventh Circuit's view on single act corporate conspiracies, all that the Circuit Court needed to do to sustain Novotny's complaint was to accept the tacit findings of the District Court that the act constitutionally applied to women as an invidious class and that Novotny had standing to raise a § 1985(3) claim. The Circuit Court expressly affirmed these findings with detailed discussion in support of its position. The Circuit Court, however, engaged what had been an increasingly heated debate over whether the statute had substantive meaning or was merely "remedial."

Circuit Judge Adams acknowledged that jurists and scholars had concerned themselves with this question, designed largely as an interpretive exercise into the meaning of "equal protection of the laws" and "equal privileges and immunities under the laws."

The Novotny district court also dismissed Novotny's Title VII retaliation claim, finding he had not taken any action before the Equal Employment Opportunity Commission. Novotny, 430 F. Supp. at 230–31. It determined that "the intent of the Congress was a limited one relating to enforcement of the Title and was not to involve the courts in every board meeting that occurred across the land . . . . Novotny did not in [this] sense "oppose" a practice made unlawful by Title VII." Id. at 231. Today the mostly settled law would support his claim for retaliation in response to his opposing an apparently illegal employment practice under Title VII. See, e.g., Taylor v. Runyon, 175 F.3d 861 (11th Cir. 1999). The District Court was ultimately reversed on this question by the Court of Appeal. Novotny, 584 F.2d at 1262.

[D]efendants maintain that their alleged concerted action was taken in their official capacities as officers and directors of GAF, and therefore cannot legally be deemed a combination within the terms of § 1985(3).

This contention finds no support in the language of § 1985(3). . . . Similarly, we can discern no basis for the defendants' argument in the legislative history of § 1985(3). Nor does defendants' suggestion have solid roots in general tenants of conspiracy theory. . . .

Novotny, 584 F.2d at 1257 (footnotes omitted).

270. Id. at 1246–47. "Once the existence of class-based invidious animus is established, the boundaries of protection offered by § 1985(3) are traced by the scope of the words, "equal protection of the laws" and "equal privileges and immunities under the laws." Id. at 1246.

271. Id., citing Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc) (protecting freedom of religion); Means v. Wilson, 522 F.2d 838 (8th Cir. 1975), cert. denied, 424 U.S. 958, 96 S. Ct. 1436 (1976) (protecting the right to vote); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (protecting free expression);
Although Judge Adams declined to resolve the debate, his approach to the issue had the same effect.272 He rejected any construction similar to that in Griffin, stating that “§ 1985(3) is not to be read as a general charter to federal courts to set codes of conduct wherever ‘equality’ of any class is allegedly infringed.”273 Resting this view on the “reluctance to trigger the development of such a ‘general federal tort law,’” Adams argued that “the laws” and “under the laws” in § 1985(3) “connotes the existence of laws outside of § 1985(3) which define ‘protection’ and ‘privileges and immunities.’”274 He then gave special weight to Senator Edmunds’ statement that the rights in the act are not created therein but that the act merely provides a remedy for rights established elsewhere.275

Adams invested little in this discussion, however, since he later found that whatever else the language means it certainly includes deprivation of rights based on a federal statute guaranteeing equal employment opportunity (Title VII).276 Resolution of Novotny’s

Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943, 96 S. Ct. 1683 (1976) (sex discrimination not actionable under 14th Amendment and § 1985(3)); Bellamy v. Mason’s Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (free association not protected); McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (1977), (en banc), (only independently illegal acts deprive of equal protection and not reaching the scope of privileges and immunities). Also citing Note, Private Conspiracies to Violate Civil Rights, 90 Harv. L. Rev. 1721 (1977) (arguing that restriction to remedy independent illegal actions is “formalistic and over-restrictive” but suggesting that the statute should exempt “areas of private choice that should remain autonomous”); Note, The Supreme Court 1970 Term, 85 Harv. L. Rev. 3, 99–101 (areas covered by § 1985(3) are “uncertain,” suggesting limitation of protection of guarantees of Bill of Rights); Note, The Scope of Section 1985(3) Since Griffin v. Breckenridge, 45 Geo. Wash. L. Rev. 239, 242–251 (1976) (arguing that § 1985(3) should be limited to providing a remedy for independent federal rights); Note, Federal Power to Regulate Private Discrimination; The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 497–98 (1974) (suggesting statute should be read as “remedial”).

272. “While we have not occasion to undertake to review the entire debate, certain observations frame our discussion here.” Novotny, 584 at 1246–47.
273. Id. at 1247.
274. Id.
275. Id.
276. Id.
claim was thus relatively easy for Adams: "Having held that at least some federal statutory rights can form the predicate for a suit under § 1985(3), we conclude that Novotny, in alleging the existence of a conspiracy to violate the equal employment rights of . . . Title VII, has adequately pleaded" a § 1985(3) case.277

Adams' construct appears considerably appealing on its own merits, as well as a fair reading of Griffin, albeit quite different from the reading offered by this author.278 Its appeal, as Adams' opinion states, is it that it reads the language of § 1985(3) as broad in scope while limiting it so as to not supplant state tort law. On close inspection, however, Adams' reading is not consistent with the construct in Griffin or the terms of the section. Adams seems to have slighted the importance of the position of the "class-based animus" language in Griffin and replaced it with a discussion of the meaning of "equal protection of the laws" and "equal privileges and immunities under the law."

The Griffin court discusses "equal protection of the laws" and "equal privileges and immunities under the law" only at the beginning of Part III of its opinion. There the court is concerned with whether it should give the statute plain meaning and extend it to private actions. In this section the court perfects a particular balance between the private law application inherent in "conspire or go in disguise on the highway"279 and the awkward notion of finding private actors depriving a person of protection of privileges and immunities of laws, equal or otherwise. The Griffin Court says:

This language is, of course, similar to that of § 1 of the Fourteenth Amendment, which in terms speaks only to the States, and judicial thinking about what can constitute an equal protection deprivation has . . . focused almost entirely upon identifying the requisite "state action" and defining the offending forms of state law and official conduct. A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might

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Id. at 1247–48 (citations omitted). Judge Adams was quite aware that this result was contrary to the Fifth Circuit's approach in McLelland v. Mississippi Power & Light, 545 F. 2d 919, 924–28 (5th Cir. 1977), discussed infra in the text accompanying notes 304–315.

277. Id. at 1251. Adams also found the Title VII claim cognizable, rejecting the District Court's view that the plaintiff in a retaliation case must oppose action before the EEOC. Id. at 1222.

278. See supra text accompanying notes 218–36. See also White, supra, note 22.

279. "Since the 'going in disguise' aspect must include private action, it is hard to see how the conspiracy aspect, joined by a disjunctive, could be read to require involvement of state officers." Griffin, 403 U.S. at 96, 91 S. Ct. at 1795.
constitute a deprivation of the equal protection of the laws by private persons.\textsuperscript{280}

This statement of Justice Stewart’s may be read to suggest only his commitment to extending the act to private action. After all, he says only two sentences later that “failure to mention any such [state action] requisite can be viewed as an important indication of congressional intent to speak . . . of all deprivations of ‘equal protection of the laws’ and ‘equal privileges and immunities under the laws,’ whatever their source.”\textsuperscript{281} However, the reticent nature of this statement and the actual difficulty of conceiving of a “right” against a private actor (especially in light of this century of adjudication), counsels for accepting the equality view as established, however tacitly, in this portion of the opinion. The next several paragraphs are silent on this point, establishing only that the private action reading is permissible, logical, and consistent with legislative history.

By the last paragraph of part III, when Stewart’s opinion mentions the risk of supplanting state tort law, Stewart has already accepted the application of the statute to private action, along with the implication that it enforces equality. The magic paragraph, to which Judge Adams refers, does not articulate the nature of the right protected in \textit{Griffin}, much less its internal or external origin. Rather, that paragraph offers a judicially fashioned limitation on § 1985(3)’s application, perhaps necessary to sustain the constitutionality of the statute after the court determined it reached private action.\textsuperscript{282} Adams’ opinion offers an additional means of limiting § 1985(3) when extended to private action; it is, however, at odds with \textit{Griffin}. Whatever strength there is to Stewart’s construction in \textit{Griffin}, the location of the relevant findings therein at least undercuts support for Adams’ alternative construct.

Adams’ construct seems to ignore the \textit{limiting} role of class-based animus in \textit{Griffin}, or at least slighted its effectiveness. Perhaps the ease with which the Circuit Court decides women constitute a protected class leaves it distrustful of the barrier class-based animus provided between the § 1985(3) cause and state tort law. To recognize women as an included invidious class (as the courts should) the Circuit Court would have been forced to make several

\textsuperscript{280} \textit{id.} at 97, 91 S. Ct. at 1796.

\textsuperscript{281} \textit{id.} at 97, 91 S. Ct. at 1796 (quoting the statute) (emphasis in the original).

\textsuperscript{282} Justice O’Connor makes a similar point in \textit{Bray}. “Griffin’s narrowing construction [the invidiously discriminatory language] was a rational effort to honor the language of the statute without providing a federal cause of action for ‘all tortious, conspiratorial interferences with the rights of others.’” \textit{Bray}, 506 U.S. at 348 (O’Connor, J., dissenting) (quoting \textit{Griffin}, 403 U.S. at 101, 91 S. Ct. at 1798).
determinations it might have been reluctant to make. First, it would have had to determine whether the act should be limited to the historical circumstance of 1871. If so, women might arguably still be covered, but the statute, importantly, would have to be read as unavailable to white men, or certain classes of white men, such as former or present members of the Ku Klux Klan and perhaps their families or other beneficiaries of the organization’s activities. While perhaps inconsistent with the statute, such a construct would most certainly conflict with the “color-blind” visions of the Fourteenth Amendment solidifying at the time Novotny was decided.

Second, if the section were read as historically particular, the Circuit Court would have had to determine if the historical circumstances that birthed the section still existed. Third, if not historically particular, the Circuit Court would, presumably, have had to suggest some basis for including women and perhaps other groups; that is, how is the category women similar to race (or blackness) in a way that matters for § 1985(3) jurisprudence.

Adams’ opinion purports to defer to Congress on this matter, citing Frontiero v. Richardson for the proposition that “Congress itself has concluded that classifications based upon sex are inherently invidious.” However, the opinion at least in part chooses to answer the third question, announcing the Third Circuit’s acceptance of the principle that individuals should not be discriminated against on “the basis of traits for which they bear no responsibility [which] makes discrimination against individuals on the basis of immutable characteristics repugnant to our system.” This construct, however, does not emphasize any current or historical oppression which might make the characteristic in question a font for the diminution of equality. Unlike Congress’ finding which can be read as a determination of fact, the Circuit Court’s own construct establishes a category rooted deeply in a particular view of the relationship of the government to its citizens. The “color-blind” approach that grows out of such a view finds its strength in the proposition that the use of race, gender or another immutable category by the government is always invidious. The Griffin construct, rather, seems to focus on the operation of the categories in a complex, plural society. Griffin’s “racial, or perhaps other class-based, invidiously discriminatory animus” limitation works as a limit precisely because it focuses on invidiousness in a society where meaning and knowledge are contingent on latent assumptions that cannot be fully captured by shorthand (and self-referentially socially constructed) categories such as race or gender.

283. Novotny, 584 F.2d at 1243, quoting Frontiero v. Richardson, 411 U.S. 677, 687, 93 S. Ct. 1764, 1770 (1973) (plurality opinion).
284. Id.
As such, Judge Adams' identification of an invidious characteristic cannot work to limit the application of § 1985(3) when applied to private parties because, to whatever degree invidious categories constitute a functional shorthand for invidious government action, it cannot sufficiently isolate the various motivations for private action, much less determine when such motivation is sufficiently great to justify the extremely intrusive inquiry into elements of conscience that are expressed as permissible speech. As difficult as it may be to determine the intent of deliberative bodies, the abstract character of public institutions at least make such determinations commonplace and familiar. To say a legislature enacted a racially restrictive law is simply less troublesome than to allege that decisions of employers or tortfeasors are "racially motivated." Consequently employment discrimination jurisprudence and the emerging anti-hate legislation has acknowledged (as it must) that these determinations are rough and entail social costs which in all events are justified by the social goal underlying those prohibitions. This surrogate construction cannot, however, be said to constitute an adequate limitation on the scope and reach of the § 1985(3) cause of action through invidiousness because, quite simply the use of the categories is not always invidious. In this context the different roles suspect categories play in equal protection jurisprudence and employment discrimination law, as opposed to § 1985(3), is extremely consequential and lost upon Judge Adams.

Using Judge Adams' construct, all injuries committed by conspiracy against someone with an immutable characteristic (perhaps by someone with another) would be actionable. Thus it is not surprising that the Circuit Court lacked confidence in the limiting effect of the invidious class-based requirement since Judge Adams' approach to identifying a cause of action has deprived the class-based animus requirement's most crucial component, "invidiousness," of all meaning in favor of its incidental surrogate, "class basis."

285. This is the dilemma confronted by anti-hate legislation.
286. Suspect categories fail as shorthand for invidiousness on two grounds. First, it is difficult to discern impermissible private motivation. This, again, is the dilemma of anti-hate legislation and such legislation aimed at incursions on free expression and conscience. The second ground must not be lost, however. If the category is to be a limiting device, it must refer to a category of actions that is to be prohibited and distinguish that category from permissible action. It does neither in Adams' use of it since all complaints against members of different categories could presumably access the section's cause of action. Moreover, unlike employment discrimination law's disparate impact cause of action, no argument is offered that perfidy, sandbagging, or an impossibility of determining the effects of actions would impair or prevent the fulfillment of the section's purposes, and thus justify the very rough shorthand. As such, any goal that might be attributed to § 1985(3) is lost and the section subsumed into § 1983 and Fourteenth Amendment jurisprudence.
By the time the Supreme Court accepted Novotny for review, the Third Circuit had already quietly distorted the balance of Griffin. Depriving its primary limiting component of effect, perhaps out of the benevolent motivation of ensuring that women could use the section, the Circuit Court was forced to craft another limiting tool to keep the section alive. Replacing the section’s apparently drab armor for a highly polished suit, the Circuit was to find the new facade protected not at all. The Circuit’s shiny new construct weighed down the statute, leaving it to fight itself. In one swift blow the Supreme Court then crippled the warrior, clothing it in yet another new and more burdensome outfit and invoking the section’s own devices to its detriment.

b. Breaking the Law at the Supreme Court

The Third Circuit’s struggle to determine whether § 1985(3) was “substantive” or “remedial” might have led some to believe the Supreme Court would find it a difficult issue, particularly given the Circuit opinion’s conflict with the unanimous Griffin decision. However, the Court rejected Novotny’s § 1985(3) claim with deceptive ease. In his opinion for the court, Justice Stewart spent no time on the remedial/substantive question. Without support or apparent acknowledgment that the issue was even substantial, Stewart flatly stated “Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violations of the rights it designates.”

As such the only question for the Court was whether Title VII could be the underlying right violated by the conspirators. Citing the complex administrative procedures required in Title VII suits, the court saw the question as “whether the rights created by Title VII may be asserted within the remedial framework of § 1985(3).” Since the case “does not involve two ‘independent’ rights,” “a complainant could avoid most if not all of these detailed and specific provisions of the law.” Novotny must lose under this construction because application of § 1985(3) to these facts would thwart Congress’ complex scheme.

But this approach, too, is deceptively simple. Only if the section creates no rights does the question of Title VII’s use as an underlying source of rights arise. The alternative approach of Griffin requires a focus on the effect of the deprivation on the equal protection and equal enjoyment of privileges and immunities of laws. In its most

290. **Id.** at 375–76, 99 S. Ct. at 2350–51.
broad construction equal protection and equal privileges and
immunities of laws means merely substantial equality of
citizenship. The Novotny Court takes a different approach.
Treating § 1985(3) as it had § 1983, it makes the ad hoc recognition
of rights the only apparent limitation preventing § 1985(3) from
standing as a font of tort law.

Because the crucial issue in § 1985(3) cases becomes the
recognition of rights in the Court’s Novotny opinion, Justices Powell
and Stevens, each concurring, find it necessary to fashion some
additional limiting mechanism to “afford . . . guidance to courts in
the federal system.” Justice Stevens’ approach is illuminating.
Recognizing the shared origin of §§ 1983 and 1985(3) in the Civil
Rights Act of 1871, he repeats the Court’s conclusion that § 1985(3)
does not create any substantive rights. However, his opinion
recognizes that the peculiar nature of the language of § 1985(3) might
not be consistent with this construct, taking the time to explain the
meaning of “equal protection of the laws” and “equal privileges and
immunities under the law.”

Since § 1983 refers to “rights, privileges, or immunities secured
by the Constitution of the United States” it might be argued that §
1985(3), without any reference to the Constitution, prohibited
conspiracies to deprive an individual of any rights including, as in
Novotny, Title VII. Stevens rejects this argument, positing the
more limiting construction that, the differing language
notwithstanding, § 1983 provides remedies for deprivations under
color of state law limited to constitutional violations and § 1985(3)

291. Conceding, as the dissenters in Novotny seem to do, that § 1985(3) requires
the violation of rights found elsewhere, the role of such violations in the Griffin
scheme is that of evidence that the conspiracy was substantial enough to deprive
the person of equal protection or equal privileges and immunities.

“The majority opinion does not reach the issue whether § 1985(3)
embraces federal statutory rights other than those proceeding in
‘fundamental’ fashion from the Constitution itself . . . I think it clear
that § 1985(3) embraces all rights guaranteed in federal statutes as
well as rights guaranteed directly by the Constitution.”

Id. at 388–89 n.5, 99 S. Ct. at 2357 (White, J., dissenting).
292. Id. at 379, 99 S. Ct. at 2352 (Powell, J., concurring).
293. The Third Circuit raised, but did not embrace this point:

It could be argued that because the phrases track the 14th Amendment’s
guarantees, the construction of the 14th Amendment’s language should
govern the guarantees of § 1985(3). Such a conclusion may be
unwarranted. First, . . . the privileges and immunity’s clause . . . is
broader [in § 1985(3)].

Novotny, 584 F.2d at 1246 n.47 (citations omitted).
294. He anticipates the debate in Maine v. Thibabout over the meaning of “and
laws,” added to § 1983 during the 1874 revision of the statute. Novotny, 442 U.S.
at 382 n.3, 99 S. Ct. at 2354 (Stevens, J., concurring). Stevens takes no position on
provided a remedy for some violations committed by private actors. Powell, perhaps more clearly, creates a similar construct. The underlying rights of which conspiracy to violate could support a § 1985(3) action ought be limited to “fundamental rights derived from the Constitution,” he posits. Powell’s construct improves on Stevens’ in that it offers a clear limit on which rights might be asserted. Both opinions, however, reveal the consequences of the “remedial statute” designation the Court attaches to § 1985(3). The Novotny decision, thus, gives rise to Carpenters v. Scott, which further attempts to outline the limits of those rights.

“The pervasive and essential flaw in the majority’s approach . . . ,” as the dissenters note, is its “characterization of [§ 1985(3)] as solely [a] ‘remedial’ provision.” Even accepting that § 1985(3) requires rights violations elsewhere, Justice White appropriately points out that it is not those violations that create the cause of action. “Because § 1985(3) provides a remedy for any person injured as a result of deprivation of a substantive federal right, it must be seen as itself creating rights in persons other than those to whom the underlying federal rights extends.” Rights violations are thus the proof of the significance of the injury claimed by the plaintiff. The majority opinion slights this because it both undervalues the limiting function of the “invidious class-based” requirement, as did the Third Circuit, and thus concerned about supplanting state tort law, it ignores the statute’s application to non-beneficiaries of federal rights who have been injured by a conspiracy—as Justice White argues.

Justice White proceeds from a view of invidiousness consistent with Griffin’s use of the requirement as a limitation on the broad scope of the act. He notes, “It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3).” This inquiry is itself sufficient to limit the reach of the act.

On the substantive issue, background rights, even if limited to federal rights, constitute proof of the kind of violation § 1985(3) is meant to reach, not the violation itself. On initial blush, this might
appear to widen the reach of the statute but in fact it also limits its scope. 301 “Because such private conspiratorial action, the paradigm of which was the activity of the Ku Klux Klan, constituted a serious threat to civil rights and civil order, it was deemed necessary to ‘giv[e] a civil action to anybody who shall be injured by [such] conspiracy.” 302 As Senator Edmonds remarked in 1871, “The . . . section . . . only provides for the punishment of conspiracy. It does not provide for the punishment of any act done in pursuance of the conspiracy . . .” 303

In the aftermath of Novotny, the Griffin approach was already substantially perverted. Most importantly, the changes in § 1985(3) were not perceived as involving a difficult issue or even to effect Griffin. As a result, Novotny creates a problem of determining what rights apply, a problem of secondary importance, at best, in the Griffin construct. That new problem would be decided in a few short years in Carpenters. Transformed from a brazen enforcer of equality to a clone of its cousin statute (§ 1983), our warrior, still burdened by the baggage of its invidiousness requirement and no more liberated by its power over private actors, limped along. Now relevant in only a narrow set of cases, Scott presents an opportunity for the statute’s splendor to be reestablished; but it is also threatened with exile in obscurity.

2. Demoting the Warrior: Scott and the Delineation of Actionable Rights

The significant departure of Griffin from more traditional approaches to rights vindication (such as the approach in § 1983 litigation), has proven problematic in operation because it has been widely misunderstood. Both the Third Circuit’s and Supreme Court’s Novotny opinions pervert the Griffin balance. Neither, however, is a self-conscious reconsideration of Griffin. Novotny is a watershed, in any case, because it worked additional transformations on attempts to understand Griffin. The new questions inspired by Novotny’s treatment of Griffin are resolved in Scott but only after further lower court struggles with Griffin’s implications.

301. Even in Hardymann the Court acknowledged that the requirement that conspiracies under § 1985(3) be consummated “for the purpose of depriving any person or class of persons equal protection of the laws, or of equal privileges and immunities under the law” itself “defines overt acts necessary to consummate the conspiracy.” Hardymann, 341 U.S. 651, 659, 71 S. Ct. 937, 941 (1951). This language has a limiting effect, although Griffin achieved that effect in a particular way, reversing Hardymann’s requirement of state action with a specific argument about rights.


Prior to Novotny the Fifth Circuit addressed an early post-Griffin case and sought to delineate the meaning and applicability of the Griffin decision. In McLellan v. Mississippi Power & Light Co.,\textsuperscript{304} the Circuit met en banc to decide whether § 1985(3) applied to a conspiracy to discharge a Mississippi Power & Light employee because he filed for bankruptcy.\textsuperscript{305} In the material section of the Circuit Court’s opinion, the Circuit confronted the second element of § 1985(3).

On its face the second element ambiguously and potentially expansively prohibits conspiracy “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.”\textsuperscript{306} The Griffin Court countenanced the broad application of this language only as limited by its invidiously discriminatory animus requirement. Griffin thus bifurcates the second element of § 1985(3), requiring (1) a deprivation (2) on an invidiously discriminatory basis.

In apparent conformity with Griffin the Circuit noted that, while § 1985(3)’s broad facial sweep was a concern of the Griffin Court, the Court “found the means to avoid a literal interpretation of the statute by giving the second element a restricted construction . . . [T]he presence of the word ‘equal’ . . . allowed the Court to limit the application of the section.”\textsuperscript{307} The Circuit revealed a partial understanding of and conformity with Griffin in the next subsection of its McLellan opinion where it addressed how private individuals deprive another person of protection of the laws. Acknowledging that Griffin did not delineate what constituted such deprivations, the Circuit accepted the Griffin facts as instructive, despite the “century of Fourteenth Amendment adjudication, which has centered on state action [and] ‘made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons.’”\textsuperscript{308}

The guidance the Circuit drew from Griffin on what constitutes a deprivation is less than clear, however. While a broad view of the

\textsuperscript{304} 545 F.2d 919 (1977).
\textsuperscript{305} McLellan’s complaint had been dismissed by the U.S. District Court for the District of Mississippi but reversed by a Fifth Circuit Panel. McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976).
\textsuperscript{306} McLellan, 545 F.2d at 923.
\textsuperscript{307} Id. at 924.
\textsuperscript{308} Id. at 925, quoting Justice Stewart for the Court in Griffin, 403 U.S. at 97, 91 S. Ct. at 1796.
balance struck in *Griffin* implies that the stopping, threatening, and assaulting of the *Griffin* plaintiffs was to be taken as a whole and read as constituting a diminution of the plaintiffs’ equal citizenship, this reading is neither clear nor necessary under a more narrow or formalistic reading of § 1985(3). It is such a reading the Fifth Circuit ultimately undertakes, departing from the broad implication of this *Griffin* language and ironically turning to language in *U.S. v. Harris*,\(^\text{309}\) the case that struck down the criminal counterpart of § 1985(3), for guidance. *Harris* is said to stand for the proposition that “The only way... [a] private person can deprive another of the equal protection of the laws is by commission of some offense against the laws which protect the rights of persons...”.\(^\text{310}\) For the Circuit § 1985(3) must therefore require the violation of some otherwise protected right.

This reading is perhaps reasonable on its own terms, but it distorts the operation of illegality in the establishment of a § 1985(3) conspiracy in *Griffin*. As the Fifth Circuit correctly noted, “the *Griffin* Court used the passage [from *Harris*] to illustrate that a deprivation of protection of the laws is not necessarily inflicted by the state.”\(^\text{311}\) But this does not also mean that it is the violation of laws that establishes the deprivation of “equal protection of the laws” or “equal privileges and immunities under the laws,” rather, it only establishes that such violations need have that effect. As Judge Godbold noted in his *McLellan* dissent, the *Griffin* Court “did not intimate that the defendants’ interferences with these federal rights could lead to § 1985(3) liability only because those interferences were independently illegal.”\(^\text{312}\) It may, nevertheless, be conceded that the operation of the Fifth Circuit's *McLellan* distinction does not work serious detriment to § 1985(3) by limiting the actionable deprivations

\(^{309}\) 106 U.S. 629, 1 S. Ct. 601 (1882).

\(^{310}\) *McLellan* 545 F.2d at 925. Judge Godbold fiercely disagreed with this characterization of the requirement of § 1985(3). Consistent with the *Griffin* approach, Godbold said:

> When the Supreme Court in *Griffin* turned to the matter of whether the petitioners' complaint satisfied the motivation requirement of § 1985(3), it did not deal at all with the defendants' liability *vel non* under Mississippi law... The Court did not intimate that the defendants' interferences with... federal rights could lead to § 1985(3) liability only because those interferences were independently illegal. When the court referred to defendants' alleged "detention, threats, and battery" as establishing a cause of action, it was discussing only the third criterion of the § 1985(3) cause of action, i.e., the necessity of an action in furtherance of the conspiracy.

*McLellan*, 545 F.2d at 535 (Godbold, J., dissenting) (citations omitted).

\(^{311}\) *Id.* at 925 n.21, citing *Griffin*, 403 U.S. at 97, 91 S. Ct. at 1796.

\(^{312}\) *McLellan*, 545 F.2d at 935.
of citizenship to those occasioned by other illegality. What is significant, however, is that the Fifth Circuit has fashioned a reconciliation of the private deprivation of equal protection dilemma that operates in the more expansive set of cases where any legal right has been deprived rather than where equality is threatened. What in McLellan appears as a limiting move is, on closer inspection, a severe disruption of Griffin with potentially excessive expansionary effect.

Given this slight change of focus, the Court's concern that § 1985(3) would consume state tort law, the concern that caused it to give the statute very limited scope in Collins, and which was expressly rejected in Griffin, is given new life, notwithstanding Griffin's consolation that those concerns were exaggerated. The Fifth Circuit correctly recognized that Griffin's requirement of invidiously discriminatory animus is designed to contain this broad prohibition. However, having broadened the potential scope of § 1985(3) by focusing on the fact of deprivation, not the effect of the deprivation on the victim's equal citizenship, the Fifth Circuit increases the burden borne by the animus requirement. Treatment of § 1985(3)'s discriminatory animus requirement is the subject of the next section; however, it is instructive to note that the Fifth Circuit cast its analytical eye on which class the deprivation worked against: "the purpose to deprive . . . must be class based." Conceiving of the "act" as triggered by normal illegality in extraordinary circumstances, the Circuit recasts Griffin's limitation as class-based rather than invidiously discriminatory; it focused on the identity of the victim rather than the effect of the illegality on the victim. Its discussion of class based animus thus threatens to merge the deprivation (now violation) and invidiously discriminatory animus components of Griffin into a single inquiry.

McLellan's allegation, which the Circuit rejects, is that bankruptcy should be a protected class. Limiting the actionable deprivations to deprivations of rights and finding that the plaintiff had no right to employment, the Circuit discusses the class requirement

313. The Collins Court noted that [t]here is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of "equal protection" or of "equal privileges and immunities" than it would be for one to assault one neighbor without assaulting them all . . . . Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.

341 U.S. at 661, 71 S. Ct. at 942.

314. It is this view of private action that to which Griffin construct responds.
as though it necessitated finding a “suspect group” as required in Fourteenth Amendment equal protection “strict scrutiny” cases. As such, the majority’s treatment slight the difference between the plaintiff’s allegation of class (bankrupts) and his deprivation of rights (illegal firing) through a focus on plaintiff’s alleged identity (bankrupt) rather than the effect of the defendant’s actions on the plaintiff.\footnote{315} The two approaches to animus are distinct.

It is the Fifth Circuit’s failure to recognize this distinction that occasions its formulaic treatment of the deprivation portion of the second element of the § 1985(3) claim. Like the Third Circuit’s approach to including the “class of women” in § 1985(3) in \textit{Novotny}, the Fifth Circuit references uncritically the formal neutrality of Fourteenth Amendment equal protection cases to define a set of protected classes. It deprives the invidiously discriminatory animus requirement of its limiting effect and must require a more stringent deprivation showing in order to limit the statute’s reach. By limiting the deprivation to deprivations of legally recognized rights, however, the Circuit in fact gives the statute coverage coextensive of state criminal and tort law. It can only limit this scope by rejecting new suspect-classes, no matter the effects of the defendant’s behavior on the victim’s enjoyment of equal protection and equal privileges and immunities under the law.

Inherent in the \textit{Griffin} balance is the notion that a person is deprived of equal citizenship by certain actions. This first component of the analysis perhaps requires a showing that the deprivation is substantial. It turns, importantly on the effect on the citizen—did the victimization make the citizen less equal. This “effects” analysis invokes the limitation in \textit{Griffin}: the effect of certain injurious acts on certain citizens has a more dramatic effect on their citizenship than on others. Mere torts against newly freed men occasioned by conspiracy could have had the effect of re-enslaving them. Indeed, this illustration shows that, while it might be reasonable to limit the deprivation part of the second element to violations of laws, even, as in \textit{Novotny}, to violations of “rights,” it is not the violation but the deprivation, the deprivation of equal citizenship, that establishes the second element. It is, therefore, not the intention to violate the plaintiff’s rights through animus against a class, but the effect of the violation against members of the invidiously discriminated class that limits and supports that deprivation under § 1983(3).

\textit{McLellan} illustrates that the \textit{Griffin} construct, perhaps because it was new and unfamiliar, proved difficult to grasp. The Fifth Circuit

\footnote{315. Perhaps this is because of the existence of a hard question of whether plaintiff’s rights were violated, resolved perhaps inadequately by the Circuit’s finding that independent illegality is required. See Godbold dissent, \textit{McLellan}, 545 F.2d at 934–36.
in a largely fair reading of the act’s requirements struggled then failed to maintain the balance struck in *Griffin*. The Circuit’s efforts produced slight modifications in that balance which reordered the importance of *Griffin*’s component requirements. Although *Novotny* could have had little or no effect on this holding, the spirit of that decision and the concurring Justices’ anticipation of future issues occasioned by the limitation of the act to violations of rights, was to change the minor modifications in *McLellan* into significant transformations of the *Griffin* doctrine, to be imported out of the Fifth Circuit in *Scott*.

**b. Decisive Skirmishes: Scott Below and Dombrowski Abroad**

In the early morning hours of January 17, 1975, a crowd of almost three hundred people assembled at the main access road to the Alligator Bayou project construction site near Port Author, Texas. Shortly after 7:00 a.m., when the employees of Cross Construction Company, the contractor hired to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure along Taylor’s Bayou, had begun work, four pickup trucks drove onto the job site. After a brief exchange with workers on the site, someone allegedly stepped from one of the trucks and hit Paul Scott, a Cross employee, on the head. The mob then entered the job site and beat Scott, Cross, and Cross’ other employees. This brief episode of violence ended several tense weeks between the Cross Company and the local union employees upset by the Cross Company’s employ of non-union workers. 316

When Scott and James Matthews filed suit against several named defendants, the local Construction Trades Council, and twenty-five local unions, the *Griffin* construct was presented with its most formidable challenge. With the benefit of its decision in *McLellan* and the Supreme Court’s decision in *Novotny*, the Fifth Circuit sought to determine what constituted a deprivation for § 1985(3) purposes and in what way did the discriminatory animus requirement limit liability in those cases.

*McLellan* and *Novotny* had already defined the parameters of the first issue; a deprivation must consist of a violation of some independently identified right. But as Justices Powell and Stevens observed in *Novotny*, there remained the question whether just any right could give rise to a violation. The *Scott* plaintiffs alleged the deprivation of an underlying right to First Amendment guaranteed freedoms. The District Court agreed, 317 and a panel of the Fifth

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316. See *Scott v. Moore*, 680 F.2d 979, 982–84 (5th Cir. 1982).
Circuit affirmed with respect to three of the eleven defendants.318 The Fifth Circuit heard the case en banc to determine, inter alia, whether a First Amendment violation could support a cause of action for a private conspiracy under § 1985(3). The Fifth Circuit began its discussion of whether a First Amendment right could properly give rise to a § 1985(3) deprivation by considering the Seventh Circuit decision in Dombrowski v. Dowling319 which said it could not.

(1) Dombrowski

Dombrowski, a white criminal law attorney, sought to lease office space from Author Bubloff & Co.’s manager, Dowling. Dombrowski sued when he was denied the opportunity because a substantial number of his clients were black and Latino. Dombrowski prevailed on a motion for summary judgment on his § 1985(3) claim, rooted in a deprivation of his First Amendment rights. Treating the case as involving a classification of criminal law attorneys as undesirable, the Seventh Circuit proceeded to reverse the District Court, holding that the First Amendment could not support a claim of an illegal private conspiracy.

While the treatment of Dombrowski’s complaint is a bit unclear given the summary disposition of the case by the District Court, the Seventh Circuit is very clear on the question that matters here. Justice Stevens, then still on the Seventh Circuit, wrote for the panel, acknowledging the private action reach of § 1985(3) and commending the District Judge for anticipating the Griffin decision. He refused, however, to recognize First Amendment rights as the basis for a deprivation in a private conspiracy on the basis of a distinction between the “interests of the plaintiff that the statute was enacted to protect” and the “conduct of the defendants which [the act] proscribes.”320 Based on this distinction, he says, §§ 1983 and 1985(3) share similar requirements.

Citing Justice Brennan’s concurrence in Adickes v. S. H. Kress & Co.,321 Stevens focuses on the dual state action requirements of § 1983: the first is the express requirement in the first element of the cause; the second “inheres in the nature of [the] plaintiff’s protected rights.”322 Since § 1983 protects only rights secured by the Constitution through the Fourteenth Amendment, and since those rights themselves require state action, state action is necessary both

318. 640 F.2d 708 (5th Cir. 1981).
319. 459 F.2d 190 (7th Cir. 1972).
320. Id. at 193.
322. Id. at 193, 90 S. Ct. at 1621.
to fulfill the first element of a § 1983 cause of action and to establish the deprivation of rights which establishes the second § 1983 element.

This reasoning, extended to § 1985(3), is the strongest argument for what the Novotny Court later takes for granted. If the focus of the deprivation component of § 1985(3)'s second element is on particular rights deprived, rather than on deprivations which work inequality of citizenship, it is only logical to require state action if the right is an individual's against the state. However, the Dombrowski Court still needed to explain why § 1985(3) requires deprivation of independently identified rights in the absence of any mention of the state (or the Constitution for that matter) in the language of § 1985(3).

On this point, then Judge Stevens offered that "the omitted language, however, is directed to the proscribed conduct of the defendants rather than the nature of the plaintiffs' rights which are protected by the statute."323 In other words, whereas § 1983 creates a cause of action for (1) "deprivations of any rights, privileges, or immunities secured by the Constitution and laws"324 which are caused by (2) "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia,"325 § 1985(3) creates a cause for deprivations, which might include constitutional deprivations, committed by conspiracies of private persons. By omitting reference to the state in the "equal protection of the laws" and "equal privileges and immunities under the laws" Congress, according to Stevens, only allowed for the possibility of private conspiracies. In his view, Congress did not establish an independent right, which is violated by private actors, nor remove state action from those rights violations inherently made by the state only.

Judge Stevens errs, however. It is that part of § 1985(3) that prohibits the conspiracy that anticipates private conspiracies326--"If

323.  Id.
325.  Id.
326.  ... § 1985 (3) operates to provide a separate remedy when the manner of denial is especially invidious and threatening. The Reconstruction Congress that enacted § 1985 (3) believed that an especial danger was posed by persons acting with invidious animus and acting in concert—thereby compounding their power and resources—to deny federal rights. Because such private conspiratorial action, the paradigm of which was the activity of the Ku Klux Klan, constituted a serious threat to civil rights and civil order, it was deemed necessary to "[g]ive [a] civil action to anybody who shall be injured by [such] conspiracy." Thus, though it may be that those who conspire with invidious motivation to violate § 703 (a) may in many cases also be reached under Title VII itself, there is no basis for inferring a silent repeal of the legislative judgment that the distinct nature
two or more persons conspire or go in disguise on the highway or on
the premises of another—and is comparable to the "under color of
state law" element of § 1983. It is this language that Justice Stewart
quotes in Griffin when he says the statute should be given a sweep as
broad as its language, and it is this language to which Stewart refers
in the first paragraphs of Griffin's Part III where he dismisses a state
action requirement.

The omission of any reference to the Constitution in § 1985(3) in
fact undercuts Judge Stevens' argument. Not only does the language
of the act embrace wholly private conspiracies but it does not limit
the deprivation to that of any particular law. Judge Stevens, like the
jurists in Novotny and McLellan, breaks significantly with Griffin
when he focuses on deprivations of laws and rights rather than
deprivations of equality. Having decided some other right must be
identified, Judge Stevens has wiped away most differences between
the deprivation required in §§ 1983 and 1985(3). He says "With
respect to plaintiff's protected interests, the language of §§ 1983 and
1985(3) . . . differs, but the coverage of the two provisions is
probably coextensive."

That § 1985(3) completely lacks the state action requirement of
the first element of a § 1983 action and conceives of the deprivation
differently, is completely ignored. The Dombrowski court soothes
this rough cut with the salve of a required constitutional authority.
That is, it turns to the Griffin Court's broad discussion of
constitutional bases for enforcing § 1985(3) against private parties to
suggest that the act only protects against constitutional violations.
Griffin's Part V is turned into Griffin, Part III. The Griffin Court's
focus on equality is replaced with a focus on Constitutional rights.
Section 1985(3) becomes § 1983.

In Scott the Fifth Circuit rejects Dombrowski's reading of Griffin.

(2) Scott

In Scott the Fifth Circuit discusses § 1985(3) in a framework of
presumptions about Griffin that forces any decision to follow or reject
Dombrowski. This construction also ultimately seals the fate of §
1985(3); the Supreme Court's resolution of the Scott/Dombrowski
conflict severely circumscribes the section's application. At stake in

327. Griffin, 403 U.S. at 96, 99 S. Ct. at 1795.
328. Dombrowski, 459 F.2d at 194–95.
Scott is more than whether victims of union violence can employ the statute, but whether the statute will have any future force. The casual and uncontroverted presumptions of the Fifth Circuit obscure these stakes as well as the subsequent devastating effect of the Supreme Court’s later decision.

The Fifth Circuit began its discussion of § 1985(3) with the casual statement, buried in the middle of an unwieldy descriptive paragraph, that Griffin held damages available for “wholly private infringements of constitutionally protected rights.”329 With this statement and its unassuming reference to constitutional rights, Scott assumes the Fifth Circuit’s own holding in McLellan as well as the spirit of the Supreme Court’s decision in Novotny. This presumption, that the act addresses only constitutional rights, leaves contested only the pre-Griffin, Dombrowski discussion of whether the act reaches private conspiracies under the First Amendment. Moreover, it necessitates that the Circuit revisit the limiting effect of the invidiously discriminatory animus requirement. Because it adopts, as did the Third Circuit in Novotny and the Seventh Circuit in Dombrowski, a reading of invidiously discriminatory animus that merely duplicates the suspect class of Fourteenth Amendment case law, its rejection of the Seventh Circuit’s Dombrowski formulation proves internally inconsistent. Finally, the presumption that § 1985(3) reaches only constitutional rights demands an argument for the constitutional power of Congress to prohibit such private deprivations, in effect creating an “incorporation” doctrine for the acts of private parties.

(2a) Constitutionally Protected Rights

The Fifth Circuit offers no authority for its suggestion that § 1985(3) protects only deprivations of constitutionally protected rights. It cites Griffin but does not quote or explain any portion of that opinion supporting that proposition. In fact, it ends its introductory paragraph with the acknowledgment that the plaintiffs in Griffin alleged “violations of the laws of the United States and of Mississippi . . . .”330 It is perhaps to be presumed that the deprivation of constitutionally protected rights is the same as the deprivation of “equal protection of the laws” and “equal privileges and immunities under the law.” Nevertheless, since the plaintiffs alleged deprivation of equal protection of the laws through a violation of First Amendment rights, it is the consequence of this designation that is important here. The problem, stated simply, is that this approach transforms all the elements of the § 1985(3) violation, meticulously listed by the Circuit

in *Scott*, into little more than the elements of the underlying constitutional violation.

By approaching the question as one of deprivation of equal protection of the laws through the violation of a right secured by the Constitution, it becomes the constitutional deprivation that matters. This construct transforms § 1985(3) into one that punishes constitutional deprivations, instead of an act which punishes conspiracies—the first element listed.\(^{331}\) If the focus is on the constitutional deprivation, the act merges into § 1983 and it becomes difficult to understand the purpose of the conspiracy requirement altogether.\(^{332}\)

The third and fourth elements, moreover, appear to merge into the otherwise independent elements of the constitutional violation. It is difficult to perceive how there could be a conspiracy to in fact deprive a person of a constitutional right where the act in furtherance is anything but an element of the constitutional right and where the injury is not (a) the injury presumed by the constitutional deprivation and (b) the injury of being “deprived of having and exercising any right or privilege of a citizen of the United States.” Section 1985(3), perhaps, is to be understood as operating independently only with regard to attempts, failed violations of constitutional rights. But surely the Reconstruction Congress could have written an attempts statute; indeed, the *Griffin* Court could have called it so.

Nowhere is the consequence of the “constitutional violation” treatment of the section more significant than in the Circuit’s discussion of the third element—that element which raises the question, what constitutes a private deprivation of equal protection? The presumption that constitutional rights are the basis for a deprivation under the third element revisits and recasts the dilemma, presumably answered in *Griffin*. Instead of revisiting whether private persons may deprive another of equal protection of laws, the Circuit grants that *Griffin* involved certain peculiar rights that could be deprived by private persons. The First Amendment is different: it can

\(^{331}\) *Id.*

\(^{332}\) It is, in this light, rather bizarre that the Circuit lists its own additional element—“that the conspirators’ conduct must be unlawful independent of the section 1985(3) violation”—developed in *McLelllan*, 545 F.2d 919. Surely a constitutional violation is a violation of a law; although, the Circuit perhaps meant to suggest that the act will be available only if there were an implied right of action available for the right in question. This “slip” on the Fifth Circuit’s part likely belies a changing view of the act. In *McLelllan* the Circuit might still have begun from the presumption that § 1985(3) prohibits deprivations of equality for which the requirement that such deprivations be effected through the violation of some law. By *Scott* the Circuit’s casual incorporation of the “constitutional violation” language clearly indicates that the effect of *Novotny* was to change the thinking of courts about the central bases of the statute.
be violated only by the state according to its own terms. This is an especially difficult question because First Amendment rights are generally litigated against state actors through the Fourteenth Amendment, which also expressly requires state action.

The conceptual difficulties with this construction are legion, but two are especially instructive. First, in line with the assumption that § 1985(3) protects only deprivations of otherwise identified constitutional rights, it requires that the person be able to “claim the rights.” This necessitates the labyrinth, through the Fourteenth Amendment, to reach the First Amendment. At each stage is a presumption of state action upon which the whole jurisprudence is built. Because the majority of the Fifth Circuit believed that the plaintiffs in Scott did state a cause of action, they correctly point out that the Griffin court rejected this view, quoting Griffin:

A century of Fourteenth Amendment adjudication has... made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. 333

The Fifth Circuit accordingly finds Dombrowski inconsistent with the spirit of Griffin, rejecting the contrary implication of Novotny. 334 This finding is, as such, but a judgment of the Circuit, admittedly perhaps at odds with the requirements of Novotny’s location of rights outside the act.

The second difficulty with this construct follows from the determination that only independent rights might produce a deprivation. It assumes that constitutional protections can be deprived only when there is a cause of action. That is to say, the principles of the First Amendment are read as having been meaning only when they operate against the state. Such is, no doubt, the implication of the Novotny holding. If a deprivation is located only in the deprivation of legally protected rights located outside § 1985(3), it is that initial constitutional deprivation, committed through conspiracy, that gives rise to recovery under the section.

333. Griffin 403 U.S. at 97, 99 S. Ct. at 1796, as quoted in Scott, 680 F.2d at 989 (ellipsis in original).
334. We are not unmindful of the Supreme Court’s statement in Novotny, that section 1985(3) ‘provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates’. ... However, so long as Griffin remains viable, we are bound by its determination that section 1985(3) reaches all deprivations of equal protection, whatever their source.

Scott, 680 F.2d at 990 (citation omitted).
As constituted, adjudication under § 1983 has evidenced the expansion of actionable rights. It seems to immediately implicate the often cited flood of litigation in federal courts and the supplantation of state tort law. Adoption of the § 1983 approach here means that § 1985(3) is merely duplicative of § 1983 but without the state action limitation. Dombrowski revives the "second" state action requirement of § 1983 in order to resolve this new found dilemma under § 1985(3). By refusing to follow Dombrowski the Fifth Circuit had failed to balance federal and state interests in the deprivation section of the third element. It became incumbent on the Circuit Court to then give greater weight to the invidiously discriminatory animus limitation. Unfortunately, its treatment of invidiously discriminatory animus proved unsuccessful at limiting this new construct. Its treatment of both issues, like the approaches of the Dombrowski and Novotny Courts, proved a significant departure from Griffin, necessitating a balance that could not succeed.

(2b) Invidiously Discriminatory Animus

It is revealing that the Fifth Circuit titles its sub-section on invidiously discriminatory animus "Discriminatory, Class-based Animus." As such, the Circuit equates discrimination and class-based animus, completely disregarding any reference to invidiousness. Indeed, the Circuit's treatment of the question presumes invidiousness is inherent in class-based decisions, at least those class-based decisions of a quality the court was willing to recognize. Like the Third Circuit in Novotny, class-based animus is, for the Fifth Circuit, the use of immutable categories such as those recognized in Fourteenth Amendment suspect class inquiry.

The Circuit also recognizes another basis for establishing a § 1985(3) class. The Scott decision quotes from the Fifth Circuit's earlier en banc holding in Kimble v. D. J. McKuffy, Inc.335 to relate its view that the "class-based distinctions required to support an action under the equal protection clause" are not the only basis for § 1985(3) discrimination.336 Section 1985(3) "was certainly intended to cover conspiracies against Republicans . . . . What Griffin stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act."337 The Circuit then anticipates something more than the narrow Fourteenth Amendment based classes, but the effect of

335. 648 F.2d 340 (5th Cir.1981), en banc.
336. Id. at 347 n.9.
337. Id.
embracing this new historical class is much the same as the Third Circuit's more limited reference to immutable characteristics alone.

By defining classes as such and limiting § 1985(3) to conspiracies based on those classes, the circuit presumes it has shown invidiousness but fails to provide any limitation on the operation of the act envisioned by *Griffin*. Though it might have argued that class-based decisions of some kind more often than not constitute invidious deprivations, including perhaps a corollary determination regarding the social situatedness of the person suffering the deprivation, the Circuit Court's construct merely rewards those who can assert that the deprivation is related to a broad-based invidious category such a race or gender. Because such deprivations lack any connection to the Constitution, a social contract, or any theory of governmental legitimacy, recovery for private acts under such a theory becomes indistinguishable from a general tort law. The Circuit's addition of historical categories like Republican to the list from which cognizable claims can be stated operates similarly; it merely adds other groups to the statute's coverage, without regard for the effects of the challenged conspiracies on the person or the category with which they are associated. Indeed the Circuit's construct seems to confirm the fears of those who would see civil rights law as a collection of special preferences for special people: if a person does not belong to a historically-or contemporarily disadvantaged group, only a conspiracy to deprive a person of certain constitutional rights might suffice to state a civil claim under the section—but then the section is indistinguishable from § 1983. Having presumed, as the Fifth Circuit does, that the act is triggered whenever a constitutional right is violated and that no state action is required in such a constitutional violation, the statute seems to demand a more restrictive reading of animus. Instead the Circuit slighted invidiousness to allow class animus to be shown in a mechanical, and therefore often less restrictive manner.\footnote{338. In dissent Judge Rubin, who created the Civil Rights Legislation class the author now teaches at the Paul M. Hebert Law Center correctly argues that the majority slights the animus requirement. He goes too far, however, requiring the plaintiff to show the defendant intended to prevent the operation of the laws. This reversion to *Collins* aside, his animus argument overlooks the various ways equality may be deprived by ascribing too inflexible an animus requirement to the *Griffin* opinion. *Griffin* focused on the limiting effect of discriminatory animus, not the relation of that animus to laws. Indeed, *Griffin* rejects the implication in *Collins* that a private deprivation of "equal protection under the laws and equal privileges and immunities under the laws." Judge Rubin, like the majority, was perhaps misled by the mistakes of *Novotny*.}

So far is the Circuit Court away from the balance of *Griffin*, its decision is confused, and internally inconsistent. As such, its
position is vulnerable on several points. However, the most urgent criticism, given its construct, is the constitutional authority for a court to allow a cause of action for private violations of constitutional rights that heretofore required state action.

(3) The Constitutionality of Scott

The discomfiting implication of the Fifth Circuit's presumption that violation of constitutional rights formed the only basis for a deprivation under § 1985(3) is nowhere more evident than in the court's apparent need to discuss the constitutional power of Congress to enact § 1985(3) as it interprets it in Scott. Like the Dombrowski court, the Fifth Circuit transforms Part V of the Griffin opinion into an extension of that opinion's Part III. It notes that "Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality."339 Nor is § 1985(3) unconstitutional "merely because it reaches wholly private conspiracies."340 However, the court's assumption that the statute protects primarily against deprivations of constitutional rights leaves it to read Griffin as finding a deprivation in the violation of the right to interstate travel and the Thirteenth Amendment. It is these rights that are said to be inherent in the Griffin finding of a deprivation and which support the constitutionality of Congress' power to enact § 1985(3) as applied.341

Since the Fifth Circuit in Scott found the section violated, through the private conspiracy's violation of a constitutional provision, the First Amendment, it needed to confront the difficult task of locating constitutional authority for prohibiting private violations of rights normally thought to be violated by acts of the state. Its Scott opinion seeks to locate such authority in Griffin's Part V; however, it misapprehends Part V of Griffin. That part explained the various bases for constitutional authority to enact § 1985(3) itself; not the authority to protect underlying rights independently. Indeed, there is no cause of action for violation of the Thirteenth Amendment, as such; nor is there any cause of action implied or express for the violation of the right to interstate travel. For sure, there is nothing in Griffin that suggests that § 1985(3) was such a statute creating such causes of action and, if it did, that construction would not support the reading that requires deprivations to be based on independent rights violations.

339. Scott, 680 F.2d at 996.
340. Id.
341. Id. at 997.
What Part V does do is outline the broad remedial powers of Congress under the Constitution to prohibit conspiracies, particularly those that disrupt the relationship between a citizen and her state. The various allegations of illegal activity in Griffin evidenced that the acts in furtherance of the conspiracy, such as the beating, had the effect of reducing the value of the plaintiffs' rights as equal citizens. Once this construct has been abandoned, the transformation of Part V into a specific authorization section is understandable. It remains, nevertheless, internally inconsistent with the Circuit's view of § 1985(3) as analogous to § 1983. It is the existence then of the constitutional discussion that causes the most concern, for such a discussion is wholly unnecessary under Griffin and virtually impossible to make under the Novotny construct guiding the Circuit in Scott.

By the time the Supreme Court was presented Scott for review, nearly all the important questions have been framed by the significant leap of the Novotny Court. The rather narrow question presented in Scott, whether there ought be a state action requirement for constitutional violations is unremarkable, but for the irony of reweaving that requirement into a statute whose language is wholly inconsistent therewith. The Fifth Circuit's opinion, birthed in undeniable good intentions, ultimately sentences the statute to its final demise.

**CONCLUSION**

On the surface, the move from Griffin to Bray seems to be a manifestation of the ascendance of conservative justices. Even considering the damage wrought by the Novotny and Scott decisions to the Griffin conception of rights under § 1985(3), one remains tempted to embrace the conservative justices’ view, only moving the advent of conservative retrenchment to the Burger rather than Rehnquist eras. Closer inspection, however, shows that Griffin was debased by sheepish and fearful efforts of more liberal minded judges seeking to apply the statute in support of civil rights plaintiffs. The activist insecurity prompted a narrowing of the statute and then its generalization into a purely remedial corollary to constitutional litigation under § 1983. Ultimately, it was this, as much as the conservative trend in the courts that explained the statute’s demise. The conservative trend in the courts is quite real and has led to the derogation of civil rights law. However, the activist insecurity is both an independent explanation for the fate of civil rights law and a key explanation of how the law changed in a way which facilitated the

342. I mean here the “going in disguise” language.
conservative transformation. Indeed, the activist insecurity explains why it has generally been unnecessary for conservative judges to overrule civil rights law even while gutting it.