
John Valery White
University of Nevada, Las Vegas – William S. Boyd School of Law
VINDICATING RIGHTS IN A FEDERAL SYSTEM: REDISCOVERING 42 U.S.C. § 1985(3)’s EQUALITY RIGHT

John Valery White*

Section 1985(3) is dead.1 The United States Supreme Court’s refusal to apply § 1985(3) to the assault and intimidation of abortion seekers by abortion protesters in Bray v. Alexandria Women’s Health Clinic2 confirmed the

* © 1994, John Valery White, Assistant Professor of Law, Paul M. Hebert Law Center, Louisiana State University; J.D., 1991, Yale Law School. The author wishes to thank Elizabeth Iglesias, M. Njeri Jackson, John Devlin, Kenneth Murchison, James Bowers, and Christopher Blakesley for their advice and comments; Germaine Jackson, Tara Mason, and Vanessa Randall for their capable research assistance; and the Paul M. Hebert Law Center for the financial support of research grants.

1. Steven F. Shatz invokes this metaphor in The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation, 27 B.C. L. REV. 911, 912 n.7 (1986). Professor Shatz, I believe appropriately, designated 42 U.S.C. § 1985(3) (1994) dead following the United States Supreme Court’s decision in United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983), which held that the conspiracy statute was not intended to reach conspiracies motivated by economic or commercial animus. Id. at 839. Shatz focused on the appropriateness of Scott in light of the legislative history of § 1985(3). Shatz, supra, at 912. This approach assumed much about the nature of rights enforced by § 1985(3). This article’s examination of the nature of the rights protected by § 1985(3) reveals why the statute is necessary and why the Supreme Court in Scott, and later in Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993), killed the statute.

It may be objected that this approach personifies the statute. This personification, however, highlights the dynamic nature of law. A statute, principally conceived of as the most static component of law, easily ascertainable and memorialized in language, is appropriately viewed as a pawn of battle—much like the abstracted, artificial, and even inhuman components of a warrior. On the battlefield a soldier is more than merely a gun, but less than a complete human. Such a view is tacitly acknowledged in the law of war, which recognizes circumstances where human beings may legally be killed, and circumstances under which they become again fully human and may not be righteously killed or mistreated. See generally The Geneva Conventions of Aug. 12, 1949 and Protocols Thereto, IV INTERNATIONAL COMM. OF THE RED CROSS, GENEVA CONVENTIONS (1958) (providing detailed guidelines for humane conduct during armed conflict and outlining which persons fall under protected status and cannot rightfully be subjected to any form of abuse or violence). Surely it is not a complete human that such a legal regime presumes can be legally annihilated. As such, a statute like § 1985(3) is not mere ordinance, lifeless and dependent on other action, but a dynamic and, in some ways, independent source of authority in an ever-changing legal landscape. It changes as much as it is changed. Its vibrancy and vitality is nothing short of living—in its own way, in its own world. It is in this way that § 1985(3) lived and it is in this way it is now dead.


145
demise of the section, already significantly undercut by the Supreme Court’s previous decisions in *Great American Federal Savings & Loan Ass’n v. Novotny* and *United Brotherhood of Carpenters & Joiners v. Scott*. If Bray is troubling for the conceptual moves Justice Scalia employed to deny recovery under the section, it is more disconcerting for the apparently inconsequential resemblance of its facts to those of the case reviving § 1985(3),

659214, at *6 (N.D. Ill. Nov. 2, 1994) (holding that under Bray, “neither anti-abortion groups . . . nor pro-choice groups constitute a ‘class’ for purposes of section 1985(3)”)


5. Justice Scalia, for example, employed a distinction between “women” as a protected class and “abortion seekers” as an unprotected class:

   [W]e reject the apparent conclusion of the District Court (which respondents make no effort to defend) that opposition to abortion constitutes discrimination against the “class” of “women seeking abortion.” Whatever may be the precise meaning of a “class” for purposes of Griffin’s speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. . . . We find it unnecessary to decide whether [as respondents contend, class-based discrimination directed at abortion seekers is really directed at women and] is a qualifying class under § 1985(3), since the claim that petitioner’s opposition to abortion reflects an animus against women in general must be rejected. [Section 1985(3)] demand[s], however, at least a purpose that focuses upon women by reason of their sex. . . . [A]ll [petitioners] share is a deep commitment to the goals of stopping the practice of abortion and reversing its legalization.


Importantly, the PDA, which excludes abortion-related procedures from Title VII’s protection, defines “pregnancy related” broadly, easily encompassing abortion procedures. “The terms ‘because of sex’ or ‘on the basis of sex’ include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .” 42 U.S.C. § 2000e(k). The PDA, however, excludes abortion protection by an express exception: “This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . .” Id.

Justice Scalia took just the opposite approach. He first defined abortion as not sex-related. And, to the degree he was prepared to accept that pregnancy-related issues implicate sex, he implied that abortion is not pregnancy related. Justice Scalia’s reasoning is, however, not inconsistent with the prevailing understanding of *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the case reviving § 1985(3), as interpreted in *Novotny* and *Scott* and to which this Article offers an alternative.
Griffin v. Breckenridge. This Article focuses on the nature of the right created by Griffin's treatment of § 1985(3). Griffin, it will be shown, recognizes a right to substantial equality of citizenship in § 1985(3)'s prohibition of conspiracies depriving persons of equal protection of the laws and equal privileges and immunities under the laws. This view of § 1985(3) cannot be reconciled with the Court's narrow, formal treatment of this section since Griffin.

The Griffin right is a casualty of a jurisprudential war beginning with the Supreme Court's 1961 decision in Monroe v. Pape. Monroe revived the dormant Section 1 of the 1871 Civil Rights Act and initiated the revival of other largely dormant sections of Reconstruction Era statutes. The cases reviving


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

Monroe held that § 1983 was "remedial" only, and created no rights itself. Monroe, 365 U.S. at 171. The rights protected by § 1983 have subsequently been limited to constitutional rights (1) incorporated through the Fourteenth Amendment, see, e.g., Tennessee v. Gardner, 471 U.S. 1, 7-8 (1985) (applying Fourth Amendment principles against state); or (2) applied directly as a violation of the equal protection or procedural due process guaranteed by that amendment, see, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990) (noting that "three types of § 1983 claims may be brought . . . under the Due Process Clause of the Fourteenth Amendment": actions based on violation of incorporated sections of Bill of Rights, substantive due process, and procedural due process claims), and substantial federal laws. Compare Maine v. Thiboutot, 448 U.S. 1, 6 (1980) (finding § 1983 vindicates federal statutory rights) with Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (identifying two broad Thiboutot exceptions).

Section 1983 actions require action under color of state law. See, e.g., West v. Atkins, 487 U.S. 42, 49 (1988) (recognizing that "traditional definition of acting under color of state law requires that the defendant . . . [has] exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed in the authority of state law'"). This requirement was adopted in Monroe by reference to United States v. Classic, 313 U.S. 299, 326 (1941). Monroe, 365 U.S. at 187 (citing Classic).


Monroe signaled an increasingly rapid expansion of "rights" discourse beyond the momentous and bloody but limited jurisprudential rebellion of legal advocates for black Americans. The National Association for the Advancement of Colored People (NAACP), through a handful of dedicated attorneys, mounted an extensive and protracted legal campaign against segregation and inequality beginning in the 1920s. Some aims of that movement were lucidly described in 1944 by then NAACP counsel and NAACP Legal Defense and Education Fund director

HeinOnline -- 69 Temp. L. Rev. 147 1996
Reconstruction Era legislation and the ensuing jurisprudential debates surrounding them⁹ are characterized by competing commitments to giving the Reconstruction Era statutes and related constitutional rights full, broad meaning and ensuring that “Our Federalism” is not destroyed. For over thirty years now, these Revival decisions have proved the font of significant disputes over history,¹⁰ statutory interpretation,¹¹ and constitutional the-

---

Thurgood Marshall. Thurgood Marshall, The Legal Attack to Secure Civil Rights, reprinted in Black Protest Thought in the Twentieth Century 250-60 (August Meier et al. eds., 1971). See also Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 27 (1994) (describing Marshall’s involvement with and leadership of NAACP legal activities). By the 1950s, the organization ceased its indirect attack on the failures of the “separate but equal” principle mandated by Plessy v. Ferguson, 163 U.S. 537 (1896)—which they hoped would make segregation too expensive—and embarked on a direct attack on that principle, culminating with the United States Supreme Court’s repudiation of “separate but equal” in Brown v. Board of Educ., 347 U.S. 497 (1954). While there were other influences, such as the rise of the administrative state, no single factor inspired the resurrection of the Reconstruction Era amendments and legislation more than the NAACP’s legal crusade. See generally Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 177-94 (1994) (detailing how NAACP attorneys relied on Thirteenth and Fourteenth Amendments and Reconstruction Era statutes to support position in Brown and subsequent cases); Tushnet, supra, at 196-216 (generally describing NAACP’s use of history and Reconstruction Era statutes to achieve civil rights reforms in twentieth century).


10. The historical appropriateness of the revival of 42 U.S.C. § 1982 (1994) in Jones, for example, is debated by Charles Fairman and Sanford Levinson. See Charles Fairman, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Volume VI: Reconstruction and Reunion, 1964-88, Part I, 1117-1260 (1971) (providing critical analysis of historical support for Thirteenth Amendment and Civil Rights Act of 1866); Sanford V. Levinson, New Perspectives on the Reconstruction Court, 26 Stan. L. Rev. 461, 482-83 (1974) (book review of Fairman, supra) (arguing that Jones Court incorrectly analyzed legislation context). The debates in the cases and legal scholarly works reproduce an old and equally contentious debate over the nature and meaning of the Reconstruction Era. The long-held view was that the period that produced the Reconstruction Acts was characterized by ill-advised vengeance of white Radical Republicans who punished the South through the imposition of corrupt and inept black rule. This view, rooted in opposition to black disfranchisement, naturally justified the period of Jim Crow that replaced Reconstruction and enforced political, social, and economic subordination of black Americans. This vision of Reconstruction was not seriously
ory. While much of the first half of this period is characterized by a deliberate focus on giving the statutes the force of their spirit and terms, the last fifteen years (at least) may be fairly characterized as a Limiting period in which the Court’s concerns have focused on the perceived threats to federalism posed by the Revival decisions. At stake are not only the underlying

challenged in the historical academy until the 1960s, excepting the foresightful work in W.E.B. DuBois, BLACK RECONSTRUCTION IN AMERICA (1935). For a succinct description of the intellectual history of Reconstruction, see ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 at xix-xxvii (1988). See also Kennedy, supra note 9, at 523-29 (summarizing Foner’s description of “historiography” of Reconstruction).

11. For such a debate over § 1985(3), see, for example, Ken Gormley, PRIVATE CONSPIRACIES and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 TEX. L. REV. 527, 541 (1985) (detailing debate concerning whether § 1985(3) was strictly limited to conspiracies motivated by racial bias and whether it could reach purely private conspiracies); Janis L. McDonald, STARTING FROM SCRATCH: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus, 19 CONN. L. REV. 471, 473 (1987) (suggesting that doctrine of “class-based animus,” required for § 1985(3) cause of action by Supreme Court since 1971, and distorted evolution of that concept are responsible for present confusion and misinterpretation of statute’s purpose).

12. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (searching for justification for judicial invalidation of acts of democratically elected branches of government). Much of the debate over the role of federal courts has, in recent years, focused on the effect of civil rights legislation on our systems of federalism and separation of powers. Perhaps most significant among these are the challenges to structural reform remedies, e.g., GERARD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 10 (1991) (detailing view that courts are generally not effective producers of significant social change), and the regular claims that civil rights litigation burdens the dockets of federal courts. Cf. Harry A. Blackmun, SECTION 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. REV. 1, 21 (1985) (stating that criticisms that § 1983 actions unduly burden federal court system are unpersuasive).


Few today would admit opposition to “rights.” Indeed, most arguments over the effect of the Constitution are couched in terms of rights. This is most clear in the contentious debate over affirmative action where the dispute is framed in terms of the rights of groups versus innocent victims. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (rejecting affirmative action plan). Cf. Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1341-45 (1986) (cautioning that, in affirmative action debate, it is often necessary to explore speaker’s motivation). To this end, the Limiting decisions typically invoke “negative rights” arguments such as the Civil Rights Cases’ reading of the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 11-14 (1883). The Civil Rights Cases
questions of racial, ethnic, religious, and gender justice and of individual rights, but also questions concerning the fundamental character of the federal structure.

proceeded on the notion that the Fourteenth Amendment protects only against state action that prevents the exercise of rights. The linchpin of the decision was that the Fourteenth Amendment provides no authority for enforcing equality, id. at 13, and that the Thirteenth Amendment, which does provide such authority by abolishing badges and incidents of slavery, was not invoked by the statute in question. Id. at 25. "The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of [public accommodations]; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race . . ." Id. at 9-10. But, the Court continued, if that prohibition is based on the Fourteenth Amendment, "[i]t is state action of a particular character that is prohibited," not the decisions of private property owners. Id. at 11. Finally, the Court argued that discriminatory limitations on access to public accommodations were not badges and incidents of slavery; if slaves were not received, as slaves, in inns and theaters, "[t]his was merely a means of preventing escapes, and was no part of the servitude itself." Id. at 21-22.

14. Supporters of the Revival interpretations have typically viewed the Limiting decisions as erasing "rights" altogether. Reactions to the Supreme Court's standing decision in Allen v. Wright, 468 U.S. 737, 738 (1984) (no standing for black parents to challenge tax-exempt status of segregated private schools), are characteristic of this view. See, e.g., Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. Pa. L. Rev. 635, 658-59 (1985) (arguing that it would be possible to confuse "standing's agenda with that of the New Right"). Professor Nichol has argued that the Burger Court, up to and including Allen, applied standing doctrine "without consistent rationale to fence out disfavored federal claims." Id. at 635. Nichol states:

As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values. And what a remarkable set of values the standing doctrine has been forced to serve.

The Burger Court has raised the toughest standing hurdles in cases in which minorities have challenged exclusionary zoning practices, patterns of police brutality, and judicial or administrative bias. Poverty plaintiffs have been barred from challenging the discriminatory enforcement of child support obligations, and the tax exempt status of hospitals that deny them emergency medical services. Litigants seeking to prevent government from contributing valuable property to a religious organization and to force public disclosure of the CIA budget have similarly fallen before an aggressive standing doctrine.

Id. at 658 (footnotes omitted). Nichol insightfully indicates the limiting techniques often invoked by the Court: concerns over separation of powers, federalism, limitations on the exercise of judicial review powers, and "the Court's view of the claim on the merits." Id. at 649.

The Limiting cases are regarded as undercutting important checks on the tyranny of the political majority, inherent in the Reconstruction Era amendments (which authorized the Reconstruction statutes), if not inherent in the original Constitution. Revival supporters cite the Revival decisions' recognition of important "positive rights" notions, necessary, they believe, to truly realizing the promise of a representative democracy. Justice Stewart's deft observation on the guarantees of 42 U.S.C. § 1982 in Jones v. Alfred H. Mayer Co. captures this sentiment:

Negro citizens . . . who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.


VINDICATING RIGHTS

This period of upheaval in American law has produced a civil rights jurisprudence characterized by broad but significantly limited rights of action. The balance, of course, does not satisfy all and may not be appropriate for or consistent with the terms and aims of particular statutes. However appropriate this balance may be, all of the revived statutes today remain available and effective means of vindicating rights—except § 1985(3). The demise of § 1985(3) has left a gap in civil rights enforcement in which a patchwork of efforts has emerged to respond to private terror: A movement to criminalize hate in the federal system; the emergence of “enhancement statutes” which extend criminal penalties for state criminal violations motivated by hate;¹⁵

voluntary affirmative action plans undertaken by governments. Justice O’Connor, writing for a plurality of four Justices and joined in the judgment by Justice Scalia, writing separately, agreed that such plans must pass the strictest scrutiny and are then permissible only when specific discrimination is identified and only if other “less discriminatory” means of remedying that discrimination are unavailable. Croson, 488 U.S. at 493. Similarly, the Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), announced several limitations on the disparate impact proof formula in employment discrimination cases, prohibiting inter-workforce comparisons and requiring sophisticated correlations between an employer’s workforce and the available pool of qualified employees. Id. at 657. And, in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court limited the reach of § 1981 to the formation (rather than performance) of contracts, after threatening to reverse the Revival decision in Runyon outright. Id. at 174.

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 42 U.S.C. § 1981’s guarantee to all persons of the same rights as white citizens to make and enforce contracts, Patterson, 491 U.S. at 174, 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 [T]itle VII . . .

Ironically, however, the Court was giving [T]itle VII a narrow construction. . . . [T]he Court in Wards Cove Packing Co. v. Atonio [490 U.S. 642 (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. [T]he Court divided on other issues indicated in Price Waterhouse v. Hopkins [490 U.S. 228 (1989)] that employment decisions motivated in part by prejudice do not violate [T]itle 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. Wilks [490 U.S. 755 (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 [T]itle VII and the [F]ourteenth [A]mendment. [T]his held in Lorance v. AT&T Technologies [490 U.S. 900 (1989)], that [T]itle VII’s statute of limitations for challenging seniority plans begins to run when the plan is adopted [and the Court limited attorneys fees awards against intervening defendants in Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989)].


and the enactment of specific legislation such as the recent federal Freedom of Access to Clinic Entrances Act of 1994,\(^6\) providing criminal and civil penalties for acts of violence against persons seeking to exercise their right to abortion. Instructively, the Clinic Entrances Act is a direct response to the Supreme Court’s failure to protect civil rights under § 1985(3) in *Bray*.\(^7\)

In 1971, when a unanimous Supreme Court revisited the 1871 legislation aimed at Ku Klux Klan violence against freedmen in *Griffin v. Breckenridge*,\(^8\) it created a distinct notion of “right” especially tailored to check sig-

---


The movement to criminalize hate was dealt an apparently severe blow in R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992), where the Supreme Court found that a St. Paul, Minnesota, hate speech ordinance violated free speech rights. The movement was given a reprieve when the Court found enhancement statutes constitutional where the hate involved motivated physical violence. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993). On the distinction, see generally Daniel A. Farber, *Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality?*, 18 WM. MITCHELL L. REV. 889 (1992). See also *Samuel Walker, Hate Speech: The History of an American Controversy* 9 (1994) (detailing Wisconsin’s enhanced penalty law that inflicts more severe penalty for assault when assailant is motivated by racial or religious bias); Michael A. Sandberg, *Bias Crime: The Problems and the Remedies*, in *Bias Crime: American Law Enforcement & Legal Responses* 203 (Robert J. Kelly ed., 1993) (same). The wave of anti-hate legislation has splintered civil rights advocates, reinvigorated a long-banished free expression defense for civil rights violations, and, perhaps most troublesome, given support to those who would cast civil rights law as concerned fundamentally with “hate”—a narrow and restrictive concept that would not only limit the effectiveness of civil rights statutes, but also makes such statutes even more susceptible to attack as restrictions on free expression.


17. Anti-hate statutes respond to similar limitations as those placed on the reach of § 1985(3), such as the finding that § 1982 (prohibiting racially discriminatory interference with property rights) was inapplicable to the anti-Semitic vandalism of the Shaare Tefilla Congregation. See Shaare Tefilla Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (noting that applicability of § 1982 depends on whether victim was member of group that Congress intended to cover at time statute was enacted).

The Clinic Entrances Act is a part of a growing federal criminal law. This federal criminal law has inspired criticism highlighting the devastating effect such legislation is said to have on state sovereignty in “Our Federalism.” My colleague John S. Baker, Jr., has offered a thorough criticism of this expansion in response to organized crime. See generally John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make it Necessary or Proper?*, 16 Rutgers L.J. 495 (1985). See also Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J.L. & Pub. Pol’y 117, 117 (asserting that enlarged criminal jurisdiction of federal courts has led to increasing federalization of criminal law).

significant expressions of racism and prejudice in order to preserve the legitimacy of the constitutional federal state. This "right" anticipated and more effectively addressed the problems at which hate crime statutes are aimed. The Griffin construct was remarkable because it accomplished this formidable feat while avoiding severe intrusions on state sovereignty.\textsuperscript{19}

The death of § 1985(3) raises two questions. First, what was the nature of the right described in the unanimous\textsuperscript{20} reviving decision in Griffin v. Breckenridge? And second, why did Griffin’s construction not survive? This Article concerns the first of these questions. The specifics of § 1985(3)’s demise will be the subject of a forthcoming article; however, the death of the section may be succinctly characterized as the result of the Court’s failure to distinguish the unique right announced in Griffin from the approach to rights it had crafted to give meaning to other civil rights statutes. This Article, therefore, describes the Griffin right in comparison with those other approaches.

Part I briefly describes the birth and demise of the Griffin right. Part II explains the Griffin Court’s construction of § 1985(3) in comparison to the Court’s Revival-period attempts to vindicate rights in a federal system. This discussion shows how Griffin’s broad reading of § 1985(3) was intelligible and independent of other revived statutes. Part III characterizes that right in comparison to more popular conceptions of rights. Part IV outlines the coverage and scope of the Griffin right.

I. Section 1985(3): From Harris to Bray

Section 1985(3) was enacted as Section 2 of the Ku Klux Klan Act of 1871.\textsuperscript{21} Its principle provision provides recovery where:

\begin{enumerate}
\item[20.] Justice Harlan wrote a concurrence disagreeing only with the Court’s unnecessary search for a constitutional basis for its decision beyond the Thirteenth Amendment. Griffin, 403 U.S. at 107 (Harlan, J., concurring).
\item[21.] Ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985). Section 1985(3) 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
\end{enumerate}
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 pur-
pose 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... 22

Phrased much like the criminal conspiracy section of the 1871 Act invalidated
in United States v. Harris,23 the language of § 1985(3) vexed courts that might
have intended to revive it. Consequently, the section was the last of the Re-
construction Era legislation to be revived by the Supreme Court and has ap-
parently never fully overcome the troubling implications of its terms.

As a part of the Ku Klux Klan Act, commentators agree that the section
was unanimously accepted as a response to the rampant Ku Klux Klan vio-
ence in the postbellum Union. However, there has been some disagreement
over the nature of this response. For example, Mark Fockele has argued that
the section was a response to terroristic political opposition by Southern
Democrats, in the context of which concerns about race discrimination were
incidental.24 On the other hand, Professor Taunya Lovell Banks has argued
that the section was a response to racial terror to which political affiliations

22. Id.
23. 106 U.S. 629, 644 (1882) (invalidating criminal counterpart of § 1985(3) on severability
theory expressly rejected in Griffin).
24. Fockele argued:

The violent activities of the Klan and similar organizations [such as the Knights of
the White Camelia, the White Brotherhood, the Pale Faces, and the "76 Association]
caused great alarm among the members of the Forty-Second Congress. . . . The Repub-
licans especially found Klan violence troubling because they were convinced that it was
politically motivated. Such is the conclusion stated in the majority report of the Senate
Select Committee to Investigate Alleged Outrages in the Southern States: "[I]t is
clearly established . . . [t]hat the Ku-Klux organization does exist, has a political pur-
pose, is composed of members of the democratic or conservative party, [and] has
sought to carry out its purpose by murders, whippings, intimidations and violence." . . .

The immediate goal of the Klan, as seen by the Republican majority, was to wrest
control of the state governments from the Republican party and to reestablish Demo-
cratic hegemony in the South. The Republicans perceived two ways in which the Klan
might seize power in the states. The first was by means of political terrorism . . . that
would ensure the success of Democratic candidates at the polls . . . .

. . . .

Ordinary voters, as well, were in danger from the Klan, not because they were
black, but because they were Republicans.

Mark Fockele, Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46
(footnotes omitted). See also Shatz, supra note 1, at 913-15 (tracing legislative history of Ku
Klux Klan Act).
were related but not central. The difference matters because it informs any determination of whether the Ku Klux Klan Act should reach beyond racial categories; however, both arguments support the view that Klan violence produced the statute.

Just 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 the Act to private action would transform all conspiracies to commit torts into federal actions without adequate constitutional authority.

In Griffin v. Breckenridge, twenty years after Collins and ten years after Monroe, the Court determined that its concerns with potential constitutional problems had been exaggerated. Griffin involved the beating of several black travelers on a northern Mississippi highway by a group of whites who mistook one of the black travelers for a civil rights worker. 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

25. Professor Banks argued:

During [the Reconstruction] period, several counter-Reconstruction organizations were formed in the South by reactionaries who believed that the Reconstruction efforts threatened the political and social structure of their states. These organizations opposed equality between blacks and whites, often punishing "offenders" of either race. The most notorious group of counter-Reconstructionists was the Ku Klux Klan, which used a variety of techniques to preserve white supremacy, including threats, destruction of property, and physical violence. By the spring of 1867, the Klan had highly organized spin-offs in all the Southern states. Congress subsequently enacted a series of laws, commonly referred to as the Force Acts [the civil rights acts of 1870 (reenacting the Civil Rights Act of 1866), amended in 1871, and the Ku Klux Klan Act of 1911].


27. Id. at 653-54.
28. Id. at 661.
30. 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.

Id. at 95-96.

31. Id. at 89-91.
32. The Griffin Court noted that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." Id. at 103.
rights protection against private acts. Together these elements produced a forceful and unanimous decision.

The decision in Griffin imposes two requirements on a § 1985(3) action. "First, a court must determine whether the defendant's conduct falls within the terms of the statute; second, it must determine whether Congress has the constitutional power to reach the conduct alleged in the particular case." This division corresponds roughly with the two components of the Griffin claim: the former ensures the facts resemble Griffin's; the latter requires constitutional support for the section's application to those facts. The operation of these requirements implies that certain classes of cases will neither satisfy the requirements of the statute nor invoke Congress's constitutional power. Fundamental to the determinations mandated by this two-part analysis is the concern in Collins and Griffin that the statute not be interpreted as a "general federal tort law."

However, this reading obscures wide confusion over the reach of Griffin. The factual and constitutional-doctrinal components of the decision

33. See United States v. Guest, 383 U.S. 745, 759 n.17 (1966) (stating that rationale behind applying 18 U.S.C. § 241 (1969 & Supp. 1996) to governmental interference with right to travel supports extending protections of statute to private interference as well). Griffin cited Guest for the proposition that "the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference." Griffin, 403 U.S. at 105-06 (citing Guest).

34. Fockele, supra note 24, at 406.
36. See, e.g., Shatz, supra note 1, at 918-19 (noting that lower courts struggled to apply Griffin's analytical framework to claims brought under § 1985(3)).

Shatz argues that the Griffin opinion was faulty for two basic reasons. The first reason he cites is the Court's use of class-based animus as a component of the cause of action. Id. at 917. This proves problematic, he says, because it tempts subsequent judges to analyze class animus apart from the "equal protection of the laws" and "equal privileges and immunities under the laws" language and implies that the section is limited to racial animus. Id. Second, Shatz argues the Court's opinion should have distinguished between equal protection and equal privileges, designating which right was violated by the Breckenridge boys. Id. at 917-18.

Shatz views the privileges and immunities portion of the section as the key to its application to non-suspect classification cases. See id. at 942 (asserting that Congress intended § 1985(3) to apply to any class and not merely those "subject to historic or pervasive animus in the community"). It is, therefore, an important omission for Shatz that the Court fails to designate whether Griffin was an equal protection or equal privileges case and connect class animus thereto; otherwise, the section is limited, as he seems to accept for equal protection cases, to suspect classification (race) motivated conspiracies. See id. at 941 (recognizing that "equal protection" prong of § 1985(3) applies only to those historically subject to discrimination, primarily covering racial and religious categories but possibly extended to any group with unpopular views).

Shatz seems correct that § 1985(3) is not limited to race, but it is difficult to see how his approach, however consistent with the 42nd Congress's views, envisions more than a "remedial" statute. As will be shown, the Griffin Court apparently read the equal protection and equal privileges components of the statute together, joining them with the animus requirement it crafted in order to create an independent substantive right. See infra part II for a more detailed analysis of the rationale behind Griffin. That reading is, I believe, more than adequate to cover certain political organizations-Congress's aim in Shatz's view. See Shatz, supra note 1, at 936-38 (noting that numerous commentators assert Congress was motivated by political rather than racial goals).
have produced two sometimes-competing readings of the statute: Some, focusing on the facts of Griffin, have suggested that the section applies only to race cases; others, focusing on the move toward judicially crafted, constitutional responses to private acts of terror, have argued that the section applies more broadly to certain classes of private actions. Moreover, it was not clear after Griffin whether the section was merely "remedial," providing for the enforcement of rights identified elsewhere, or created substantive rights itself.

In the context of extending Griffin to gender discrimination in employment, the Supreme Court sought to clarify Griffin in Great American Federal Savings & Loan Ass’n v. Novotny, declaring the statute to be remedial only. Section 1985(3), the Court noted, "creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section." 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," 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 the section did not) were questions raised in United Brotherhood of Carpenters & Joiners v. Scott. In Scott, the claim of a construction company owner and his non-union employees, who were beaten by union workers protesting the non-union shop in a union county, was found beyond the scope of the section. The Court found that animus

37. Recent cases express this view: "Both the Supreme Court and the Ninth Circuit have given 42 U.S.C. § 1985 a very narrow reading. In [the Ninth Circuit], § 1985 applies only to cases of discrimination against suspect or quasi-suspect classes or against groups that have been afforded special federal protection of their civil rights . . . ." Schueller v. Edgar, No. C94-4277 TEH, 1994 WL 594064, at *5 (N.D. Cal. Oct. 24, 1994) (citing Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985)). "To be afforded protection under § 1985(3), a 'class' must be "'possessed of discrete, insular and immutable characteristics comparable to these characterizing classes such as race, national origin and sex.'" Crain v. Martinez, No. 93-942-CIV-ORL-22, 1994 WL 391672, at *1 (M.D. Fla. July 12, 1994) (quoting Savina v. Beghart, 497 F. Supp. 65, 68 (D. Md. 1980) (quoting Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1028 (E.D. Va. 1973), aff'd, 508 F.2d 504 (4th Cir. 1974))). But see Williams v. City of Harvey, No. 93 C 7253, 1994 WL 186793, at *4 (N.D. Ill. May 11, 1994) (mem.) ("To plead a conspiracy claim under section 1985, a plaintiff must allege that the conspiracy was founded on racial or class-based discrimination. Plaintiff does not satisfy this requirement merely by pleading her race.") (citation omitted).
39. Id. at 372.
40. Id. at 376.
43. See id. at 834-36 (holding that § 1985(3) applies only to racial or other class-based discriminatory animus). The violation of the First Amendment in question was perceived to be motivated by political animus, and thus was not encompassed in the narrow reach of § 1985(3). Id. at 846.
based on union membership did not constitute the kind of class-based animus necessary to invoke the section’s protection. However, the Scott Court went further, saying that the association rights, said to be protected by the section, 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 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 requirement that the right violated be one which protects against private action. While Justice Scalia’s opinion seems to go beyond what is necessary to dispose of the case, it is not inconsistent with the Court’s precedent.

44. The Court found that § 1985(3) provided no recovery for conspiracies “motivated by economic or commercial animus.” Id. at 838. This finding was an alternative basis for the Court’s decision.
45. Id. at 832.
46. See id. at 832-33 (noting that First Amendment violation requires state action, which is therefore essential element of any claim brought under § 1985(3) alleging violation of association rights).
48. Id. at 266-67.
49. Id. at 268 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).
50. Id. (citing United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 833 (1983)).
51. See id. at 278 (noting that deprivation of asserted right to abortion cannot be object of purely private conspiracy, actionable under § 1985(3)).
52. Id. at 274-75.
53. Id. at 268.
54. In this regard, Justice Scalia’s discussion of “racial, or perhaps otherwise class-based, invidiously discriminatory animus” seeks to transform that requirement into a requirement of specific intent to violate rights based on the suspect categories of Fourteenth Amendment Equal Protection jurisprudence. Quoting from Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279
Of some concern, however, is the close resemblance of the facts in Bray with the facts in Griffin. As in Griffin, the plaintiffs in Bray suffered numerous violations of state and federal law. The deprivations and violations took place in the context of acrimonious political debates about civil rights and liberties. Moreover, the perpetrators of the violations acted upon their victims not so much because of who they were, but because of what they were assumed to be doing and therefore represented. Indeed, the identities of the victims in both classes were informed largely by the political debates associated with them. Application of the intervening jurisprudential development, therefore, seems to have excluded even cases resembling Griffin from the section's coverage.

This anomaly is the direct result of the Court's characterization of the section as "remedial." As Professor Banks noted:

The characterization in Novotny of section 1985(3) as remedial is

(1979), he insisted that "'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. The same principle imposed this Fourteenth Amendment standard on the animus requirement of 1985(3). Id. at 272. Accordingly, Justice Scalia required that plaintiffs show that the defendants were motivated by gender and not pregnancy-related conditions, like abortion. Id. at 271.

While Justice Scalia's distinction between gender- and pregnancy-based motivation has support in the Fourteenth Amendment context, see Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974) (holding that excluding pregnancy from covered disabilities was not invidious discrimination on basis of sex in violation of Equal Protection Clause), there is no support for the view that Congress or the Griffin Court meant to impose such a requirement on § 1985(3). Indeed, Justice Scalia only offered an unimpressive reference to the Webster's Second International Dictionary definition of "invidious" for the suggestion that invidiousness could not describe abortion protesters' animus against abortion seekers. Bray, 506 U.S. at 274. Somewhat disingenuously, he stated "w[h]ether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description," that is, "[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." Id. (quoting WEBSTER'S SECOND INTERNATIONAL DICTIONARY 1306 (1954)). However, only by beginning from the presumption that abortion should not be permissible or legal can one view the raucous fervor and violence of anti-abortion protests in the past five years as anything but "unjustly and irritatingly discriminatory," "odious," and "likely to give offense."

Similarly, Justice Scalia dismissed the argument that the right to interstate travel had been violated by imposing a specific intent requirement on that right. Because the protesters intended to protest abortion, they did not, he argued, intend to frustrate interstate travel. See Bray, 506 U.S. at 275-76 ("Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion was performed after interstate travel."). Additionally, he argued that no actual barriers were erected to interstate travel; rather, any barriers erected were to the exercise of the abortion right, a right only enforceable against state action. Id. at 277-78.

55. That was the view of Justice Souter, who dissented in part:

Prior cases giving the words "equal protection of the laws" in the deprivation clause an authoritative construction have limited liability under that clause by imposing two conditions not found in the terms of the text. . . . The Court follows these cases in applying the deprivation clause today, and to this extent I take no exception to its conclusion.

Bray, 506 U.S. at 289 (Souter, J., dissenting).

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 supposed 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.\(^{57}\)

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 concededly related § 1985(3). Justice Scalia’s undifferentiated reference in Bray to Fourteenth Amendment jurisprudence is not, in this context, unusual; civil rights law, treated in this way, becomes an undifferentiated mass of litigation in which distinctions between the terms of various statutes are of little importance. Judges in this context are free to draw selectively from decisions confronting problems unique to one statute to make a point in another statute, even where that particular problem is amenable to differential resolution in the latter or even where the statutes in fact share no analogous problems.

During the past fifteen years—the limiting period of civil rights jurisprudence—significant restrictions have been placed on civil rights statutes in order to preserve fundamental tenets of federalism, perceived as threatened by application of the terms of those statutes. Section 1985(3) has suffered poorly in this period, a fact evidenced by the disturbingly inconsequential similarity between the allegations in Griffin and Bray. Bray confirms the death of § 1985(3), a death precipitated by the conflation of that section with § 1983. In order to understand what has been lost, and why the arguments offered against the plaintiffs in Bray are inconsistent with Griffin, the nature of the right announced in Griffin must be distinguished from the rights-vindication approaches established under other civil rights statutes.

II. Revival Approaches to Civil Rights Vindication: The Griffin Right With Respect to Form

The revival of § 1985(3) in Griffin was the last major revival of a Reconstruction Era statute. The preceding revivals, in Monroe and in Jones, and the subsequent revival, in Runyon,\(^{58}\) created jurisprudential regimes that, although very controversial, have promised rights enforcement to those embraced by the revived statutes’ terms. Among the revival decisions, only Griffin has been subsumed into its subsequent precedent. The obsolescence of Griffin is strange because in each other reviving case, the Supreme Court confronted a single problem which it resolved in a manner intended to pre-


serve the unique terms of the particular statute involved. The approach to rights in *Griffin*, contrary to the implications of subsequent § 1985(3) decisions, was no less successful at resolving the puzzle presented by its terms; yet, by the time of the *Scott* decision, the *Griffin* construct had collapsed.

The Reviving decisions are characterized by a preoccupation with civil rights statutes' apparent threats to the fundamental structure of government, especially "Our Federalism." After the Revival period, which has been marked most fundamentally by the ascent of rights talk in legal discourse, few suggest that rights are anything but law; rather, contemporary jurisprudential battles concern which institutions are properly responsible for and what are the proper means of identifying and protecting rights in our constitutional order. The Revival period has given force to the federal government's supreme and ultimate role in ensuring constitutional rights, as expressed in the Reconstruction Era amendments and statutes, but the pe-

---

What ["Our Federalism"] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.


Professor Charles Allen Wright's observations on justiciability queries captures the stakes of these debates: "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." Expansion of the categories of justiciable controversies has underscored the nearly ineffable nature of the judgments involved." CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 62 (5th ed. 1994) (quoting Renne v. Geary, 501 U.S. 312, 316 (1991)). See also MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 87-109 (1991) (noting Court's requirement that plaintiff suffer injury-in-fact as jurisdictional prerequisite); Alexander M. Bickel, *The Supreme Court, 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1960) (asserting that Supreme Court creates exceptions to Court's own appellate jurisdiction under Article III); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959) (asserting that Supreme Court's docket must be kept to manageable size and this can be accomplished by revising governing statutes).

61. Rights today, as the rebirth of a natural rights notion long discredited by positivist legal sensibilities, project the union of previously contentious regimes; positive law and morality merge, at least in prevailing conceptions of constitutional rights. So appealing is this current conception of rights that it is difficult to imagine the once-central critique of rights as less than
law. Universal natural or human rights, the product of Enlightenment political theory, were seen by the middle of the nineteenth century as nonsensical, dangerous, and bourgeois. For critiques of natural rights by Jeremy Bentham, Edmund Burke, and Karl Marx, see JEREMY WALDRON, NONSENSE UPON STILTS (1986). Particularly well-stated is Bentham's critique. Jeremy Bentham, Anarchial Fallacies, in WALDRON, supra, at 46. In his critique of the French Declaration of the Rights of Man, Bentham offered his oft-quoted description of natural rights: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." Id. at 53. In less quoted but more direct language in the same passage, Bentham summarizes his attitude on natural rights' relation to law: "But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights." Id. Bentham viewed the very idea of natural rights as violence on governments. And he did so despite his apparent sympathy for the Enlightenment project that birth rights and in the tradition of which the United States Bill of Rights gave some conception of rights positive force. These views of Bentham's were not published until the late 1800s, well after his death. Nevertheless, they accurately reflect his views on the subject which, along with those of Edmund Burke and David Hume, stood at the forefront of a broad attack on natural rights. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 22-25 (1975) (discussing Bentham, Burke, and Hume and their reasons for attacking natural law).

This attack precipitated a version of positivism that characterized the Constitution's guarantees, in light of states' rights arguments, as limits on the government's power rather than guarantees to its citizens. This construct is often understood in the well-known language of "negative" versus "positive" rights. Cf. Isaiah Berlin, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 122-34 (1969) (distinguishing negative and positive rights along division between West and East of Cold War). The Fourteenth Amendment is conceded to have given positive effect to these rights against states. However, restrictive readings of the effect of that amendment, principally in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), put off any transformation of the notion of rights in the name of preserving the federal relationship. The Slaughter-House Cases preserved a conception of the Constitution as primarily (or perhaps exclusively) system-defining rather than rights-creating, and defined that system to have changed little with the passage of the Fourteenth Amendment. See Slaughter-House Cases, 83 U.S. (16 Wall.) at 77-78 (asserting that fundamental rights are generally established by states and not by federal Constitution). Rights created or memorialized in the Constitution are, in this view, fundamentally negative rights primarily limiting the state and federal governments' power.

In some respects, the Fourteenth Amendment begins to have significant effect only with the line of cases epitomized by the Supreme Court's controversial decision in Lochner v. New York, 198 U.S. 45 (1905). Lochner, advancing a laissez-faire vision of economic and property relations under the Constitution, recognized substantive due process rights and, perhaps more importantly, vested the judiciary with great authority rooted in identifying such rights. See Lochner, 198 U.S. at 53 (recognizing right to sell one's labor as substantive due process right protected by Fourteenth Amendment). Cf. Cass R. Sunstein, Lochner's Legacy, 87 COL. L. REV. 873, 874 (disputing "[t]he received wisdom . . . that Lochner was wrong because it involved 'judicial activism' "'). While a more limited view of judicial power perhaps ended the Lochner era, see United States v. Caroene Prosds. Co., 304 U.S. 144, 152-53 n.4 (1938) (recognizing constitutional basis for invalidation of legislation which impacts groups without access to political processes), Lochner signaled a transformation of the relationship between the federal and state governments that, notwithstanding Caroene Product's separation of powers celebration and the federal system implications of Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938) (invalidating federal courts' power to make general common law in diversity cases), defined a principal role for federal courts in announcing what Professor Fiss terms "public values" in the articulation of the Constitution. See OWEN M. FISS, THE SUPREME COURT, 1978 Term: Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 1-2 (1979) (arguing that values protected by Constitution, including liberty and equal protection, are "public values," and that federal judges should play role in giving meaning to these values). See also BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS
riod has also confronted the (perceived) urgent challenge of preserving local sovereignty in the federal system, even as most narrowly conceived. Revival decisions interpreting Reconstruction Era statutes represent a precarious balancing of ultimate federal responsibility for rights under the Constitution with respect for the authority and sovereignty of states. 62

11-12 (1992) (arguing that foundationalists support view that judicial intervention may be necessary to protect fundamental rights). After Carolene Products, federal courts are, perhaps, to be more circumspect in exercising power, but the Fourteenth Amendment, undoubtedly now, authorizes them to articulate rights protected by the Constitution.

Monroe, by providing a civil cause of action for damages resulting from the violation of rights, fueled a period of expanded articulation of those rights. See Monroe v. Pape, 365 U.S. 167, 187 (1961) (providing civil remedy for violation of constitutional rights by city police officers whose actions were committed under color of state law). Whereas rights conservatives now suggest that the federal balance has been subverted by these cases, they do not now succeed in arguing that rights are not law. The transformation has proceeded from its initial point, viewing the Constitution’s principles, perhaps embodying natural law concepts, as first having effect only to the extent natural rights inherently underlie all adjudication and was “discovered” by a jurist where the law was otherwise deficient. See Cover, supra, at 27-28 (noting that process by which Constitution become positive law is based in natural law); see also Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842) (initiating regime where federal courts, understood as co-equal law finders, found general common law rules in diversity cases). The transformation continued until the Constitution was later viewed as subjugating those rights to a limited positivist position, and viewed finally as broadly embracing constitutional rights’ positive effect as representative of an idea of rights curiously akin to natural rights (in positive form). The “brooding omnipresence” rejected in modern realist legal understandings, cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), has been replaced by the formative text while, ironically, the challenge to such rights has sought to return those concepts to the airy confines of moral conscience in deference to majoritarian demands and structural allocations of power represented by the separation of powers and federalism cries that today concede rights, only to deny their enforcement. Cf. United States v. Carolene Prods., 304 U.S. 144 (1938) (outlining only narrow exceptions to presumption of constitutionality of legislation).

62. Professors Edward L. Rubin and Malcolm Feeley imply that the federal courts’ interest in striking a balance is overstated. They suggest that federalism is a neurosis which courts have sought to eliminate rather than balance:

In fact, federalism is America’s neurosis. We have a federal system because we began with a federal system . . . . We began with a federal system because of some now uninteresting details of eighteenth century British colonial administration. We carry this system with us, like any neurosis, because it is part of our collective psychology, and we proclaim its virtues out of the universal desire for self-justification. But our political culture is essentially healthy, and we do not let our neuroses control us. Instead, we have been trying to extricate ourselves from federalism for at least the last 130 years.


However, that federal courts have attempted a balance is most clear, if not most successful, in § 1983 cases. In Paul v. Davis, 424 U.S. 693 (1976), then Justice Rehnquist repeatedly juxtaposed constitutional protection with state tort law. For example, Justice Rehnquist determined that § 1983 did not make the Fourteenth Amendment a “font of tort law” and read constitutional liberty interests as establishing “no constitutional doctrine converting every defamation by a public official into a deprivation of liberty . . . .” Id. at 701-02.

This balancing act is made all the more difficult by the corollary views that the Revival period has produced excessive litigation in federal courts and reproduced state common law as federal constitutional litigation. On the former issue, see Douglas A. Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 WM. & MARY L.

HeinOnline -- 69 Temp. L. Rev. 163 1996
The Limiting decisions which have dominated rights jurisprudence for the last twenty years attempt to preserve the federal structure that Revival decisions, presumably, insufficiently protected. Notwithstanding the concerns expressed in Limiting decisions, the Revival decisions, in fact, manifest such a balance. Federal courts’ efforts to allow for an expansive reading of the Reconstruction Era acts without transforming those acts into enabling legislation for any and all potential lawsuits has produced balances which, however appropriate as a reading of the acts, their history, and their purposes, have created powerful tools for the vindication of rights.63

---

Rev. 935, 935 (1990) (noting that civil rights litigation places severe burden on federal courts’ dockets). For an outline and criticism of the latter assertion, see Sheldon Nahmoud, Section 1983 Discourse: The Move From Constitution to Tort, 77 Geo. L.J. 1719, 1720 (1989) [hereinafter “Section 1983 Discourse”] (arguing that by couching § 1983 interpretations in tort rhetoric, the Court is able to send increasing numbers of proposed § 1983 actions to state courts to be disposed of on state law grounds”); Sheldon H. Nahmoud, Section 1983 and the “Background” of Tort Liability, 50 Ind. L.J. 5, 25-26 n.9 (1974) [hereinafter “Background of Tort Liability”] (arguing “that an insistence that damages awarded in 1983 actions must be based solely on damage concepts developed from the common law is unsound”). This difficulty is most clearly illustrated by prisoners’ cases. Facilitated by special provisions enacted to ensure prisoners’ access to courts, see, e.g., 28 U.S.C. § 1915 (1994) (governing manner to proceed in forma pauperis), these cases have been openly criticized by federal judges for their volume, presumed frivolity, and adjudication of “mere torts.” Commenting on the sanctioning of prisoners in the Fifth Circuit, Dean Neil H. Cogan took issue with the impressions at work in Gabel v. Lynaugh, 835 F.2d 124 (5th Cir. 1988):

In Gabel v. Lynaugh, a panel of Judges Gee, Garwood, and Jones said, per curiam, that the court of appeals is concerned with the large number of frivolous pro se appeals, especially by prisoners. According to Gabel, prisoners obtain complete or partial reversals in 7.62% of appeals, more than half the rate of all appeals, 14.3%. With all due respect to the court, 7.62% is not a particularly poor reversal rate for litigants without counsel. Nonetheless, the perception that prisoners bring a large number of frivolous appeals is causing some conflict about how to sanction such appellants.

Neil H. Cogan, The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit, 42 Sw. L.J. 1011, 1018 (1989). Fifth Circuit panels have imposed or upheld sanctions against prisoners for instituting numerous or frivolous suits. Mayfield v. Klevenhagen, 941 F.2d 346, 347 (5th Cir. 1991) (imposing sanction on prisoner for purposely filing habeas corpus petition in improper venue); Jackson v. Carpenter, 921 F.2d 68, 71 (5th Cir. 1991) (imposing monetary sanctions on prisoner for frivolous appeals); Moody v. Miller, 864 F.2d 1178, 1181 (5th Cir. 1989) (holding that sanctions were appropriate where prisoner made frivolous allegations in complaint).

Perhaps Justice Blackmun states this point most clearly:

One brand of criticism has focused on the extent to which § 1983 cases are claimed to be overburdening the federal courts. Critics rehearse statistics as to the number of § 1983 actions filed each year, with emphasis on those filed by state prisoners challenging the terms or conditions of their confinement. There appears to be a growing belief that § 1983 actions are likely to be frivolous complaints by litigants who seek to use the statute to convert or bootstrap garden-variety state-law tort claims into federal cases.

Blackmun, supra note 12, at 2 (footnotes omitted). Blackmun noted that these perceptions have produced demands that civil rights actions be limited, a demand he perceived as threatening, precipitating “a tendency to strain otherwise sound doctrines in order to ease the perceived federalism tensions generated by § 1983 actions.” Id. at 3.

63. Granted, some of those tools have limited substantive scope (§ 1982) and reach only a narrow class of cases (§ 1981), and indeed one has recently been interpreted in a manner which
In the Revival cases, the Court formulates three approaches to this balancing act, each somewhat less direct. All three approaches can be understood as efforts to conform with the conception of rights vindication as a condition precedent to the federal government’s legitimacy as a constitutional government of the people without trammeling states’ constitutionally ensured authority. Each approach offers an effective, although not unproblematic, resolution to this tension. The balance in Griffin most effectively formulates an approach that sufficiently protects rights and preserves a notion of the federal system. Even as these acts were being “revived,” new legislation was enacted to ensure, less directly, the vindication of rights. Based on the powers of broadly interpreted Commerce and Spending clauses, the Civil Rights Act of 1964 prohibited, for example, discrimination in public accommodations and employment. Subsequent interpretation of this Act has operated to give broad scope to its prohibitive language, but within significant limits. The 1964 Act, while not technically a revival interpretation by its nature, thus distinguishes a fourth approach to vindicating rights.

A. Attempts To Ensure Rights Directly

The surviving sections of the Reconstruction Era acts can be divided into two broad categories: acts interpreted to require state action and acts interpreted to reach purely private action. Both types of legislation seek to provide criminal or civil remedies against rights violations directly. That is, violations of rights, identified in the acts themselves or in constitutional or federal law, give rise to criminal or civil penalties. Whenever such rights have been identified, they supplant local law by providing an additional and supreme forum for the rights’ adjudication. In order to prevent the complete duplication of state common law and the consequent diminution of notions of comity and federalism, the Supreme Court’s initial treatment of each of the surviving Reconstruction Era civil rights statutes during the Revival

appears to undercut the balance presumably struck in the initial modern interpretation (§ 1985(3)); nevertheless, these balances have negotiated the difficult task of giving broad scope to civil rights actions without supplanting state contract and tort law.

64. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (holding that Congress, under powers granted in Commerce Clause, could prohibit racial discrimination in motels); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress could prohibit racial discrimination in restaurants having close ties to interstate commerce under Commerce Clause).


67. Although this modern legislation is historically distinct from the Reconstruction Era acts, it is often used as a model against which the Reconstruction legislation is interpreted and with which it is often conflated. As a model, it will, therefore, be briefly outlined in this section.

68. The clearest case arises when those rights are otherwise adjudicated under the common law as modified by state legislation in state courts of general jurisdiction.
period imposed some limit on the statute’s reach. These limiting provisions perfected a balance, allowing the Court to give the acts broad universal scope without supplanting state sovereignty.

1. 42 U.S.C. § 1983

In Monroe v. Pape, the Supreme Court “revived” § 1983, allowing recovery of civil damages for violations of federal statutory and constitutional rights by a person acting under color of state law. It had been assumed before Monroe that the language of the Act limited it to vindicating deprivations occasioned by positive legislation or, at the very least, behavior that rose to the level of official policy. The Monroe Court, relying on interpretations of the criminal analogue of § 1983, 18 U.S.C. § 242, in United States v. Classic and Screws v. United States, loosened the state action limitation,

69. This is merely a description of how the Court treated the statutes. It might perhaps have interpreted the statutes as historically contingent and designed to resolve a narrowly defined, if hugely important, constitutional question: the treatment of freedmen after the Civil War. The Civil Rights Cases adopted this approach but then limited the “badges of slavery” to so narrow a category it deprived the phrase of any meaning distinguishable from the legal designation of slavery. See The Civil Rights Cases, 109 U.S. 18, 28-31 (1883) (noting that discriminatory acts based on race or color cannot be challenged under Thirteenth Amendment unless rising to level of indentured servitude or under Fourteenth Amendment unless sanctioned by state action). Such an interpretation could have been based on Congress’s authority under the Thirteenth Amendment and would appear to limit the reach of the statutes, not simply to race cases (as § 1981 is now viewed), see Patterson v. McLean Credit Union, 491 U.S. 164, 176-77 (1989) (holding § 1981 limited to race), but also to the plight of the descendants of former slaves. Indeed, such a historically-contingent view might counsel for an interpretation of the statutes as obsolete and no longer applicable if Jim Crow is not regarded as the equivalent of slavery, since the Thirteenth Amendment, which would authorize such a broadly historical interpretation, refers only to slavery. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976), which extended application of § 1981 to whites, might therefore be wrong (much as the limitation of the act to racial discrimination suggests). Much of the language and legislative history of these acts counsels for a contrary reading, however. See id. at 280, 290 (noting that Title VII and § 1981 refer to all racial discrimination, including against whites); St. Francis College v. Al-Khazraji, 481 U.S. 604, 612-13 (1987) (finding § 1981 to be applicable to discrimination against any individual based on ethnic or racial group); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (holding § 1982 to be applicable to discrimination against any ethnic or racial group). Nevertheless, a compelling version of this view is presented by Justice Brennan’s dissent in Patterson in the form of a Free Labor ideology theory of the Reconstruction Congress’ motivation. See Patterson, 491 U.S. at 206-07 (arguing that legislative history behind § 1981 supports broad application of statute in employment context) (Brennan, J., dissenting). For a discussion of Free Labor ideology, see Foner, supra note 10, at 234-36 (1988) (asserting that Free Labor movement was among driving forces behind Radical Republicans’ support). See also Amy D. Stanley, Conjugal Bonds and Wage Labor: Rights of Contract and Emancipation, 75 J. AM. Hist. 471, 473 (1988) (discussing how post-Civil War reforms failed to include married women).

71. Id. at 187.
72. 312 U.S. 299 (1941).
73. 325 U.S. 91 (1945). Classic and Screws each progressively loosened the yoke of this restrictive state action reading. Classic upheld an indictment under the present day 18 U.S.C.
recognizing a cause of action where official state policy prohibited the offending act but the actors were nonetheless clothed in state authority. This change, although slight on its face, had immense consequences, providing the most popular tool for enforcing rights.

The form of the protection provided by § 1983, by the holding of Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics, and by 18 U.S.C. § 242 is important. Courts are charged with recognizing rights

---

§§ 241-242 (1969 & Supp. 1996) against Louisiana officials exercising state election law powers improperly. Classic, 313 U.S. at 328-29. Interpreting the "under color of state law" language in § 242, the Court found the behavior of primary election officials covered by the statute, although Louisiana law did not prohibit or authorize their infractions. They acted under color of Louisiana law, however, because that law empowered them to count primary election votes, the counting of which they manipulated. See id. at 325-26 (finding constitutional violations committed by election officials were "under color of state law" because power was possessed only by virtue of state law). In language later reproduced in Screws and Monroe, the Classic Court said: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Id. at 326 (quoted in Monroe, 365 U.S. at 184; Screws, 325 U.S. at 109.) The Screws Court upheld the validity of present day 18 U.S.C. § 242, reading into it a willfulness requirement that it said operated to eliminate any invalidating ambiguity. See Screws, 325 U.S. at 103-04 (noting that requirement is met when one acts with specific intent to deprive another of constitutional rights).

This approach was extended to violations of a right by federal officers through the recognition of an implied right of action in Bivins v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Bivins supplemented § 1983, which is limited to violations of rights committed under color of state law. See id. at 392-94 (extending remedy for violations of person's Fourth Amendment rights by federal agents).

The popularity of § 1983 actions has led critics to decry its creation of a flood of largely frivolous litigation. See supra note 62 (addressing concerns that reviving § 1983 opened floodgates to frivolous claims, particularly by state and federal prisoners). The oft-cited "flood" is usually demonstrated by comparing the number of civil rights filings prior to Monroe and in recent years. For example, Professors Schwab and Eisenberg report:

In fiscal 1960 there were 287 suits filed in, or removed to, federal district court under the federal civil rights statutes, not including suits by or against the United States or its officers. In fiscal 1977 there were 13,113 such suits and in calendar year 1985 there were 17,582 such suits. These figures do not include more than 7,500 civil rights cases filed by prisoners in 1977 and the 19,000 such cases filed in 1985.

Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641 (1987). Eisenberg and Schwab go on to debunk much of the claim of a civil rights "flood" while acknowledging the costs of increased filings of all sorts on the judiciary. See id. at 693 (noting that actual numbers of constitutional tort cases brought is far less than predicted or perceived).

See Bivins, 403 U.S. at 392-93 (extending remedy for constitutional violations committed under color of federal authority).

18 U.S.C. § 242, the criminal analogue to § 1983, provides for criminal penalties: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.
which are defined outside these "remedial" statutes—primarily in the Constitution—and giving those rights effect by providing equitable civil recovery. This scheme limits the reach of the right of action by recognizing only rights violated by state actors or persons acting under color of state law. While the state action requirement is bound with the existence of a right, it is independently significant because it operates as a check, if a limited one, on rights vindication under these statutes. The recognition of rights outside of the


Section 242, first enacted as a part of the Civil Rights Act of 1866 and reenacted by the Civil Rights Act of 1870, was used as a model for drafting what became § 1983 in 1871. As a criminal statute, § 242's "willfully" language has been read to require specific intent to deprive a person of acknowledged constitutional rights. Screws, 325 U.S. at 101, 103. This requirement makes § 242 a substantially weaker tool for vindicating rights, but highlights the direct approach familiar to both § 1983 and Bivins cases; the statute is purely "remedial," in that it establishes no rights itself. Any rights violated must be defined elsewhere.

78. The limiting effect of state action might not be immediately apparent to some. However, that state action operates as a limit is a manifestation of the implicit view of rights as positive law rights in the Constitution, rather than natural rights born of human nature or dignity. Natural rights of this sort imply no limits to state action; they operate against all entities, public and private. The concept of natural rights, of course, arose as part of the particular political theory we today understand as liberalism. As such, the concept of natural rights is implicitly tied to the individual-government relationship. However, this connection is less than necessary to a rights regime based on intrinsic concepts like human dignity or nature. Indeed, it is only after the criticisms of Bentham, Hume, and Burke that the distinction between positive rights and natural rights is set in clear relief and positive law notions of rights begin to dominate rights thinking. See supra note 61 and accompanying text for a discussion of such criticisms of natural law. In this manner, the identification of rights in a federal positive law source (the Constitution, federal statutes, etc.) also operates as a limit on federal rights adjudication. If these rights were conceived of as inherent, there would be no reason to bind them to the Constitution or the federal government. Such an unbounded system is fully consistent with the regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), rejected in the positivist revolution epitomized by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

79. Dissenting in Monroe, Justice Frankfurter expressed significant doubt whether there was any limitation. See Monroe v. Pape, 365 U.S. 167, 220-23 (1961) (arguing that Court failed to apply legislative history establishing that remedy was limited to constitutional violations committed by action of state law, not "under color of state law"), overruled in part by Monell v. NYC Dept. of Soc. Servs., 436 U.S. 658 (1978). His discomfort seems to have been informed by his disagreement with the Court's reliance on Classic and Screws for their expanded view of "under color of state law." Noting that § 242, which Classic and Screws interpreted, is a criminal statute containing the additional limitation of criminal willfulness, Justice Frankfurter read the application of § 242's state action standard as eliminating all limitations on § 1983, a civil statute with no such specific intent requirement. Monroe, 365 U.S. at 207-08 (Frankfurter, J., dissenting). Much of the remainder of his opinion argues that "under color of state law" should not be read so expansively because it would consume state tort law.

Frankfurter's concerns are overstated, however. He fails to acknowledge that, in both Classic and Screws, the Court relied on the identification of constitutional or statutory rights as additional limits on the reach of the § 242. Granted, the Screws Court found this limitation insufficient to overcome vagueness concerns in the context of this criminal statute and added the willfulness requirement. Screws, 325 U.S. at 103-04. However, Screws' language clearly indicates that the Court viewed the identification of rights as a limiting component of its construction for rights vindication:

It is said that the Act must be read as if it contained those broad and fluid definitions of due process and that if it is so read it provides no ascertainable standard of
statutes themselves, while potentially expansive, actually represents a second restriction of the right to recovery in this scheme; it requires the identification of a right inherent in or incorporated by the Fourteenth Amendment or, for Bivins-type cases, the recognition of an express or implied right under the Constitution. In the case of § 242, the criminal nature of the statute carries with it a third limitation: the requirement of criminal intent. Although this first form of rights enforcement, characterized by a direct cause of action for the vindication of rights, has been responsible for numerous claims and has ushered in an "Age of Rights," recovery under this scheme is nevertheless powerfully limited, turning on whether there exists any right to vindicate. Only upon identification of such a right is the power of the federal court unleashed.

This straightforward approach to rights identification and vindication is fully consistent with traditional (and, ultimately, quite narrow) conceptions of rights in liberal theory. The thoroughly conventional nature of this

guilt. . . . [In United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 [(1921)], an Act of Congress was struck down . . . "which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." . . . The act contained no definition of an "unjust or unreasonable rate" nor did it refer to any source where the measure of "unjust or unreasonable" could be ascertained. In the instant case the decisions of the courts are, to be sure, a source of reference for ascertaining the specific content of the concept of due process. But even so the Act would incorporate by reference a large body of changing and uncertain law.

Screws, 325 U.S. at 95-96 (emphasis added). Frankfurter's comments are instructive, however, since they foreshadow the predominant objection to this approach—insufficient limitations—and the major limitation added after the fact, albeit primarily to the underlying constitutional claims—the requirement of specific intent. See Washington v. Davis, 426 U.S. 229, 248 (1976) (recognizing that expansion of application of statute designed to serve neutral ends beyond its very terms must be undertaken by Congress); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (noting that proof of racially discriminatory intent is necessary to show constitutional violation).

80. See Screws, 325 U.S. at 101, 103 (imposing "willfulness" requirement in application of § 242).

81. The term "right" proves difficult to define, and this difficulty, in turn, creates significant disagreements over the nature and implications of claims of "right." Hohfeld explained the difficulty:

One of the greatest hindrances to the clear understanding . . . and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests . . . . [I]n any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the . . . inadequacy and ambiguity of terms unfortunately reflect . . . corresponding paucity and confusion as regards actual legal conceptions.

method of rights vindication can be illustrated by viewing it in light of Profes-

Hohfeld identified four senses of right: right as a legally enforceable claim; right as privilege; right as power; and right as immunity. Hohfeld, supra, at 30, passim. See also Layman E. Allen, Rights, Rights, Rights, Rights. And How About Right, HUMAN RIGHTS 106-42 (E. Pollock ed., 1971). However, these four categories merely elaborate a more basic distinction between right (with duties) and power (with liability). See Lon Fuller, The Morality of Law 134 n.50 (rev. ed. 1969). Fuller rejects this construct, reproduced in H.L.A. Hart, Concept Of Law 95 (1961) (stating that reliability of law depends on skill and fluctuations among judges), as relying on the identification of a lawmaking authority in order to find law. Fuller, supra, at 133-51. Fuller sees law, and thus rights, as a “purposive enterprise.” Id. His insistence on the existence of rights, implicit in law and which he juxtaposes to Hart’s claim that law is the consequence of authoritative structure, outlines prevalent views of the role of a constitution. One view maintains that the Constitution creates rights; the other insists that it defines a government structure.

Today, with “right” repeatedly and often invoked, it has become like “property,” a term Hohfeld asserts that “[b]oth with lawyers and with laymen . . . has no definite or stable connotation.” Hohfeld, supra, at 21. As Hohfeld further observed of “property,” “right” is intermit-
tently used in all of its various forms. “Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a ‘blended’ sense as to convey no definite meaning whatever.” Id. at 21-22.

In the years following World War II, in light of the atrocities of the war, the numerous struggles for national liberation in colonized countries, and the efforts to end the apartheid of Jim Crow in the United States, the concept of “right” gained expanded value and import, becoming increasingly associated with allegedly inherent notions of morality. Reviving the natural rights notions held by the contractarian political theorists of the enlightenment project that in-
spired the United States Constitution’s Bill of Rights, the increased consequences of rights claims deprived the term of any necessary association with positive enactments (such as that reflected in Hohfeldian conception of rights as claims) and made a more careful definition and justification of rights necessary—including constitutional rights which, presumably, already sat-
ify positivist constraints, but especially human rights. As such, modern legal thinkers have sought to justify universal rights, e.g., Ronald Dworkin, Taking Rights Seriously 268 (1977) (discussing liberal and vast view of human rights), and to outline the relation between law and morality, e.g., Fuller, supra, notwithstanding a crisis in the philosophical attempts to do the same. See, e.g., John Rawls, A Theory of Justice 184 (1974) (attempting to fill void with revived contractarian theory).

As a participant in this project, political theorist Ian Shapiro has offered a thought-provok-
ing definition of rights, drawing on modern theories of meaning advanced by W.V. Quine, J.L. Austin, and Wittgenstein. See Ian Shapiro, The Evolution of Rights in Liberal Theory 18-19 (1986) (tracing various historical views of rights and introducing modern approach to rights theory). Shapiro’s theory is invoked throughout subsequent sections of this Article to explore the nature of rights under Revival understandings of Reconstruction Era civil rights statutes. James W. Nickel offers a similar theory. See James W. Nickel, Making Sense of Human Rights 13-35 (1987) (stating that human rights are based on complex relationships between people). Both authors see a claim of right as premised on various relationships tacitly invoked in the claim. This construct frees rights claims from any necessary connection to posi-
tive enactment—as implied by Hohfeld’s conception of right—and allows for numerous justifications, including Kantian empiricism and Benthamite utilitarianism (each of which had ultimately devolved to require positive enactment as a condition for a legal right) while continuing to countenance alternative views that may inform rights. As Nickel noted, “we do not need to choose between the will and interest accounts of rights, because rights can have more than one distinctive function.” Nickel, supra, at 22. A “right” then, can be understood as “a four-fold assertion about the subject of entitlement, the substance of entitlement, the basis for entitlement, and the purpose of entitlement.” Shapiro, supra, at 14. See also Gerald C. MacCallum, Jr., Negative and Positive Freedom, in Philosophy, Politics & Society: Fourth Series 174-
91 (Peter Laslett et al. eds., 1972) (discussing true nature of freedom in society). Rights, how-
sor Ian Shapiro’s requisites for an intelligible rights claim. Shapiro de-

ever, are significantly tied to the historical understandings that underlie the assertions and make them relatively persuasive. Shapiro adds on this point:

> Conformity to the schema is a necessary condition for an assertion being about rights, but it is by no means sufficient. The formal, empty character of the schema points to the fact that assertions about rights rest on and entail a great many substantive propositions about other things, some abstract, some normative, and some empirical. . . . [M]oral arguments about rights are deeply embedded in assumptions and beliefs about how the world actually operates causally, and claims which purport to be purely hypothetical and theoretical invariably require such assumptions. . . . If a claim about rights, for instance, is partly a claim about what there are rights to, about the substance of rights, or the things that have value, this will obviously rest on assumptions about how those things are in fact created and distributed. . . . It is a virtue of the schema that it brings such engagements to the surface and makes them explicit.

Shapiro, supra, at 17 (citations omitted). This approach allows room to explain the force and appeal of universal rights as “legal” rights absent positive enforcement, transcending the contractarian theories invoked in quasi-constitutional manner to give international human rights force, see Louis Henkin, The Age of Rights 2 (1990) (noting that modern, broad theory of rights is not based on any one specific political theory), and explaining the significance of modern theories of constitutional rights. Jack Donnelly employs a version of this approach to explain universal human rights. See Jack Donnelly, Universal Human Rights in Theory and Practice (1989) [hereinafter “Universal Human Rights”]; Jack Donnelly, The Concept of Human Rights (1985) [hereinafter “Concept”] (arguing that human rights are a form of self-fulfilling moral prophecy of particular appeal to people, and thus the foundation of the notion of legal rights).

82. See Shapiro, supra note 81, at 14 (outlining four basic concepts involved in rights claim). “Conventional” in this context refers to rights as limitations on the state’s powers, in the negative libertarian sense attributed to early contractarian political theorists such as Hobbes and Locke. See id. at 147 (noting that Hobbes and Locke both based their views on human needs and wants). Hohfeld’s notion of right as legal claim, applied here, produces the direct model. Admittedly, rights as legal claims have not always been the type of right embraced in our constitutional system, even since the Reconstruction Era amendments; however, this circumstance was created by Court’s rather limited view of what the Constitution affords. That is, as the Court deprived the Fourteenth Amendment’s privileges and immunities clause of meaning in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), it, albeit temporarily, left the citizen with no right to claim. It did not say an individual could claim no right, although this difference produced the same result.

Shapiro’s argument supports the view that negative libertarian rights are fundamental to most liberal rights theories. Shapiro argues that much of liberal rights theory is committed to “long term prescriptive goals [aimed at attaining] well functioning capitalist markets,” with divisions emerging over the propriety of Keynesian/Pigouvian versus neo-classical economic theories as the basis for achieving these goals. Shapiro, supra note 81, at 153-54. The neo-classical approach, which he associates with Robert Nozick’s book, Anarchy, State and Utopia (1974), most clearly calls for limited government in which rights are characterized as checks on government action. Id. at 155. Shapiro argues that John Rawls’ conception of rights, normally seen as egalitarian and at least agnostic to different government forms, ultimately also requires capitalist markets and a non-interfering government where negative rights are the preferred, if not the exclusive, form of right, since markets and individual preferences form the fundamental basis for his arguments about justice. See id. at 284-300 (analyzing Rawls’ theories).

Limited negative rights are, in some respects, the natural consequence of extreme positivism, perhaps inherent in contractarian theories of political legitimacy, such as constitutionalism. However, neither Nozick or Rawls can be said to limit their notions of right to negative rights. See, e.g., Jonathan Wolff, Robert Nozick: Property, Justice and the Minimal State 19-20 (1991) (stating that Nozick would recognize positive right obligations, although only as
scribes a claim of right as a relational, semantic argument, "a fourfold assertion about the subject of entitlement, the substance of entitlement, the basis of entitlement, and the purpose of entitlement." Viewed in light of consequence of express, voluntary contract. The distinction between "positive" and "negative" rights might invite some confusion. Indeed, Henry Shue convincingly argues that the distinction is both false and of little moral significance. See Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 35 (1980) (arguing that there are no "positive" or "negative" rights). As Jack Donnelly puts it, "the key conceptual issue is the distinction between acts of omission and acts of commission." Donnelly, Universal Human Rights, supra note 81, at 34. Rights in this "conventional" sense are limitations on government action violated by an act of government. Since failure to protect (an omission) is not envisioned, the operation of the market can go on undisturbed, even where it produces problematic results like racial discrimination and exclusion of citizens from the social, economic, and political community.

83. Shapiro, supra note 81, at 14. James Nickel puts forth a similar view of rights: "Because rights often involve complex relationships concerning who has the right and when it can be applied, it is helpful to have a detailed analysis of the parts of a fully specified right." Nickel, supra note 81, at 13. On the "subject" and "substance" of the right, Nickel nearly duplicates Shapiro: "First, each right identifies some party as its possessor or holder. A right's conditions of possession, may be narrow enough to apply to only one person . . . or broad enough to include the whole human race. . . . Second, rights are to some freedom or benefit." Id. Although not as clear as Shapiro's formulation, Nickel's requirement that a right identify its addressees—"Third, a fully specified right identifies a party or parties who must act to make available the freedom or benefit identified by the right's scope"—and locate the right's relative weight—"the weight of the right specifies its rank or importance in relation to other norms"—invokes the right's basis and purpose. Id. at 14. Nickel's more detailed discussion of the function of rights offers greater exposition of the varied purposes of rights in its different uses. Id. at 15-26.

Nickel anticipates the criticism of his understanding of rights as based on negative libertarian presumptions, dismissing H.J. McCloskey's theory of rights as entitlements to freedoms, set forth in H.J. McCloskey, Rights—Some Conceptual Issues, 54 Australasian J. Phil. 99, 99 (1976), as ultimately debasing the efficacy of a rights claim. Nickel states:

"Viewing rights as mere entitlements, however, is likely to have inflationary results. A moral right will exist whenever there are conclusive moral reasons for ensuring the availability of a certain good. Hence there is danger that the list of entitlements will be nearly as long as the list of highly desirable goods. To extend the economic metaphor, this conception has no built-in assurance that the demand side of rights will not outrun the supply side—the side involving addressees who bear normative burdens.

Another way to say roughly the same thing is to suggest that the entitlement theory is insufficiently penetrating because it is unable to distinguish between rights and high-priority goals. . . . The entitlement theory comes close to collapsing rights into high-priority goals by diluting the mandatory character of rights and by cutting out essential reference to their addresses.

Nickel, supra note 81, at 30. For similar reasons, Donnelly contends that human rights are inherently individual.

"All" human rights are embedded in a social context and have important social dimensions. Due process and equal protection makes no sense except in the context of a political community; speech, work, and politics take place only in communities; torture and social insurance alike occur only in a social context. The very idea of respecting and violating human rights rest on the idea of the individual as part of a larger community and social enterprise.

There is no special class of human rights that are rights of society or any other collectivity. . . . We must not fall into the trap of calling everything good a human right, thus draining all meaning from the term.

Donnelly, Universal Human Rights, supra note 81, at 20-21. But Donnelly proves too
Shapiro's relational definition of rights, the Monroe cause of action is the fulfillment of a rights-based constitutional federal system which entitles citizens to particular substantive rights based on the Constitution, for the purpose of justifying and preserving governmental legitimacy.

Although potentially a threat to state sovereignty, this rights-based constitutionalism does not challenge a system of federalism. To say one has a right requires the tacit identification of someone against whom the right is claimed. The recognition of federal rights thus presupposes the federal government as the entity against whom the right is claimed; the state action requirement in this context constitutes a recognition that some portion of sovereignty is vested by the Constitution in the state, but for which the federal government is ultimately responsible. The right, if recognized, is thus a claim of right against the state as intermediary of the federal government. The state action inquiry of § 1983 is correctly understood as a component part of a determination of where there exists a rights violation. If a matter is exclusively reserved for the state, there is no ultimate federal authority, no rights violation, and therefore no need for any state action inquiry.

much. Unlike Nickel and Shapiro, he employs too static a view of rights. Indeed, rights, as we have come to understand them, support his view, but our understanding is limited, as Donnelly himself recognized pages earlier, by both the semantic nature of a rights claim and its underlying substantive assertion, historically informed. Donnelly's failure is his suggestion that groups may not possess rights on conceptual grounds. Individuals are doubtless the beneficiaries of such "group" rights, but that puts no limit on how the rights claim may be constructed.

It is in this sense that Nickel's and Shapiro's assertions about rights avoid the negative libertarian charge. Nickel avoids this charge through his flexible identification of beneficiaries and addressees of rights. Shapiro, despite Mark Stohs' criticism, see Mark D. Stohs, Book Review, 98 Ethics 175, 176 (1987) (critiquing Shapiro's view of negative libertarianism as vast oversimplification), avoids the charge through the identification of the basis of rights that, albeit ambiguously, references and incorporates the respondent of rights.

84. In his opinion for the Court in Monroe, Justice Douglas rejected the argument that 18 U.S.C. § 241, and therefore § 1983, enforced rights only against the federal government: "It has been said that ... § 241 ... embraced only rights that an individual has by reason of his relation to the central government, not to state governments. But the history of the section of the Civil Rights Act presently involved [§ 1983] does not permit such a narrow interpretation." Monroe v. Pape, 365 U.S. 167, 170 (1961) (citations omitted), overruled in part by Monell v. NYC Dept. of Soc. Servs., 436 U.S. 658 (1978). Douglas quoted the legislative record to emphasize that the section "defin[ed] the rights secured by this Constitution of the United States when they are assailed by any State law or under color of any State law ... ." Id. at 171 (quoting Cong. Globe, 42d Cong., 1st Sess. app. 68, 80 (statement of Sen. Edmunds, Chairman of the Senate Committee on the Judiciary)).

This relation to the state is fully consistent with the longstanding, but not uncontroversial, views of the Fourteenth Amendment. See, e.g., The Civil Rights Cases, 109 U.S. 3, 10 (1883) ("The first section of the fourteenth amendment ... is prohibitory in its character, and prohibitory upon the states."). These decisions locate the traditional view that rights relate only to a state. Shapiro's construct readily locates the appeal of this notion as a semantic structure; his treatise locates it in ideological history. Nevertheless, both components of Shapiro's work reveal this construction of rights as less than necessary. See supra notes 81-83 and accompanying text for a discussion of Shapiro's construct of rights theory.

85. This explains the appeal of the Tenth Amendment arguments urged in several cases. In fact, the Court invoked such an argument in the Civil Rights Cases. Disputing the power of Congress to legislate against the deprivation of life, liberty, and property in "every possible case,
We no longer debate whether rights exist because, under this understanding of the Fourteenth and Fifth Amendments, the Constitution authorizes, for the individual citizen at least, a claim against the state or federal government for the purpose of maintaining the federal government’s legitimacy as against the citizen’s will or interests. Rather, it is the very consequential allocation of exclusive state prerogatives that proves controversial. The argument that authority over a controversy is reserved to a state is a complete response to a federal rights claim. If authority over a controversy is shared by state and federal governments, there can be no contrary state law in a system of federal supremacy that takes rights seriously. In any case, exclusive state prerogatives, currently drawn quite narrowly, prove difficult to identify in a United States.

Even in the areas in which mutual prerogatives are easily ascertainable, the direct enforcement scheme remains broad enough to embrace widely divergent conceptions of federal power and varied notions of the content of federal rights. Precisely identifying the content of federal rights is dependent, as the Civil Rights Cases accurately anticipated, on the scope of state action. Thus, the breadth of state action determines the scope of federal power and the outward limits of federal rights.

as well as to prescribe equal privileges in inns, public conveyances, and theaters,” the Court noted that:

[The implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound [and] repugnant to the Tenth Amendment . . . .

Civil Rights Cases, 109 U.S. at 14-15. While this argument is properly unpersuasive in the current legal landscape (this is what much of Monroe is dedicated to refuting, see Monroe, 365 U.S. at 174-84 (recognizing Congress’s power to pass remedial legislation geared toward controlling action under state authority)), it foreshadows the public/private action distinction that has informed the state action debates, whether in the form of identifying state actors, determining municipal liability, or determining the procedural process due a party injured by the state.

86. See Nahmoud, Section 1983 Discourse, supra note 62, at 1745-47 (arguing that use of tort rhetoric in § 1983 claims raises federalism concerns by promoting state power through federal cause of action).

87. Justice Brennan’s observation that “a municipality has no discretion to violate the Federal Constitution,” Owen v. City of Independence, 445 U.S. 622, 649 (1980), is fully applicable to states. States, of course, are immune to suit under the Eleventh Amendment. Hans v. Louisiana, 134 U.S. 1, 18-19 (1890). The Court has held that Congress has the power to override this immunity. E.g., Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (concluding that Congress has power to override state’s Eleventh Amendment immunity when enacting legislation); Fitzpatrick v. Bitzer, 427 U.S. 445, 460 (1976) (denying Eleventh Amendment as defense for Connecticut on specific facts of case). However, § 1983 has been interpreted as not effecting such an override. Quern v. Jordan, 440 U.S. 332, 341 (1979) (holding that § 1983 does not override traditional sovereign immunity of states under Eleventh Amendment).

88. The Civil Rights Cases Court stated:

It is state action of a particular character that is prohibited. . . . It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or
Monroe is significant because it addressed a state actor that is broader than the official acts of the state legislature and executive branch. The Monroe Court embraced three contexts that would justify vindication of rights:

First, it might, of course, override certain kinds of state laws. . . .

Second, it provided a remedy where state law was inadequate. . . .

But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. 89

Monroe thus identified state action, and as such, rights violations, where injuries were commanded by state law, occasioned by state officers (and perhaps others) in the absence of state law, or committed by state officers or others where the state has remedies in theory but tolerates and thereby sanctions the violative acts. Monroe's construction of state action has remained controversial; state action questions have defined the battleground in direct rights enforcement cases, fueling the rights battle precisely because the state is the object of rights in this traditional understanding. 90 Still, what should not be lost is that, for all its effect, Monroe essentially reproduced a traditional construct of right in a thoroughly conventional manner; whatever problems attach to the Monroe approach are at the heart of even the most narrow conceptions of rights in contractarian constitution. 91

Thus, the first model provides direct causes of action for violations of

property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests congress with power to enforce it by appropriate legislation.

109 U.S. at 11.

This admitted, it remains unclear what the scope of state action should be. Compare the technically consistent formulations of Monroe (including behavior undertaken under color of state law) with Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring showing of intent to establish state violation of Equal Protection Clause of the Fourteenth Amendment). In addition, compare these cases to the "official policy cases" under § 1983, culminating in City of St. Louis v. Praprotnik, 485 U.S. 112, 128 (1988) (requiring official policy to be made by policy maker to find municipal liability), and to the procedural due process cases, culminating in Parratt v. Taylor, 451 U.S. 527, 543 (1981) (denying relief because state agent causing injury did not follow state procedures, which were entirely adequate) and Hudson v. Palmer, 468 U.S. 517, 534 (1984) (using attributability of actions to state to determine whether pre- or post-deprivation process necessary).


90. The second limiting component—the definition of rights—has also fueled much debate. That subject is more appropriate for a work on constitutional law, although Paul v. Davis, 424 U.S. 693, 712 (1976), stands as an excellent example of the importance of such determinations as limiting the availability of federal courts to vindicate alleged deprivations of rights.

91. Section 1983's core conventionalism may explain why jurists complain so much about the number of cases. Rather than be viewed as opposing rights, as the all-or-nothing nature of the section would seem to require of its critics, these jurists seek merely to reduce the numbers and eliminate frivolous claims—that is, separate the truly important from the merely pedestrian.
federal rights. Those rights are treated as conditions for citizenship in the Lockean sense. Section 1983 actions are thus mini-revolts, an alternative to revolution and a condition of government legitimacy. The rights enforced by these direct actions are based on the Constitution or other important laws. They belong to individuals and are exercised against the states or the federal government (Bivins suits) for the purpose of maintaining the federal government's legitimacy (avoiding actual revolution) and the state's obligations under the Constitution.


The Supreme Court initially interpreted § 1981, § 1982, and § 1985(3) to reach private action, thus nullifying the primary internal check on rights vindication inherent in § 1983. In Jones v. Alfred H. Mayer Co., the Court first read a Reconstruction statute to reach wholly private action, based on the view that the Thirteenth Amendment authorized § 1982. The

See, e.g., Paul, 424 U.S. at 712 (defamation by public officials not violation of constitutional rights).

92. This limits the duplication of state law in reference to rights created under federal law, highlighting the supremacy of federal law and its ultimate responsibility for rights. Exclusive state prerogatives limit the reach of this approach. A controversial and questionable application of this approach can be found in Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984).

93. It is, of course, not always this simple. Within this scheme of understanding rights, several substantive views of right may reside. See Shapiro, supra note 81, at 17-18. These substantive views are outlined in Part III of this Article.

94. When revived in 1976, § 1981 provided:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


The 1991 Amendments added language confirming § 1981's coverage of private action, and extending the section's coverage to the terms and conditions of a contract. Pub. L. No. 102-166, Title I, § 101, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1994)). Sub-section (c) was designed to memorialize the reviving decision, Runyon v. McCrary, 427 U.S. 160, 175 (1976) (extending Act to private action), thus quelling the opposition that had gained force when the Court reconsidered, but did not overrule, Runyon in 1989. See Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989). Sub-section (b) was designed to reverse Patterson's holding that the Act reached only discrimination in the formation of contracts. See id. at 177-78.

95. Section 1982 provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (1988).

96. See supra note 21 and accompanying text for the full text of § 1985(3).


98. The Thirteenth Amendment abolished slavery and authorized Congress to enact appropriate legislation to enforce this prohibition of involuntary servitude. The Civil Rights Cases read this as empowering Congress to “enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents,” but assumed that private segregation was not such a badge or incident of slavery. 109 U.S. 3, 21-24 (1883). This view, duplicated in Jones, is uncontested by its dissenters. See Jones, 392 U.S. at 476-77 (noting Thirteenth
subsequent extension of this reading to § 1981 in Runyon v. McCready—over Justice White's protest that § 1981 was authorized by the Fourteenth Amendment (which requires state action), rather than the Thirteenth Amendment (which does not)—created the potential that these acts would subsume housing and contract law—that is, would not protect constitutional rights at all. The specific limit of the sections' scope to contracts and conveyances in land prevented the statutes from subverting the § 1983 formula. Nevertheless, by recognizing the statutes' coverage of private action, all contracts and conveyances of land, which were previously governed largely by state law and viewed in some limited way as informed by principles of freedom of contract and free alienation of property, could potentially

Amendment cannot form basis for extending remedy to private acts of discrimination) (Harlan, J., dissenting; joined by White, J.).


100. Id. at 205-11 (White, J., dissenting).

101. The doctrine is, perhaps, best captured by Sir George Jessel's words, reproduced in the introduction to the Kessler contracts casebook.

If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 8 (3d ed. 1986). Freedom of contract was memorialized as a fundamental precept of American constitutionalism by the beginning of the twentieth century in Coppedge v. Kansas, 236 U.S. 1, 26 (1915) (holding state law that prohibits employers from conditioning employment on agreement not to join labor union to be unconstitutional); Adair v. United States, 208 U.S. 161, 180 (1908) (holding federal government could not prohibit interstate carrier from discharging employee for membership in labor organization); Lochner v. New York, 198 U.S. 45, 64 (1905) (holding state could not interfere in private contracts between employer and employee by regulating hours of labor). KESSLER ET AL., supra, at 12. While never unequivocally embraced, see, e.g., Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454, 482 (1909) (claiming some of Court's decisions regarding freedom of contract were incorrect), this doctrine was the organizing principle that reconciled the expanding powers of the federal judiciary to invalidate law with the notion that its powers should be exercised sparingly. See generally Morton J. Horowitz, The Transformation of American Law: 1780-1860 1 (1977) (noting that courts played large role in social policy, particularly in Civil War era). It is this balance that the Court's post-New Deal exercise of power, particularly in civil rights cases, disrupted and for which it has sustained increasing criticism. See, e.g., BICKEL, supra note 12, at xxx; Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 26-35 (1959) (criticizing judicial activism in civil rights cases in post-New Deal era, beginning with Classic).

Along with the doctrine of possession in property, freedom of contract played a substantial role in the emergence of American industrial capitalism. Speaking generally, Max Weber articulated the limitations of this approach while tacitly acknowledging its advantage:

The great variety of permitted contractual schemata and the formal empowerment to set the content of contracts in accordance with one's desires and independently of all official form patterns, in and of itself by no means makes sure that these formal possibilities will in fact be available to all and everyone. Such availability is prevented above all by the differences in the distribution of property as guaranteed by law. . . . The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others. . . . The exact extent to which the total amount of "freedom" within a given legal
be subject to the scrutiny of federal courts. Every decision not to contract, even for reasons expressly authorized by state law or consistent with freedom of contract, was potentially illegal under these sections. The rights protected by §§ 1981 and 1982, although expressly stated in the sections, nevertheless threatened to disrupt the federal balance. If applied broadly to reach private action, the statutes threatened to consume pedestrian state common law; if construed narrowly, they would fail the apparent purposes of Congress and the apparent spirit of their own terms. To preserve this balance, the Court recognized a tacit limitation in the acts and restricted their scope to "rights" questions (as opposed to contract and property conveyance questions). This restriction, the requirement that the refusal to contract or convey be based "solely on the basis of invidious classification," had a limiting effect similar to the state action requirement of § 1983, the federal action requirement of Bivins, and the state action and criminal intent requirements of § 242.

Ordinarily, Justice Rehnquist's majority opinion in General Building Contractors v. Pennsylvania\textsuperscript{103} is viewed as the source of an intent requirement on § 1981 suits. However, Justice Rehnquist's opinion in fact does little more than articulate a very narrow view of an intent requirement that existed from the Court's first blush with these statutes in Jones and Runyon. Indeed, Justice Rehnquist accurately characterized state action, specific intent, and disparate impact as increasingly effective limits on the reach of the statutes:

\begin{quotation}
[T]he fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relevant opinions are hostile to such an implication. Thus, although we held in Jones \ldots that § 1982 reaches private action, we explained that § 1 of the 1866 Act "was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute." Similarly in Runyon v. McCrory \ldots we stated that § 1981 would be violated "if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees."\textsuperscript{104}
\end{quotation}

The Court's first cases interpreting § 1981 and § 1982 do not necessarily re-

\textsuperscript{102} Free alienation of property, the doctrine that drove the reform of ancient limits on the sale of inherited land, played a role similar to, if much more limited than, freedom of contract in facilitating advanced capitalism. Both doctrines convey the notion that a citizen is free, indeed best suited, to determine the socially desirable use of economic resources in their possession. Quite obviously, these views erroneously equate individual motivation and social benefit even when analyzing discriminatory motivation. \textit{Cf.} Gary Becker, \textit{The Economics of Discrimination} 8 (2d ed. 1971) (describing discrimination as irrational "taste").

\textsuperscript{103} 458 U.S. 375 (1982).

\textsuperscript{104} \textit{Id.} at 387-88 (citations omitted).
quire specific intent, as Justice Rehnquist insists, but they do necessitate some form of intent as a limit on the broad reach of the statute.

This formula protected citizens against the invidious denial of the right to contract and purchase land. Such a construction locates the right to be free, by analogy, from invidious discrimination. That construction is most akin to the indirect approach taken in modern civil rights statutes; however, these Reconstruction statutes nonetheless differ from the recent civil rights legislation because a "right" is apparent in the text, limited by—but not turning on—the requirement of invidious discrimination.

Taken in light of Shapiro's formulation, § 1981 and § 1982 superficially duplicate the § 1983 formula, but protect rights defined in the sections rather than rights in the Constitution or federal law. Importantly, these rights are traditional private contract rights (with § 1982 addressing the subset of real property conveyances) where a presumption against regulation might have existed absent express congressional action. These traditionally private law matters imply that these rights are exercised, by their nature, against private persons. A state action requirement appears antithetical to any view that Congress sought to change the ability, as opposed to the capacity, to contract of the acts' beneficiaries. To the extent that the right to contract means right to refuse to contract—as the principle of freedom of contract

---

105. See *infra* notes 167-91 and accompanying text for a more detailed discussion of the modern civil rights statutes.

106. See *infra* note 189 and accompanying text for a discussion of this requirement in recent civil rights litigation.

107. See *supra* notes 81-83 and accompanying text for a brief formulation of Shapiro's theory on rights.

108. In addition to the theories of freedom of contract and free alienation of property, the Constitution expressly protects the obligations of contracts and prohibits the deprivation of property without compensation and due process of law. *E.g.,* U.S. CONST. art. I, § 10 ("No state shall ... pass any bill ... or law impairing the obligation of contracts."); U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."). Moreover, in some instances an argument for non-interference might be made in the form of an equitable abstention claim: In general, "a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court," but "it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession ... ." Markham v. Allen, 326 U.S. 490, 494 (1946) (citations omitted).

Rather than prohibiting the enforcement of racially restrictive covenants, for example, these concerns counseled for federal non-intervention in local enforcement of those devices. The principle of possession tacitly acknowledged, or at least tolerated, these devices, allowing the owners of land and property rights to manifest their prejudices and racism unabated until the Supreme Court eventually invalidated their enforcement. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding state judicial enforcement of discriminatory restrictive covenants in housing violates Fourteenth Amendment). Like *Jones* extension of § 1982 to private property conveyances, *Shelley* required a finding of constitutional authority to overcome these trenchant principles of "right," expressed as non-interference. The Court in *Shelley* found state action in the enforcement of the private agreements in order to ground its anti-discrimination ruling in the Fourteenth Amendment. *Shelley, Jones,* and *Runyon* all rejected the negative libertarian understanding of the law and political theory.
implies—the construction of these acts as addressing the ability to contract suggests a limitation on the freedom of other citizens' right of refusal to contract. Justice White argues so much in his Runyon dissent:

The words "right . . . enjoyed by white citizens" clearly refer to rights existing apart from this statute. . . . The right to make contracts, enjoyed by white citizens, was . . . always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.109

White's construction, however, is premised on only the first two of Shapiro's factors.110 The relative incompleteness of this construction of the statutes reveals an insistence on viewing these contracts in the confines of a private relationship between individuals. As such, White's partial construction tacitly denies that § 1981 and § 1982 created rights. The construction assumes both the basis and purpose of the "rights" created in the sections is the principle of freedom of contract and its preservation. The Revival decisions in Jones and Runyon, and perhaps the Reconstruction Era Congresses, read the sections as creating rights, however. Assuming the sections created some rights, the Revival opinions were required to explain some bases and purposes of these new rights.111

Jones and Runyon look to the Constitution and find substance in the Thirteenth Amendment. Premised on Congress's Thirteenth Amendment authority to eradicate the "badges of slavery," a power not limited to state

110. See supra note 81 for an outline of Shapiro's four factors which constitute an assertion of right.
111. The private law subject matter of these statutes could plausibly be interpreted as based on the statute, i.e., created by the statute, for the purpose of protecting the right to contract (or some similar purpose such as promoting efficiency in contracts). This construct, cast in general terms, is, however, not completely consistent with the view of freedom of contract as a private law matter. Nor does it seem consistent with the view that the Reconstruction Congress was, in the Reconstruction Era statutes, ensuring rights for freedmen and other newly recognized citizens.

If the statutes are read as Congress's attempt to extend constitutional citizenship under the Fourteenth Amendment generally, the right might be read as a right against a private person on the basis of the Fourteenth Amendment for the purpose of ensuring full and equal citizenship. Read as a whole, this full citizenship interpretation draws the statutes as independent of the contract subject they address. Indeed, rights to contract are therein read as contingent on constitutional authority or legal grant, which the constitutional authority of the Fourteenth Amendment limits. Equal citizenship, taken in light of the private nature of contract and housing can only mean the equal ability, as distinguished from capacity, to contract. If the Acts are enacted under authority of the Fourteenth Amendment, they must be interpreted broadly to cover the ability to contract by their very structure. This, of course, assumes that their application to private parties is understood as consistent with that amendment. Contra Runyon, 427 U.S. at 193 (White, J., dissenting) (section ensures only capacity to contract). But cf. General Bldg. Assoc. v. Pennsylvania, 458 U.S. 375, 389-90 & n.17 (1982) (Fourteenth Amendment read as partial authority for § 1981, although still applied only to private parties).
action or mandating formal equality of treatment, the purpose of the right is eradicking slavery-like conditions, whoever imposes them. Understood in most grand terms, the legitimacy of the post-Civil War Union is viewed as premised on the eradication of slavery conditions.

Importantly, the relation to slavery limits this approach. The "solely because of" and "invidious discrimination" requirements of Jones and Runyon operate as limitations. As surrogates for slavery, each limitation ensures freedom from enslavement for individuals whose relative ability to enter into contracts—notwithstanding their possession of any slavery-related characteristic like race—might be compromised, while leaving all other contracts unregulated. Whether justifiable or compelling, this "relation to slavery" limitation effectively restricts the potentially broad application of the right by identifying its constitutional basis and purpose.

The second model thus recognizes a statutorily defined right and applies it against private actors to achieve a government purpose that is, perhaps only under this view, constitutionally authorized. The apparently broad scope of this approach is limited through the application of a surrogate for the authorizing concern in the form of an invidiously discriminatory treatment requirement. Hence, the limited reach of constitutional and statutory authority inherent in the limiting language of the acts protects local authority over contracts.

3. Section 1985(3)

In Griffin v. Breckenridge,112 the Supreme Court revived § 1985(3), the civil conspiracy section of the 1871 Civil Rights Act. Distinguished from the related § 1983, the Court’s formulation of a direct means of vindicating rights took on the most broad, though still limited, form. Tacitly overruling its earlier decision in Collins v. Hardyman,113 the Court interpreted the section to reach private conspiracies to deprive persons of the "equal protection of the laws" and "equal privileges and immunities under the laws."114

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 42.115 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

113. 341 U.S. 651 (1951). Collins only determined whether the facts alleged stated a claim. The Collins Court made no effort to interpret the constitutionality of the statute. Griffin, therefore, needed only to explain why the facts presented therein stated a claim to avoid impacting Collins.
114. Griffin, 403 U.S. at 104.
115. 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).
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. 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."

(a) Collins and the private deprivation of "equal protection under the laws" and "equal privileges and immunities under the laws"

In Collins, the plaintiffs, opponents of the "Marshall Plan," were conducting a meeting to draft opposition to the plan in order to petition their congressmen. They alleged that the defendants conspired to and did enter their meeting, disrupting it by assaulting and intimidating them. The plaintiffs alleged § 1985(3) was violated because the defendants went in disguise upon the highways, wearing caps of the American Legion unlawfully and without authority or, in the alternative, conspired with the purpose of depriving them of equal protection of the laws and equal privileges and immunities under the laws. Additionally, the plaintiffs complained, as a part of their allegation of deprivation of equal privileges and immunities under the laws, that they were deprived of the underlying right to peaceably assemble.

The allegations presented the question, revisited in Scott, whether political groups and conflicts between those groups were covered by the statute. However, the majority avoided this question. Instead, it focused on the question of constitutional authorization: "It is apparent that, if this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty." Specifically, the Court was concerned that, if the statute were read to reach private action, it could not be authorized by the Fourteenth Amendment, and would be invalid in light of "issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights."

Again, the Court avoided the difficult question of defining private depri-
vation of equal protection, even as it assumed the constitutional issues were
determinative. Justice Jackson, for the Court, insisted that the section
must be authorized by the Fourteenth Amendment, if authorized at all. He
then argued § 1985(3) was invoked only if the conspiracy was "of such magni-
tude and effect as to work a deprivation of equal protection of the laws, or of
equal privileges and immunities under laws" or involved action under
color of state law. Justice Jackson sought to resolve the problem of how ac-
tions of a private person deprive the victim of those acts of equal protection
of the laws or equal privileges and immunities under the laws. Concerned
about federalism and the subsumption of state tort law into the federal law,
Justice Jackson required action under color of state law or such a scope of
private action that would suggest the state had been completely
overwhelmed.

The problem with Justice Jackson's reading is that it required him to
ignore most of the section's language. As Justice Burton pointed out in dis-
sent, "[t]he language of the statute refutes the suggestion that action under
color of state law is a necessary ingredient of the cause of action which it
recognizes." It "speaks of 'two or more persons'... conspiring," or "going
'in disguise on the highway,'" and does not limit its reference to state offi-
cials, as Congress did in other Reconstruction legislation, most notably
§ 1983. "When Congress, at this point, did intend to limit comparable

124. Justice Burton argued in dissent that the section need not necessarily be authorized by
the Fourteenth Amendment. Id. at 663 (Burton, J., dissenting).
125. Id. at 662.
126. The Court, per Justice Jackson, argued:
Passing the argument, fully developed in the Civil Rights Cases, that an individual or
group of individuals not in office cannot deprive anybody of constitutional rights... it
is clear that this statute does not attempt to reach a conspiracy to deprive one of rights,
unless it is a deprivation of equality...

... There 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.

Id. at 661.

127. Justice Jackson argued:
Indeed, the post-Civil War Ku Klux Klan, against which this Act was fashioned, may
have, or may reasonably have been thought to have, done so. It is estimated to have
had a membership of around 550,000, and thus to have included "nearly the entire
adult male white population of the South." It may well be that a conspiracy, so far-
flung and embracing such numbers, with a purpose to dominate and set at naught the
"carpetbag" and "scalawag" governments of the day, was able effectively to deprive
Negroes of their legal rights and to close all avenues of redress or vindication, in view
of the then disparity of position, education and opportunity between them and those
who made up the Ku Klux Klans.

Id. at 662 (footnote omitted). It is, however, difficult to imagine that Congress enacted a statute
designed to be available only in such futile a circumstance as Justice Jackson (perhaps romanti-
ically) seems to have envisioned.

128. Id. at 663 (Burton, J., dissenting).
129. Id. at 663-64 (Burton, J., dissenting).
civil rights legislation to action under color of state law, it said so in unmistakable terms."\textsuperscript{130}

More generally, the other conspiracies prohibited by § 1985(3) seem to presuppose a world where the local government apparatus is intact, conforming with and enforcing the law, and presumably available to provide redress. The second conspiracy prohibited by § 1985(3), a conspiracy aimed at preventing state officials from assuming or fulfilling their office, expressly presumes the state apparatus exists and is available. While it does seem to acknowledge that outside forces might subvert the state’s efforts, the second conspiracy is not limited to situations where many, most, or all officials of a Reconstruction Era government, for example, are frustrated in the fulfillment of their office. Indeed, any conspiracy to stop a single black Justice of the Peace from reaching the county seat to be sworn in appears reasonably covered by these words.

Similarly, the third conspiracy, proscribing activities designed to prevent voting or campaigning on behalf of a federal Executive or congressional candidates, assumes the existence of state-recognized voting rights.\textsuperscript{131} Certainly, throughout most of the century following the Civil War, black Americans lived under conditions that duplicated, even made unnecessary, the Klan revolt which Justice Jackson thought necessary to trigger § 1985(3). Indeed, the minimal condition necessary for the third conspiracy to make sense—universal franchise—was not met. Even as Justice Jackson reminisced of a polity dominated by Klansmen and sought to limit § 1985(3) to that world, state officials throughout the South all but expressly denied the franchise to black Americans.\textsuperscript{132} The section’s language would seem to have been triggered long before the Klan’s triumph; its terms would censure a completely private conspiracy to obstruct a sole black sharecropper who, in 1951, perhaps decided to vote, such likely conspiracies notwithstanding.

Finally, the fourth conspiracy, one aimed at an advocate for equal rights or equal franchise, assumes the existence of room for political debate, discussion, and change. It seems to demand that there is something for advocates to do, someone to whom an appeal can be made, and someone to respond. Certainly, this someone is at least as likely to sit in the state house as the federal building. In any case, the world that Justice Jackson presumes necessary to trigger the act would give neither an advocate nor a plaintiff under the act any place to go for satisfaction. The white voting rights organizer, though beaten by a mob of whites, seems fully covered by the language of this act. Justice Jackson, it seems, would tell this white man he has “a case of a lawless

\textsuperscript{130} Id. at 664 (Burton, J., dissenting).

\textsuperscript{131} States “have broad powers to determine the conditions under which the right of suffrage may be exercised.” Carrington v. Rash, 380 U.S. 89, 91 (1965) (quoting Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959)).

political brawl, precipitated by a handful of white citizens against other white citizens. [The state] courts are open to plaintiffs and its laws offer redress for [your] injury and vindication for [your] rights,"\textsuperscript{133} notwithstanding the section's clear language authorizing relief.

Justice Jackson's requirement of state action or exceptional circumstances demands that recovery be denied under all of these conspiracies, none of which raise the problem of "what is a private conspiracy to deprive a person of equal protection of the laws or equal privileges and immunities under the laws." The language of § 1985(3), it appears, reaches wholly private action. Although Justice Jackson's concerns are far from unfounded, they are overblown. Most importantly, the first conspiracy does give rise to a difficult question. However, rather than confront what a private deprivation of equal protection of the laws means, Justice Jackson merely assumes the act did not change anything fundamental about the law and reads its prohibition narrowly. Rather than identify what privileges and immunities must be protected from deprivation, he searches for rights deprived by state actors, or in the alternative, a condition that makes the state and its presumptive authority meaningless.\textsuperscript{134}

(b) Griffin and rights in the preservation of legitimacy

The fear that unchecked "private" deprivation of "equal protection" and "equal privileges" could prove limitless,\textsuperscript{135} though a well-founded concern, does not necessitate the inevitable subsumption of state law by § 1985(3). The Court in Griffin sought to find middle ground and dismissed the Collins Court's concerns about usurping state tort law. The Griffin Court stated, "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."\textsuperscript{136} The difficulty recognized in Collins, nevertheless, led the Court to give meaning to the section by constructing a distinct right to equality from its face.

The Court stated, after arguing that the act reaches private conspiracies:

That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspirato-

\textsuperscript{133} Collins, 341 U.S. at 662.

\textsuperscript{134} See supra notes 128-30 and accompanying text for a critical discussion of the state action requirement for a § 1985(3) case.

\textsuperscript{135} The Collins Court articulated this curiosity by questioning what effect the defendants' assaults could be assumed to have had on the law, as such: "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 . . . ." Id. at 651.

\textsuperscript{136} Griffin v. Breckenridge, 403 U.S. 88, 95-96 (1971). The Court was free to address Eugene Griffin's claims—that Lavon and James Breckenridge violated § 1985(3) when they brutally beat him and others—without constitutional difficulty because the Collins "Court [made] clear that it was deciding no constitutional question, but simply construing the language of the statute, . . . determining the applicability of the statute to the facts alleged in the complaint." Id. at 94 (footnote omitted). The Collins Court's focus on the facts' applicability to the statute was completely appropriate.
rior 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." 137

The 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." 138

The "right" is internal in this construction. The Griffin Court's limitation of the statute to an injury that infringes freedom from invidious discrimination serves a broader purpose than its § 1981 and § 1982 corollaries. Without the internal substantive limitations of § 1981 and § 1982, this furtive limitation not only prevents a deluge of tort actions in federal courts, it provides substantive coverage. Its location and purpose in the 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. 139

137. Id. at 101-02 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 485 (1871) (statement of Rep. Cook)).

As amicus curiae, Solicitor General Griswold urged in Griffin for the recognition of a cause of action under § 1985(3) for the petitioners. Griswold recognized the difficulty presented by the statute as a problem of limits, a continuum of lax and excessive limits in the relevant prior cases. On behalf of the United States, he argued that the issue cannot be resolved by looking to the prior decisions of this Court. Indeed, at one extreme, there are rulings in U.S. v. Harris, 106 U.S. 629, and Baldwin v. Franks, 120 U.S. 678, which read the identically worded criminal provision . . . very broadly to reach acts of violence committed by entirely private groups against individuals without regard to their race or membership in any definable class . . . . At the other pole is Collins v. Hardyman, 341 U.S. 651, in which . . . "the Court in effect interpreted § 1985(3) to require action under color of law even though this element is not found in the express terms of the statute."

Brief for the United States as Amicus Curiae at 4-6, Griffin v. Breckenridge, 403 U.S. 88 (1971) (No. 70-144) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 165 n.31 (1970)) (footnotes omitted). The Solicitor General proceeded to urge the Court to "find a middle ground between what is, in our view, the too expansive reading of Harris and the too restrictive construction reflected in Collins." Id. at 7.

138. Griffin, 403 U.S. at 102 (emphasis added).

139. The term "citizenship" is used here to emphasize the government's fundamental concern with its legitimacy. Section 1985(3) refers to "persons" rather than "citizens." 42 U.S.C. § 1985(3). But, this does not detract from the legitimacy preservation basis for the Griffin construct. This country, in 1870, a nation of immigrants with an increasing flow of new residents, could reasonably be concerned with maintaining its legitimacy in the eyes of non-citizens. Recall that, even prior to the development of international humanitarian and human rights regimes, states had obligations to individuals, albeit obligations owed to the states whose nationality the individuals possessed. See 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362-69 (2d ed. 1912) (discussing correlation of rights and duties between citizens, states, and foreign states). A more important consideration, though perhaps only for hindsight appraisers, was the substan-
A similar reading of the section had been urged by the Solicitor General in Griffin. Having expressed his agreement with the concerns of the Collins Court, the Solicitor General argued:

The scope of the provision, we submit, is this: that Federal law will intervene whenever group conduct (usually wholly unsanctioned by State authority) attempts to prevent a class of citizens from enjoying, equally with others, the "protection" of State or federal "laws" or the "privileges and immunities" they grant.

Subsequent cases have not embraced this reading of § 1985(3). However, such a reading is necessary if § 1985(3)'s unique language is to be given effect independent of the construction of § 1983. Moreover, it conforms with the language, history, and context of the statute, and is fully consis-

140. The Solicitor General argued:

[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 meaningless change of words. . . . We fully accept the statement in Collins v. Hardyman, that it is no deprivation of "equal protection" or of "equal privileges and immunities" within the meaning of Section 1985(3) "to assault one neighbor without assaulting them all, or to liable some persons without mention of others."


141. Id. at 15.

142. As the Solicitor General noted, reading the statute to require state action makes "the statute wholly superfluous in light of section 1983." Id. at 10. In Scott, the Court eliminated most, if not all, significant differences between these two sections of the 1871 Civil Rights Act, at least for claims based on violations of constitutional rights. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 839 (1983) (holding that § 1985(3) claim is limited to discrimination motivated by race or other suspect classification).

143. Justice O'Conner recently offered a similar reading of § 1985(3) in her dissent in Bray. Objecting to Justice Scalia's use of the "racial, or perhaps otherwise class-based, invidiously discriminatory animus" language to exclude abortion seekers' claims against abortion protesters, Justice O'Connor accused Justice Scalia of "focus[ing] on that phrase [which does not appear on the face of the statute] to the exclusion of our reasons for adopting it . . . ." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 347 (O'Connor, J., dissenting). She continued: "Griffin's narrowing construction of § 1985(3) 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.'" Id. at 348 (O'Connor, J., dissenting) (quoting Griffin v. Breckenridge, 403 U.S. 88, 101 (1971)). Furthermore, Justice O'Connor stated:

Griffin's requirement of class-based animus is a reasonable shorthand description of the type of actions the 42d Congress was attempting to address. Beginning with Carpenters v. Scott, however, that shorthand description began to take on a life of its own. . . . [I]nstead . . . Congress had in mind a functional definition of the scope of §§ 1985(3),] and intended to "provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence."

Id. at 348-49 (O'Connor, J., dissenting) (quoting United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 851 (1983) (Blackmun, J., dissenting)). Despite this forceful argument, O'Connor's dissent in Bray is flawed. After this considerable eloquence, the Justice continued to read the
tent with the authority of federal courts to act under more restrictive theories of judicial authority, such as footnote four in Carolene Products—perhaps more so than some § 1983 actions.144

(c) The Griffin reading in context

Comparison of the Griffin reading with the current understanding of § 1985(3) illustrates the necessity of the reading of Griffin offered above.

statute as a remedial statute, requiring an inquiry into specific deprivations of rights she finds unnecessary when examining the motive requirement of the statute. See id. at 355-56 (extending this analysis to anti-abortion demonstrators in their attempts to prevent abortion). While not strictly inconsistent, the combination of these requirements (beginning in Novotny) led to the very approach she criticized earlier in Scott.

144. As Professor Fiss reports, "Carolene Products . . . has been taken, as perhaps it was intended, to be a . . . general statement of the role of courts in our political system." Fiss, supra note 61, at 6. Fiss describes Carolene Products' "legislative failure" theory as providing that, even on constitutional questions
the courts should defer to the legislative branch . . . unless there is some reason for assuming that the processes of the legislature are inadequate . . . . [F]ootnote [four]
identified two instances of legislative failure: abridgment of the right to vote and victimization of a discrete and insular minority, a group disabled from forming coalitions and thus from effectively participating in majoritarian politics.

Id. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing presumptions and scrutiny afforded to Congress as to constitutionality of its various acts). The provocative work of Professors Daniel A. Farber and Philip P. Frickey on Carolene Products should be noted here. See generally Daniel A. Farber & Philip P. Frickey, Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation, 79 CAL. L. REV. 685 (1991) (analyzing past, present, and future interpretations of Carolene Products). Farber and Frickey have suggested that Carolene Products' political powerlessness justification for civil rights is subject to use against oppressed or subordinated minorities whenever positive political theory (or public opinion) suggests a group is disadvantaged by the political process. Id. at 695-96. Justice Scalia's attacks on affirmative action seem, they argue, to invoke the notion advanced by Professor Bruce Ackerman that diffuse majorities, and not discrete minorities, need protection from the political process. Id. at 708-09. See Bruce Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 717 (1985).

The Griffin construct outlined above easily fits in the second exception to deferring to the legislature, although that exception may have been abandoned by the court's recent strict scrutiny cases. Compare Griffin v. Breckenridge, 403 U.S. 88 (1971), with Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (holding that all racial classifications are deserving of strict scrutiny); Shaw v. Reno, 113 S. Ct. 2816, 2825-28 (1993) (allowing claim under Equal Protection Clause to prevent state redistricting plan); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) (applying strict scrutiny to city plan requiring contractors to subcontract at least 30% of business to minorities). Moreover, that interpretation of § 1985(3), to the extent it is a fair reading of the language and legislative intent, is authorized by Congress. In either case, the fundamental point is that the Griffin construct and Carolene Products share a concern with the diminution of the citizen's standing as a citizen when that citizen is poorly situated to demand assistance in majoritarian bodies.

This construct does not profit from Fiss’s structural reform justification for judicial activism, as it addresses itself to the treatment of individuals by private parties acting in concert. Fiss' concern is with bureaucracies. The justifications of each do not detract from the other, however. Moreover, it is fully consistent with Professor John Hart Ely's explanation of Warren Court activism as aimed at advancing open and equitable political participation. John H. Ely, Democracy and Distrust: A Theory of Judicial Review 75-87 (1980).
Under the *Griffin* model, § 1985(3) creates a self-limiting right, internal to the statute and independent of other statutes. Post-*Griffin* cases have taken § 1985(3) and § 1983’s shared origin in the 1871 Civil Rights Act to return the Act to its pre-*Griffin* status, illustrated by *Collins*, requiring deprivation of underlying rights,145 and in some cases state action,146 as in § 1983 cases. These subsequent readings locate the right protected by § 1985(3) outside the statute and require invidious intent in order to limit the statute’s reach.147 This recent approach is familiar to students of § 1983 litigation and projects a more limited scope, perhaps earning it increased favor among commentators.148

The Supreme Court’s move to more narrow readings of § 1985(3) draws some support from its readings of Reconstruction Era criminal corollaries of the section. In *United States v. Harris*,149 the Court simply invalidated a section establishing criminal conspiracies on the same ground as § 1985(3).150 The Court had another occasion to confront similar language when interpreting the current 18 U.S.C. § 241 in *United States v. Classic*,151 however. The *Classic* Court illustrated both jurists’ discomfort with embracing broad equal-

---


146. *See* Scott, 463 U.S. at 830 (requiring state involvement for § 1985(3) claim based on infringement of First Amendment rights).


148. *See* Scott, 463 U.S. at 830 (limiting scope of § 1985(3)).

149. 106 U.S. 629 (1883).

150. *See id.* at 644 (declaring § 5519 of Revised Statutes lacked constitutional authority for its enactment, as neither Thirteenth or Fourteenth Amendments could provide Congress with such authority). The invalidated statute declared:

If two or more persons in any state or territory conspire or go in disguise upon 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 or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory form giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

*Id.* at 632 (quoting Act of Apr. 20, 1861, § 2, 17 Stat. 13, 14).

The *Harris* court rejected the Thirteenth, Fourteenth, and Fifteenth Amendments and the Privileges and Immunities Clause of the Constitution, as set forth in Article 4, Section 2, as authority for the section. *Id.* at 637-44. In doing so, the Court emphasized its view that Congress possessed the power to prescribe the actions alleged in the indictment only if they involve state action. *Id.* at 636-40 (relying on holdings in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), United States v. Cruikshank, 92 U.S. 542 (1875), and other cases to support conclusion).

151. 313 U.S. 299 (1941).
ity rights that prove foreign to its core ideology of rights and their dogged commitment to that core ideology.

In Classic, the Court reinstated an indictment under both § 241 and § 242. Ruling on whether a conspiracy to prevent the official count of citizens' ballots violated § 241, the Court quoted the section: "[Section 241] makes it a crime to 'injure' or 'oppress' any citizen 'in the free exercise . . . of any right or privilege secured to him by the Constitution.' The pairing of "oppress" and "secured him by the Constitution" suggests some question as to the statute's protection of complex behaviors constituting oppression or violation of "rights" identified in the Constitution. With the aid of decisions on similar factual circumstances in Ex Parte Yarbrough ("The Ku-Klux Cases") and United States v. Mosley, the Court easily dispatched the ambiguity. Resting its decision on the right to vote as constitutionally guaranteed, it held the statute, "[i]n unambiguous language . . . protects 'any right or privilege secured . . . by the Constitution,' a phrase which [extends to the right to vote], as well as numerous other constitutional rights which are wholly unrelated to the choice of a representative in Congress."

To the Classic Court, § 241 read like § 1983, providing a remedy for violations of rights defined outside the terms of the statute. Classic's reading of § 241 seems, then, to support more recent readings of the similar language in § 1985(3). However, § 241 refers specifically to "any right or privilege se-

152. W. V. Quine describes knowledge in terms of fields, challenging the analytic/synthetic dichotomy of Kant. Quine explains how beliefs work and why they are resilient in light of counterfactuals:

The totality of our so-called knowledge or beliefs . . . is a man-made fabric which impinges on experience only along the edges. . . . A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. . . . But the total field is so undetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to reevaluate in light of any single contrary experience.

W.V. Quine, Two Dogmas of Empiricism, in From a Logical Point of View 20, 42-43. (1980). Referring to this statement, Shapiro describes ideologies as "conservative adaptive mechanisms" and proceeds to extract the core ideology of liberal rights discourse. See Shapiro, supra note 81, at 11-14 (discussing and analyzing Quine's work on empiricism).

153. That ideology can be described as the view that rights belong to individuals against state action only for the purposes of regulating state action and only based on the Constitution. This is a constant refrain in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), United States v. Cruikshank, 92 U.S. 542 (1875), United States v. Harris, 106 U.S. 629 (1882), and the Civil Rights Cases, 109 U.S. 3 (1883).

155. 110 U.S. 651 (1884).
156. 238 U.S. 383 (1915).
157. Relying on the Court's previous holdings in The Ku-Klux Cases and Mosley, which held that interference with the right to vote is a violation of a right secured by the Constitution, the Classic Court noted it had found "no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen 'in the free exercise . . . of any right or privilege secured to him by the Constitution.' " Classic, 313 U.S. at 321 (quoting 18 U.S.C. § 241). The Court then extended these holdings to conclude that conspiracy to prevent a person from voting in a primary election is equally a constitutional violation and thus actionable under § 241. Id. at 321-22.
158. Id. at 322.
cured . . . by the Constitution or laws of the United States," language more akin to § 1983 than § 1985(3). Indeed, the dilemma presented by § 1985(3) is more formidable than § 241's errant "oppress" reference.

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"—plural—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." 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,"159 singular and specific.160 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.161 The reference to "equal 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.162

159. U.S. Const. amend. XIV.
160. The Solicitor General's brief noted:
It may be that "privileges and immunities under the laws," the "equal" enjoyment of which [the] provision protects, do not include those conferred by State law. We are inclined to the opposite view, however, because that seems the natural reading of the words . . . . At all events, the statute, in this part, does not speak of privileges and immunities "of citizens of the United States" (like Section 1 of the Fourteenth Amendment), but, rather, privileges and immunities "under the laws," presumably including . . . state "laws" . . . . [S]ince the guarantee is one of equality, there could be no constitutional reason for limiting it to federally granted rights . . . ."

Brief of the United States as Amicus Curiae at 15 n.5, Griffin v. Breckenridge, 403 U.S. 88 (1971) (No. 70-144).

161. The petitioners argued forcefully in their brief to the Court that this statute reached private actions, the position ultimately adopted by the Court. In the process of arguing so, they appraised the Court of statements in the legislative record, which emphasized that the statute was in no way limited to federal laws, but included private violations of state laws. Representative Poland is quoted endorsing the statute:

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.


162. The reading of the statute as a guarantee of enjoyment of a system of laws is fully supported by the Solicitor General's Brief in Griffin.

[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 themselves have no more specific object than to deter black citi-
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.163

Understood in these terms, attempts to read § 1985(3) as little more than a conspiracy corollary of § 1983 prove problematic and turn out to be largely incomprehensible. The rights protected in recent readings of § 1985(3), defined elsewhere as in the § 1983 approach, must be rights against private individuals if one gives the statute’s very different language any meaning at all. Not only are “Constitutional rights” against private individuals rare in our constitutional precedent,164 they are inconsistent with both the traditional view of rights, represented by § 1983 and the modified approach of §§ 1981 and 1982. Using Shapiro’s explanation of rights,165 such a right would be a right based on the Constitution for the purposes of giving meaning to that constitutional provision. However, such constitutional provision, if it creates or ensures the government’s legitimacy, must refer to the government. To

zens 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.


163. The notion that § 1985(3) creates a right to enjoyment of the rule of law is fully supported by the otherwise peculiar reproduction of paragraphs 2-8 and paragraph 12 of the petitioners’ complaint at the beginning of Justice Stewart’s Griffin opinion. Griffin v. Breckenridge, 403 U.S. 88, 89-92 (1971). Those paragraphs allege numerous violations of both federal and state rights committed by the defendants in furtherance of the conspiracy. Id.

164. The Court has recognized only one such right, freedom of travel in Griffin, rejecting even otherwise broadly-interpreted First Amendment rights as a basis for § 1985(3) litigation. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 831, 838-39 (1983) (rejecting free association right as basis for § 1985(3) claim). Compare Scott with third-party standing cases where a court has recognized standing to challenge vagueness and overbreadth on the part of third parties, implying the fundamental nature of these rights counseled for liberal application of constitutional limits. E.g., Broadrick v. Oklahoma, 413 U.S. 601, 611-18 (1973). In these cases, however, the right is not against a private party, but rather a presumptive violation against a party injured by the government’s chilling effect. Id.

165. See supra note 81 for a brief description of Shapiro’s rights construct.
relate to the individual there must be some intermediary reference to the individual that only the Thirteenth Amendment and, by implication from *Griffin*, the right to travel appears to supply.

Moreover, the current view of § 1985(3) offers little resolution to the state sovereignty conflict because those rights protected by this provision preempt contrary state practice. To avoid a conflict of federalism, and a subsumption of state law, this second approach must be available only rarely. Any vigorous application of the current understanding of § 1985(3) would cause more significant problems than this article’s reading of *Griffin* by importing the problems attributed to § 1983 to private cases, and perhaps conspiracies that incidentally deprive rights. In practice, therefore, the more recent readings of § 1985(3) prove merely restrictive, a characteristic expressed clearly in *Bray*.

The splendor of the *Griffin* approach is that it avoids these problems while solving the conceptual difficulty presented by the section’s language. If Shapiro’s four factors are taken seriously, a right of an individual against another individual for violations of law can make little sense if that right is born of a constitution—that is, if § 1985(3) is only remedial. Where a constitution creates a legitimate government obliged to preserve the rights of its constituent subjects and citizens, a right must be of the individual against the state on the basis of that constitution and for the purpose of preserving legitimacy. The *Griffin* Court negotiates the constraining implication of this construct by reconstituting the right as a right of the individual against private conspirators who would undercut the benefits of a constitutional government and deprive persons under its authority of the equal privileges and immunities guaranteed by the government’s laws (the basis). Otherwise, such a government is deprived of its constitutionally based legitimacy. Section 1985(3) is read in *Griffin* as an attempt to protect that legitimacy from the peril of private terror. In sum, the Court conceived of a generalized right to substantially equal benefits of a government’s laws guaranteed by the central government for the purposes of justifying its authority and which it identifies, under this act, as eroded by the invidious acts of private citizens.

The *Griffin* model thus protects a person’s equality under the laws from deprivation *de facto* through the conspiracies of her fellow citizens. Conceived of 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.

B. Indirect Enforcement of Rights

This Article concerns Revival approaches to vindicating rights, espe-

---

166. This is the § 1983 construct. However, there is no state action requirement here.
cially under § 1985(3). However, even as the Court gave meaning to Recon-
struction Era statutes and attended to the peculiar effect of intervening
developments in the structure and substance of constitutional law, Congress
was busy fashioning new legislation meant to ensure constitutional rights.
This legislation is perhaps best represented by the Civil Rights Act of 1964,
especially its Title VII provisions prohibiting discrimination in employment.
These means of rights vindication are characterized by their indirect ap-
proach: the legislation is in each case based on the broad grant of authority
over a related but distinct matter. Title VII, for example, which was designed
to end discrimination in the workplace, is authorized by Congress's power to
regulate commerce.\footnote{167} Similar efforts to end race and disability inequity
in the private workplace have drawn on congressional power under the com-
merce and spending clauses.\footnote{168}

The 1964 Civil Rights Act, a broad and comprehensive prohibition of
discrimination in public accommodations, government spending, and employ-
ment, has perhaps been more effective than the Reconstruction Era acts at
regulating discrimination. This legislation departs from the Reconstruction
Era acts' direct approaches to rights vindication. Its several titles are more
specific than the Reconstruction Era acts, but are joined by their mutual re-
liance on the constitutionally created congressional interest in interstate com-
merce and federal spending.\footnote{169} The Commerce and Spending clauses thus

\footnote{167. There may be some ambiguity on this point, especially where the statute applies to state
Rehnquist, writing for the Court, characterized Title VII as based on the Fourteenth Amend-
ment: "In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting
under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in
favor of a private individual against a state government found to have subjected that person to
employment discrimination . . . ." \textit{Id.} at 447. Justice Rehnquist relied on Congress's express
reference to § 5 authority. \textit{Id.} at 456. While this may be reasonable given the 1972 amendments'
concern with extending the Act to state action, Justice Rehnquist's invocation of § 5 as the basis
of authority might be read as an attempt to suggest that actions against state bodies be limited to
intentional discrimination, as required under the Fourteenth Amendment by Washington v. Da-
vis, 426 U.S. 229, 239-48 (1976). Although concerned more with competing theories of sovereign
immunity under the Eleventh Amendment, Justices Brennan and Stevens separately concurred,
each adding that the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, authorized the amendment
as it did the original act. \textit{Fitzpatrick}, 427 U.S. at 458 (Brennan, J., concurring; Stevens, J.,
concurring). "Congressional authority to enact the provisions of Title VII at issue in this case is
found in the Commerce Clause . . . and in § 5 of the Fourteenth Amendment." \textit{Id.} at 458 (Bren-
nan, J., concurring). "In my opinion the commerce power is broad enough to support federal
law regulating the terms and conditions of state employment . . . even though Congress
expressly relied on § 5 of the Fourteenth Amendment." \textit{Id.} (Stevens, J., concurring).

Rehabilitation Act of 1973 requirement that contractors accommodate disabled workers); Fuld-
love v. Klutznick, 448 U.S. 448, 473 (1980) (upholding federal affirmative action plan as exercise
of spending clause power), overruled by Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097

169. In the debate prior to the passage of the Act, its supporters seemed most concerned
about congressional authority for Title II, which prohibits discrimination in public accommoda-
tions. The legislative history on this point is extensive, pointing universally to the view of the
Act's sponsors and supporters that the Commerce Clause afforded Congress the power to regu-
provide a surrogate or indirect means of guaranteeing rights, allowing for the prohibition of various private acts. The underlying constitutional justification is connected to the substantive rights under this approach by the view, rooted in the teachings of Gordon Alport and Gary Becker, that discrimination stifled economic prosperity.\textsuperscript{170}

It may be persuasively argued that this turns the 1964 Act on its head; Congress was doubtlessly concerned with the specific substantive matters addressed in the Act. The resistance to desegregation of public education mandated by \textit{Brown}, the often violent suppression of southern black protesters,\textsuperscript{171} and the acrimonious sit-ins, marches, boycotts, and increasing outbreak of riots\textsuperscript{172} clearly motivated congressional action in voting,\textsuperscript{173} public accommodations, public facilities and schools,\textsuperscript{174} federally assisted programs,\textsuperscript{175} and employment.\textsuperscript{176} The Act, nevertheless, was sold as creating a better world, principally by promoting economic prosperity.\textsuperscript{177}

\hline
late treatment of patrons of these facilities. Their conclusions were upheld by the Supreme Court in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964).

\textsuperscript{170} BECKER, \textit{supra} note 102, at 8-9 (discrimination is irrational "taste"); GORDON W. ALPORT, \textit{THE NATURE OF PREJUDICE} 22-23 (1954) (prejudice is irrational disposition).

\textsuperscript{171} Senator Javits of New York remarked during the Senate debates on the Civil Rights Act:

\begin{quote}
Mr. President, the focus of attention, both in the news and in the debate on this bill, continually returns to the subject of racial demonstrations.
\end{quote}

\begin{quote}
\ldots In the South—no matter how much opponents of the civil rights bill would like to confuse the issue—many racial demonstrations, constitutionally perfectly valid, have been cruelly repressed by the local and State authorities.
\end{quote}

\begin{quote}
\ldots Demonstrations are large and significant because a large and significant number of people hold deep-seated grievances, and it is because there is no other legally sanctioned redress for those grievances that they must demonstrate to call attention to the need for law.
\end{quote}

\textsuperscript{172} CONG. REC. 8243 (1964) (statement of Sen. Javits).

\textsuperscript{173} If the bill should lose, as lose it might, the result will be certain resumption of the civil rights demonstrations which rocked the big cities of the East and South last year. With the Negroes' moderate, non-violent leaders repudiated, the militant extremists may well take over. The Negro may try to gain with his fist what he could not gain through appeal to our reason and our conscience. American democracy will have failed its most important test, and it may not have another chance.


\textsuperscript{179} The economic prosperity pitch for the Civil Rights Act derived much of its force from Gary Becker's seminal monograph, \textit{The Economics of Discrimination}. There, Becker took on
the effects of discrimination on markets—employment, housing, and transportation. "Such discrimination ha[d] assumed importance . . . because of the belief that by eliminating market discrimination one could eliminate much of the discrimination in non-market areas." BECKER, supra note 102, at 9. Becker created an economic analysis of discrimination as taste with which he concluded that complete segregation reduced incomes of 1950s blacks by up to 40%. Id. at 27-30. The actual discrimination effect, which he gauged would result in something less than a 40% income difference, "could easily result from the manner in which individual tastes for discrimination allocate resources within a competitive free-enterprise framework." Id. at 30. Becker's work thus supported the view that discrimination reduced total output of an economy and, further, offered an economic reason for integration.

Explaining that economic minorities might also discriminate, Becker argued that such discrimination generally would adversely affect only the minority.

Minority groups are often tempted to "retaliate" against discrimination from others by returning the discrimination. This is a mistake, since effective economic discrimination occurs against them, not because of the distribution of tastes but because of the distribution of resources. [Minorities are clearly] hurt even more by [their] own discrimination.

Id. at 31-32.

Beckerian views were prevalent in the development of the Civil Rights Act. See President Kennedy's Message to Congress on Civil Rights, PUB. PAPERS, 221, 222 (Feb. 28, 1963) ("Race discrimination hampers our economic growth by preventing the maximum development and utilization of our manpower."). The opinions of Representatives McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathis, and Bromwell are illustrative of this point. In a joint statement on H.R. 7152, the House version of what would become the Civil Rights Act of 1964, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2487, the Representatives argued that Title VII was necessary to address severe economic differentials between white and black citizens.

Testimony supporting the fact of discrimination in employment is overwhelming. . . . [The rate of black unemployment is nearly twice that of whites, a fact more clear when broken down according to age, sex and occupational categories.] Moreover, among Negroes who are employed, their jobs are largely concentrated among the semiskilled and unskilled occupations. This has the effect of severely retarding the economic standards of the Negro population.

Id. at 2513. Their statement was even more Beckerian as they noted that the "effect of this severe inequality in employment is felt both on the personal level and on the national level," id. at 2514, and attested that national prosperity would be attained only through the elimination of employment discrimination:

The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime.

National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment.

Id. at 2515. The extent of this economic argument was revealed in the paragraphs which followed it, as the Representatives offered anti-discrimination as an elixir for all manner of social problems: "A nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages in skilled occupational categories. All that is needed is the institution of proper training programs and the elimination of discrimination in employment practices." Id. (emphasis added).

Nor were these arguments limited to the Act's employment provisions. In the Senate Report on the Bill, SEN. REP. NO. 872, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2355, it was reported:
While the economic prosperity arguments were clearly designed to sell the statute, they served as an important link in its justification.\textsuperscript{178} The Act and its underlying assumptions were, of course, not uncontested;\textsuperscript{179} however, by establishing the Act as a lubricant for commerce, the commerce-related purposes stood at the forefront of the Act's design, ushering broad support for its provisions.\textsuperscript{180}

\begin{quote}
[Discriminatory] practices have a stifling effect on the business of providing accommodations for conventions. Mr. Ray Bennison, convention manager of the Dallas (Tex.) Chamber of Commerce was quoted in the Wall Street Journal, July 15, 1963, as stating:

This year we've probably added \$8 to \$10 million of future bookings because we're integrated.

Within 1 day after 14 Atlanta hotels recently announced they would accept Negro convention guests, the Atlanta Convention Bureau had received commitments from three organizations including 3,000 delegates that would not have otherwise visited Atlanta, according to the same source.

\textit{Id.} at 2371. The Report further argued that "industry [is] discouraged from locating where discrimination is practiced," \textit{id.} at 2372, and that "where desegregation in public establishments has been achieved either by community biracial efforts or legislation or ordinance, it has been done without the adverse economic results that had been forecast by its opponents." \textit{Id.} at 2375.

178. As Senator Gaylord Nelson then consoled members of the Milwaukee Bar:

Congress, of course, must show that there is a relationship between interstate commerce and the evil to be regulated. The civil rights bill establishes that relationship.


180. The centrality of the economic prosperity argument is illustrated by the role of other considerations in the defense of Title VII by Representative McCulloch and his colleagues. These Representatives concluded:

Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.

H.R. Rep. 914, 88th Cong., 2d Sess. (1964), \textit{reprinted in} 1964 U.S.C.C.A.N. at 2487, 2517. Inherent natural rights, for all the importance the Representatives placed on them, were relegated to the very last paragraph of the defense, nestled between an acknowledgment of the political and economic motivations (the purposes of the rights) and the constitutional, democratic concerns (the bases of the rights). \textit{Id.} at 2517. Natural rights might have informed the substance of these rights, but the economy and the Constitution defined their nature. A claim of right under the
The most heavily litigated element of the 1964 Act over the past 30 years has involved Title VII's employment discrimination prohibitions. In the years following the Act's passage, the Court gave the Act a liberal interpretation. Courts initially construed it broadly, largely untroubled by concerns with the Act's application. However, in the last twenty years, the Court has imposed increasingly severe limits on Title VII's reach through significant demands on the plaintiffs. Throughout both the Revival and Limiting periods of Title VII's life, no matter has so dominated American politics and jurisprudence.

The controversy surrounding employment discrimination laws under the 1964 Act and the apparent lack of a single theory to explain the Court's sometimes contradictory and often acrimonious case law might suggest that the economic prosperity justification fails to explain Title VII, or at least recent Title VII jurisprudence. However, as Professor Mack A. Player stated, "the constitutionality of Title VII as applied to private entities was never in doubt," and generally the structure of the indirect model has not been the subject of much of the concededly acrimonious debate. Rather, the subject of controversy has been the content of the rights protected, and has largely been expressed through battles over how discrimination is to be proven. This fact alone highlights that the scheme has sufficiently met fed-

Some might today, with the benefit of hindsight, question the persuasiveness of these quite enthusiastic claims that the 1964 Civil Rights Act would produce prosperity. With the nation still enjoying the post-World War II economic expansion, however, optimism was high and these claims seemed to have remarkable appeal. The statement of the vice president of the National Association of Manufacturers at this time, Charles A. Kothe, attests to these arguments' persuasiveness. Kothe remarked: "It is important that we recognize at the outset that the law imposes no great or unusual burden on the employer. As a matter of fact, the level of its requirements is far below most of the self-imposed standards of most enlightened employers." Charles A. Kothe, Background of the Law and Some of its Implications, in A TALE OF 22 CITIES: REPORT ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, COMPILED FROM NAM SEMINARS 5, 7 (Charles A. Kothe ed., 1965).


183. A brief look at Title VII case law reveals the explanatory power of the economic prosperity justification. Section 703 of Title VII designates discrimination as "an unlawful employment practice." 42 U.S.C. § 2000e-2. However, the title nowhere defines discrimination; rather, it makes practices, otherwise generally considered legitimate employer action, unlawful when they are related to several prohibited categories. See Barbara Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 1-2 (3d ed. 1983) (unlawful employment practices under Act defined as behavior "by a respondent cognizable under Title VII . . . on a basis cognizable under Title VII: race, color, [etc. . . . on an issue cognizable under Title VII: hire, discharge, compensation, [etc. . . . [and with a casual connection, or nexus, between the basis and the issue]). See, e.g., Alfred W. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 63, 75-89 (1972) (discussing judiciary's problems and concerns in interpreting Title VII); Pamela L. Perry, Two Faces of Disparate Impact Discrimination, 59 FORDHAM L. REV. 523, 524-25 (1991) (explaining lack of consensus.
on what constitutes "discrimination" based on unclearly written statute). Interpreting this language, the courts have developed several proofs or categories of discrimination, the most important of which are "Disparate Treatment" and "Disparate Impact." See Texas Dept' of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (discussing necessary elements and burdens to succeed upon and defend discriminatory treatment claim); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-06 (1973) (establishing "order and allocation of proof" in disparate treatment cases); Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971) (establishing allocation of burdens of proof for disparate impact cases).

In Griggs, the Court ignored the defendant employer's lack of discriminatory intent and prohibited the use of facially neutral devices that have a disparate impact on members of a protected class and are not justified by business necessity. Griggs, 401 U.S. at 429-32. Significantly, the Griggs Court made little effort to demonstrate that the devices in question had a disparate impact in operation. Id. While it admonished employers that general requirements would not suffice, it referenced only general statistics describing high-school graduation rates, id. at 430 n.6, to established that Duke Power's high-school diploma requirement "operate[d] as 'built in headwinds' for minority groups." Id. at 432. The Justices' concern, it seemed, was advancing economic opportunity; their apparent assumption was that unjustified employment criteria restrained the economy and did so impermissibly if it affected minority employment opportunities. See id. at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

Two years later, in McDonnell Douglas, the Court restricted the Griggs formulation to cases alleging disparate impact of facially neutral employment devices. McDonnell Douglas, 411 U.S. at 805-06. It viewed the McDonnell Douglas case as the choice between two equally sufficient, but mutually exclusive, explanations of the employer's actions. See id. at 801 (plaintiff alleged discrimination while employer argued its decision was based on employee's participation in illegal protest against employer). In this way, the McDonnell Douglas Court confronted a somewhat more difficult issue presented by the language of § 703. If employers were to maintain the prerogative to hire and fire and do what employers traditionally have done, where is the line to be drawn when the employee is treated differently and the dispute is whether the different treatment was for a lawful or unlawful reason. The Court evidenced great sympathy for the employer's proffered reason, see id. at 803 (noting that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it"), but refused to decide the case on that point. Id. at 804. Instead, it defined a prima facie case, id. at 802-04, shifted the burden to the employer, once the employee established a prima facie case, to "articulate some legitimate, nondiscriminatory reason for the employee's rejection," id., and then permitted the plaintiff to contest the defendant's proffered nondiscriminatory reason. Id. at 802-05.

The creation of the what is now treated as the "McDonnell Douglas formula," refined in Burdine, 450 U.S. at 252-56, was necessitated, not by the language of Title VII, but by the Court's effort to give the economic prosperity justification meaning. The Court could have read the language to authorize courts to define discrimination on a case by case basis, developing a federal common law of discrimination, if you will. This would have required the Court to decide, as a matter of law, what the effect of the employer's illegal conduct was. However, such an approach would restrict economic opportunity whenever the Court chooses to grant employers great discretion, affording defendants an easy opportunity to restrict minority employment opportunities, or to restrict employer decision-making, giving plaintiffs the benefit of the doubt. In McDonnell Douglas, this approach would have required either hiring the plaintiff despite his unlawful activity or allowing the employer to discriminate merely because of an arguably unrelated illegal activity by the plaintiff. Instead, the Court chose a scheme allowing lower courts to balance the parties' competing interests without the restrictive effect of precedent attaching to possible errors in judgment. Id. at 802-04. Furthermore, the Court's articulation of the three-step formula might be read only to guarantee the plaintiff his day in court. Id. at 798-800. Regardless, such readings are best understood as manifestations of the economic prosperity justifi-
eralism concerns, despite the broad coverage and significant impact of the Act.184

The claim here is not that an economic prosperity justification of employment discrimination laws is appropriate or even justifiable. Rather, it is only that Title VII may be understood as a particular approach to rights that takes congressional constitutional prerogatives and enforces anti-discrimination rights through them with the aid of an economic prosperity justification. The significant substantive swing in Title VII cases in recent years has not been occasioned by the Court's rejection of the basic model of rights under that statute. Rather, the ability of courts to restrict Title VII, as they have during the Limiting Period, is attributable to the narrowness and consequent malleability of the economic prosperity argument as an underlying justification. The Limiting cases, and therefore the economic prosperity-based descriptions of Title VII, may correctly be seen as a corruption of the egalitarian goals of the civil rights movement which produced the Act.185

cation: Opportunities must be afforded to promote full employment of minorities and employers must not be forced to hire unproductive or disruptive workers. This is why the allegations of the parties proved so difficult and why the Court opted for a careful, detailed examination of the facts of McDonnell-Douglas and subsequent disparate treatment cases.

When compared to Griggs and McDonnell Douglas, the Court's recent decisions in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658, 660 (1989) (requiring employees to meet higher burden to prevail in disparate impact cases), and St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747-50 (1993) (requiring employees to meet higher burden of proof in disparate treatment cases), seem peculiar. Importantly, however, the tension between the Court's confident and uncomplicated application of Title VII in Griggs and McDonnell Douglas and its skeptical and enigmatic requisites in the recent decisions is reconciled by its 1977 decision in Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-13 (1977) (imposing strict requirements on use of statistical evidence in "pattern and practice" proof cases as defined and explained in International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-43 (1977)). Hazelwood represented a fundamental change in the Court's view of the underlying premise of Title VII. While the Court retained the assumption that the Act was aimed at advancing economic prosperity, it was no longer easily convinced that a vigorous application of employment discrimination laws would accomplish this purpose. Hazelwood, 433 U.S. at 307-13. By 1977, the Court was no longer certain that a liberal construction of the act would produce economic prosperity. From Hazelwood, the caution and skepticism of Wards Cove and Hicks are only a short step away.


185. In recent years it has become common to note the distance between the egalitarian
goals attributed to Title VII and the statute's poor success at eliminating the nation's economic apartheid. See Derrick Bell, The Supreme Court, 1984 Term: Foreword: The Civil Rights Chronicles, 99 Harv. L. Rev. 4, 16 (1985) (finding it "incredible that our people's faith could have brought them so much they sought in the law and left them with so little they need in life.... Equal opportunity, far from being the means of achieving racial equality, has become yet another device for perpetuating the racial status quo."). The resulting disgust among supporters of civil rights legislation has produced a variety of reactions, from the standard Critical Legal Studies complaint that these statutes create false consciousness, legitimating discrimination through anti-discrimination laws, through the Critical Race Theory call for a law more informed by the victims of oppression's subjective experiences—that is, the adoption of the victim's perspective. See, e.g., Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1052-57 (1978) (describing validation of "perpetrator perspective" by viewing discrimination as series of individual violations); Charles R. Lawrence, III, The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 384 (1987) (noting clash in values between perpetrators and victims of racism); Gerald Torres, Critical Race Theory: The Decline of the Universalist Ideal and the Hope for Plural Justice, 75 Minn. L. Rev. 993, 1001 (1991) (suggesting that equality requires treatment which accounts for subject's particularity). These complaints have generally been focused on judges, and deep structural or unconscious biases they manifest through the law. See, e.g., D. Marvin Jones, The Death of the Employer: Image, Text, and Title VII, 45 Vand. L. Rev. 349, 389-90 (1992) (arguing that under normative view of individual rights, invisible legal choices lead to regime in which "the white men win"). In any case, a more immediate difficulty is perhaps obscured. The constant in the Revival and Limiting periods is the conceptualization of employment discrimination as a market failure through the use of the economic prosperity justification.

In one sense, the problem of discrimination simply has been cast too narrowly. As John Work puts it: "Neo-classical economics does not admit of racism in its analyses of employment discrimination based on race. At best, racism is recognized as an exogenous variable." John W. Work, RACE, ECONOMICS, AND CORPORATE AMERICA 12 (1984). Work derides Milton Friedman for "what amounts to a meretriciously intellectual appeal probably to large numbers of white readers." Id. at 12-13. Friedman writes:

It is hard to see that discrimination can have any meaning other than a "taste" of others that one does not share.... Is there any difference in principle between the taste that leads a householder to prefer an attractive servant to an ugly one and the taste that leads another to prefer a Negro to a white or a white to a Negro?

Id. at 13 (quoting Milton Friedman, Capitalism and Freedom 110 (1982)). Work notes that Gary Becker approaches racism similarly, relegating it to taste and confusing his discussion to the operation of taste on otherwise fully informed profit maximizing economic decisions. Id. at 13-15. However effective Becker's work was in building a consensus against discrimination, so narrow a view simply cannot account for the complex ways race has informed decisions in our society. Indeed, it cannot even comprehend theories of racial superiority that long justified lynchings. See, e.g., Jessie D. Ames, The Changing Character of Lynch: Review of Lynchning, 1931-1941 at ix-x (1942), stating:

The white South still believes... that the rights and privileges of democracy can be limited by force; that certain jobs are the exclusive prerogative of white people; that equal pay for equal work, equal protection and administration of the law for all, and the free exercise of the ballot imperil white racial supremacy.

Such theories are periodically reborn as "reasoned" arguments against antidiscrimination laws. Cf. Richard J. Herrnstein & Charles A. Murray, The Bell Curve: Intelligence and Class Structure in American Life 479-508 (1994) (presenting case for returning to original concept of affirmative action as mandating equal opportunity rather than equality of outcomes). For a critical review, see Adolph Reed, Jr., Intellectual Brown Shirts, Progressive, Dec. 1994, at 15, 15-16 (disparaging The Bell Curve as "really just a compendium of reactionary prejudices"). Nevertheless, there are deeper faults in the economic prosperity justification and, therefore,
However, the flexible economic prosperity arguments accommodate egalitarian goals, thereby encompassing most alternative perspectives in employment discrimination controversies of the past thirty years.

It is a distortion of the spirit of egalitarianism, which drove the civil rights movement, and a perversion of the hope for empowerment, which drove the movement’s participants, to characterize the regime of the 1964 Act as market-based. But egalitarian norms are ambiguous. In many respects egalitarian arguments, like Rawls’ difference principle, express fundamentally only a modification of market-based analyses of justice. The larger point is, indeed, that a market bias has accompanied the Act from its inception and that over the past thirty years alternative visions of the Act’s purposes have been incorporated into the underlying market-based arguments.

Though attacked recently as an unjustified tax on employers, Title VII need not implode, leaving Professor Epstein’s fanciful “deregulated” world. Title VII is, however, accurately characterized as a market-based

---

186. See Shapiro, supra note 81, at 225-34 (describing Rawls’ difference principle as asserting that inequalities can be justified if operating to everyone’s advantage).

regime requiring a defense in market terms, short of a wholesale reappraisal of the act, its purposes, and approach.

188. Professor Epstein's attack on employment discrimination laws has been skillfully and forcefully rebutted by numerous capable scholars. E.g., James J. Heckman & J. Hout Verkerke, Racial Disparity and Employment Discrimination Law: An Economic Perspective, 8 Yale L. & Pol'y Rev. 276, 291-97 (1990) (finding that federal antidiscrimination law significantly improved wages and status for Southern black workers between 1965 and 1975); Cass R. Sunstein, Why Markets Don't Stop Discrimination, in REASSESSING CIVIL RIGHTS 22, 31-34 (Ellen F. Paul et al. eds., 1991) (arguing that noneconomic factors of preference, belief formation, and incorporation of baseline norms are significant non-market influences on discrimination); John J. Donohue, III, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 Stan. L. Rev. 1583, 1611-14 (1992) (book review) (recognizing value of Epstein's analysis of social costs but decrying failure to balance social benefits of Title VII); J. Hout Verkerke, Free to Search, 105 Harv. L. Rev. 2080, 2082-96 (1992) (book review) (attacking Epstein's theoretical, historical, and empirical analyses). Their work has been very valuable in challenging the unstated assumption that has accompanied the Limiting period—that employment discrimination laws are too costly or, more extreme, an unjustified "taking." However, more is needed; the underlying assumptions of employment discrimination laws must also be challenged. Otherwise, the debate can progress little beyond a standoff over the role of non-tangible costs and benefits in maintaining discrimination. As the debate between McAdams and Epstein illustrates, see supra note 187 (describing each side), Epstein's argument is capable of surviving any attack by simply insisting that a "pure market" would overcome all complex belief structures that produce or maintain discrimination.

If antidiscrimination laws are conceived exclusively as focused on cleansing markets of irrational behavior, the nature of the debate will ultimately turn on impressions of the market, particularly as affected by the irrationality in question and the remedy inserted to remove it. The debate between defenders of Revival and Limiting period interpretations of employment discrimination law thus resembles that between adherents of the competing moral theories of Robert Nozick and John Rawls. However, the opposition in both cases is false. As Ian Shapiro says of Rawls:

Rawls' exclusive focus on distributive outcomes [at the expense, especially, of any discussion of the origins of private property] is one of the main sources of the deep conservatism in his argument. His evident indifference to so many questions relevant to issues of distributive justice places serious limits on the extent to which his arguments might be used critically to evaluate existing economic institutions. This is hardly surprising since... Rawls has little desire to do this. He clearly believes that, provided the worst problems of externality, free ridership, and monopoly are dealt with and the weak requirements of the difference principle are satisfied, capitalist markets are just distributive mechanisms that function simultaneously to preserve the priority of right and economic efficiency.

Shapiro, supra note 81, at 259. Debates over the appropriateness and scope of the Title VII regime duplicate the Nozick/Rawls debate because antidiscrimination law has been sold and defended in Rawlsian terms. They are vulnerable precisely because their Rawlsian basis subjects any "moral," redistributive, or reparative goals to a prior but unstated commitment to market efficiency, assumed in the first instance to produce just outcomes.

The deep conservatism demanded by allegiance to markets explains much more than allegations about institutional biases, the limiting decisions in Title VII jurisprudence. This does not mean that some, perhaps even most, jurists are not (unconsciously) "racist" in the Critical Race Theory sense. See Lawrence, supra note 185, at 384 (suggesting unconscious racism stems from clash of values). It does mean, however, that the assumptions of Title VII law inevitably deteriorate into self-destructive premises about the impropriety of not just discrimination but also discrimination law in markets. All that is left to debate is what degree of market interference by government is necessary to defeat market interference by taste. When taken with the fact that
Economic prosperity justifications and a relatively slight shift in perspective at the beginning of the Limiting period explains the difference between Revival and Limiting views of Title VII. However, it is still the form of rights that explains the types of limits invoked during the Limiting period. Like § 1981 and § 1982, the statute is limited by its substantive scope. For Title VII, that scope has been variously read liberally and conservatively to achieve Beckerian purposes of economic prosperity. The specific means of accomplishing this was to allow the plaintiff into court under the Griggs and McDonnell Douglas formulas and later to restrict access by requiring each component of the Griggs and McDonnell Douglas formulas to be independently probative of discrimination in order to bind the defendant.

These limitations resemble the § 1981 and § 1982 model because the requirement that the components of the Title VII case prove discrimination is in fact the invidious discrimination distinction imposed on those Reconstruction Era acts. Invidious motive, long sought after by certain justices as a means of limiting Title VII, has yet to be recognized as the sole basis for Title VII liability, but the Court’s decisions in Wards Cove and Hicks go a long way toward requiring it. Justice Souter’s concern in Hicks that the Court’s position will invite employers to manipulate litigation to hide invidious discrimination is on point. However, the majority is not concerned with employees so much as it is the cost of litigation on businesses that, perhaps unaware of what really transpired in a particular case, are held liable for articulating the wrong non-discriminatory reason.

While Title VII and § 1981 and § 1982 overlap and both refer to private action, the former might be said to raise a different order of federal problem. Indeed, discrimination is arguably the kind of issue uniquely challenging the legitimacy of the federal authority, at least given our long history of slavery, Jim Crow, and de facto segregation. In the end, however, both models of rights challenge alleged contract and property rights and perhaps residual rights reserved to the states or people. As such, the revival balance remained necessary, along with some balance in those interests. It should be noted,

taste as discrimination is a particularly narrow view of discrimination, the answer invariably is “not very much.”

189. After Hicks, the linchpin of the plaintiff’s case is proof of discriminatory intent. See St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (requiring such proof). The role of the proverbial smoking gun memorandum in antidiscrimination cases illustrates the nature of the change. The disparate treatment formula has always applied in theory to cases of express racial classifications, long assumed to be the easy cases under Title VII. Accordingly, a memorandum stating that black workers shall not be hired for job X was, prior to Hicks, simply illegal. A plaintiff denied job X under this policy could prevail because a defendant would not be able to refute its admitted policy. That is, the policy was illegal. Because, under Hicks, intent is the focus of the inquiry, it is no step at all to argue that the plaintiff in such an action would have to offer evidence of intent (perhaps apart form the memorandum), not merely evidence of a policy of distinction. Ordinarily, one would assume the memorandum accomplishes both purposes. The difference in cases without smoking gun evidence is that invidious intent does diverge from racial classification. It is those cases that Hicks is designed to distinguish but which it may merge.

190. Hicks, 113 S. Ct. at 2762-63 (Souter, J., dissenting).
however, that these provisions have produced real substantive restrictions. Significantly, recent Court decisions have all but completely rejected justifications for Title VII or the Reconstruction Era acts based on the continued effects of our long history of discrimination. 191

Like the direct models—especially the model used to enforce rights through § 1981 and § 1982—the indirect scheme justifies enforcement of rights while reconciling that enforcement with federalism considerations. Because the basis of that reconciliation is a particular view about advancing the economy, it proves susceptible to sharp changes according to rather limited changes in the perception of the law’s operation on the economy. In Shapiro’s terms, the Title VII version of the indirect model involves the individual right to be free of employment decisions that rely excessively on the prohibited categories. The right is based on the constitutional commerce powers of Congress and operates for the purpose of advancing economic prosperity through the opening of economic opportunity.

Notwithstanding the problems inherent in the economic prosperity justification for the indirect approach, it is an interesting alternative means of protecting rights. It takes seriously the Commerce Clause basis for the statute and effectively uses the Commerce Clause as a surrogate for rights. Here, Congress’s role as guarantor of commerce is direct; its role as guarantor of rights—understood as a right to non-discrimination in employment (§ 1981 analogue) or equal enjoyment of employment opportunities (§ 1985(3) analogue)—is indirect and premised on its direct interest in advancing commerce.

During the Revival period, rights have been vindicated directly and indirectly. Direct approaches have provided a remedy for deprivations of identified constitutional rights, protected contract and land conveyance rights from discriminatory infringement, and, for a brief period, ensured broad equality. Indirect approaches have guaranteed employment, education, and equal access to public facilities as conditions of government spending or in the advance of commerce.

III. THE NATURE OF VINDICATED RIGHTS

_Griffin v. Breckenridge_ 192 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 conceptions of “right,” vindicated under the other approaches described above. Compared to the substantive manifestations of those vindication approaches, the distinctive nature of the _Griffin_-right is readily apparent. Indeed, a complete understanding of the nature of rights, especially the general

---


rights protected by § 1983 and § 1985(3), profits from heeding Shapiro's warning that his scheme for describing the intelligibility of rights assertions, on its own, reveals little about the content of rights.\textsuperscript{193} Thus, while the discussion of approaches to vindicating rights in the preceding part has offered a basis for understanding how the rights described in Griffin can be intelligible, it provides only the barest basis for understanding how or if that understanding of rights might prove compelling.\textsuperscript{194} Among the Revival approaches to rights vindication, only the § 1983 model and § 1985(3)'s equality model are general rights models. That is, neither is limited to any area of the law—such as contracts or employment—and neither is confined to any type of action, such as discrimination. Because these models are not limited to any specific area or type of right, a complete description must go beyond the models' formal approach to vindication. As the discussion of the general models' formal approach to right vindication implies, questions concerning the content of rights are every bit as relevant to the balance between rights vindication and federalism as questions concerning form. The more important and broad the rights protected under these generalized models are, the more threatening to state law each approach appears. Understanding the substance of the rights protected by each section is fundamental to understanding the nature and role of each rights model in American jurisprudence. Accordingly, the conditions under which the Griffin construct might prove compelling, as well as a fuller appreciation of the construct and its promise as a means of vindicating rights—indeed, its demise relative to § 1983—can occur from locating the nature of the Griffin construct relative to the predominant understandings of rights in the Revival period.

A. Roe, Brown and Understandings of Rights

As central cases in our modern legal culture, Brown v. Board of Educa-

\textsuperscript{193} See Shapiro, supra note 81, at 14-18 (describing structure of rights requiring determinations about subject, substance, basis and purpose of asserted entitlement). The scheme outlines:

[The] core meaning of the term 'right,' which should be taken only to mean that if the term is used in such a way as to violate the injunctions entailed by [the scheme's] analysis, it is difficult to see how it could be intelligible . . . [W]e are talking here about conditions for the intelligibility of utterances about rights, not conditions that make them plausible or convincing.

\textit{Id.} at 16. Indeed, the stuff of Shapiro's book is a "historically and culturally specific" discussion of developments in Anglo-American liberalism since the English Civil War. \textit{Id.} at 17.

194. Shapiro makes use of W.V. Quine's discussion of knowledge to locate the importance of the scheme in dictating the requirements of an allegation of a "right" while acknowledging the role of ideologies as "conservative adaptive mechanisms." \textit{Id.} at 11-13. He cautions, however, "[i]f the schema places some basic limitations on intelligible uses of the term 'right,' this is not all that constitutes the skeleton of its main uses in the liberal tradition since the English Civil War." \textit{Id.} at 18. That skeleton is also informed by certain substantive characterizations of the terms. \textit{Id.}
tion and Roe v. Wade are complementary but at odds. Brown and Roe share an approach to rights rooted fundamentally in an assessment of the effect of the state on individuals. In Brown, the Court invoked social science data to explain the undesirable effect of segregation, concluding that separate could never be constitutionally equal. Roe, also citing scientific understanding, sought to estimate the proper bounds of individuals' autonomy and states' interests. While sharing concern for individuals' relationship with their governments, however explained, Brown and Roe nevertheless represent different visions of rights.

Brown stands for a broad equality principle that, despite the Court's identification of harm in the psychological effect of Jim Crow on individual victims, focused fundamentally on institutions (specifically, school systems), their often blind, bureaucratic operation, and their unjust, inequality-perpetuating nature when they constitute part of a system of formalized inequality, such as Jim Crow. It is this aspect of Brown, the repression of individuals by institutions, that Professor Fiss's Structural Reform model of adjudication summarizes and which his structural injunction is designed to vindicate.

197. Cultural anthropologist Micaela di Leonardo says of Roe and Brown:

The Supreme Court's logic in the Brown case is in tune with larger currents in American political discourse in this century—looking for right in all the wrong legal and cultural places. The psychologizing emphasis on damage to black children's self-esteem, the poignant exercises with black and white dolls, were and are no doubt valid, but are hardly the most salient factors to adduce in an argument for school integration. There is an eerie parallel with the later Roe v. Wade decision. In each case, the Court plumped for an argument—"feeling of inferiority," "right to privacy"—that, in its effacement of the lesser political and economic power afforded to blacks and women, allowed subsequent legislation and policy that clearly contradicted the Court's intent.


198. The structural injunction is:

[T]he formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution. . . . [It] received its most authoritative formulation in civil rights cases, specifically those involving school desegregation, and has been legitimized in terms of those cases. Required to defend structural relief, reference will always be made to Brown v. Board of Education and the duty it imposed on the courts of the nation to transform dual school systems into constitutionally acceptable forms.


Professor Randall Kennedy is perhaps more clear:

In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. In retrospect, however, it appears that the concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated. . . . [F]orged by the gritty particularities of the struggle against white racism, [Brown] stand[s] for the proposition that the Constitution prohibits any arrangements
Individuals' rights are implicated, not so much as the subject of abuse by the state or even the institution, but as a means of regulating institutions operating in conflict with public values enshrined in the Constitution and its jurisprudence. ¹⁹⁹

Roe, as Professor Fiss indicates, is not concerned with the institutional character of rights deprivations: "Over the last twenty years, Roe v. Wade has replaced Brown v. Board of Education as the central organizing precedent of our jurisprudence, and it has commonly been taken to affirm the value of individual autonomy."²⁰⁰ Institutions, the intermediary apparatus of the state, are less than an essential component of Roe's construction of privacy and abortion. The focus is on the individual's prerogatives, ensured by the Constitution and violated by the state.

Roe and Brown's significance as organizing precedents derive from what they say about citizens' relations with the state. Roe tells of inviolable human rights and a state whose power derives from an agreement to preserve the inviolable—that agreement sometimes understood as advancing the public good. Brown shares this origin in natural rights rhetoric, but tells fundamentally of a responsibility of government to advance important "public values." Brown's "public values" relate to and incorporate natural rights, but, unlike Roe, fulfill a larger role.

Since Monroe v. Pape, ²⁰¹ the numerous § 1983 cases have manifested both Roe and Brown characteristics. Moreover, the controversial nature of the § 1981 and § 1982 approach to rights vindication, represented by the reconsideration of Runyon, ²⁰² can be understood as, essentially, a Roe/Brown struggle: Are contract rights the formal province of the individual/state relationship where the only concern is the extent of an individual's state-created and -ensured capacity to contract; or is the substantive interest in contracting ability in a discriminatory society a subject of state concern? These guiding precedents similarly inform the indirect approach. Title VII's prohibition of discrimination in employment has, particularly in the Limiting period, repeatedly raised the fundamental question whether the statute is concerned with treatment or results: that is, whether the statute concerns the relationship

¹⁹⁹. “But in structural litigation no individual is singled out; the remedies are forward-looking and the practices of a bureaucratic organization are examined for the impact on the welfare of a social group.” Fiss, supra note 198, at 978 (citing Owen M. Fiss, The Social and Political Foundations of Adjudication, 6 LAW & HUM. BEHAV. 121, 123 (1982)). See also Fiss, supra note 61, at 42-44 (justifying structural injunction within individualistic framework).

²⁰⁰. Fiss, supra note 198, at 974 (citations omitted).


between the commerce participant and the individual or, more generally, the individual's employment opportunities in the commercial world.\textsuperscript{203}

The demise of Griffin's approach to rights, in favor of a modified § 1983 model, is also a move from a Brown-like results approach to a Roe-like status approach. However, Griffin is fundamentally different, presenting a third substantive rights model. This difference is reflected in the fact that post-
Griffin cases' turn from a Brown-like to a Roe-like approach has meant the subsumption of § 1985(3) into the § 1983 model. Unlike the other vindication models which have survived this move, the move from Brown to Roe in § 1985(3) cases cannot be accomplished without dismantling the Griffin vindication approach altogether. Because the Griffin model is general and involves private action, the change to a Roe-like individual rights approach makes the approach articulated in Griffin incomprehensible. The substance of Griffin's unique approach to rights is, perhaps, best understood by locating it relative to Roe and Brown on a continuum defining rights infringed by increasingly private actors and designed to ensure an increasingly complex view of a person's role in social life. In context, Griffin is properly seen as a third approach to rights, supplementing Roe and Brown, and necessary for comprehensive protection of persons' rights under the rule of law.

1. Roe and Individual Rights

The description of Roe as a central precedent is, at best, curious given the controversy surrounding the abortion question. Roe, however, is controversial for many of the same reasons that make it central to contemporary rights discourse and American jurisprudence generally. Roe most clearly juxtaposes the state and individual on a matter and in a manner that suggests that the state has no business. Roe involves the allocation of authority between the state and individual, an allocation fundamental to any theory supporting rights in liberal theory.\textsuperscript{204}

\begin{quote}
203. Under Titles VI and IX of the Civil Rights Act of 1964, the question is whether we are concerned with bans preventing minorities or women from benefiting from government-funded programs, or whether we are concerned with their equitable access to that spending.

While the economic prosperity justification adequately reconciles these theories in the scheme of Title VII's prohibitory language, it ultimately only moves the question to remedial phases of litigation. There the battle has raged more fiercely, especially on the question of affirmative action. Private bodies may ensure equality through anticipatory remedial preferences. \textit{See} United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (finding that private sector may voluntarily adopt affirmative action plans). States and the federal government may not. \textit{See} Adarand Constructors, Inc. v. Penland, 115 S. Ct. 2097, 2113 (1995) (requiring strict scrutiny for racial classifications by both state and federal government); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989) (requiring that affirmative action plan be narrowly tailored to remedy prior discrimination and serve compelling governmental interest to be valid). This battle has spilled over into voting rights cases. \textit{See} Miller v. Johnson, 115 S. Ct. 2475, 2482-83 (1995) (requiring strict scrutiny where states draw congressional districts based on race of voters); Shaw v. Reno, 113 S. Ct. 2816, 2824-25 (1993) (same). It has also raised issues of participation relative to preferential remedial orders. \textit{See} Martin v. Wilks, 490 U.S. 755, 769 (1989) (permitting white firefighters to challenge employment decision allegedly favoring less-qualified blacks).

204. In his excellent introduction to the abortion debate and abortion jurisprudence, Ian
\end{quote}
Roe is important not only because the individual's interests (or autonomy) were at the forefront of its concern, but also because it involved state prohibitions affecting those interests. This feature is apparent foremost in the remedial approach employed. Roe identified the individual's interest in privacy, defining the parameters of the individual's inviolable autonomy and declaring prohibitions which infringed on those interests invalid. The Brown Court, precipitating significant criticism, subordinated the interests of its individual complainants in its Brown II opinion to the public value of achievable desegregation "with all deliberate speed."

In addition to the Brown Court's choice of remedial schemes, Brown supports the individual rights case less than Roe because its facts raised individual autonomy questions less directly than Roe. Education, a benefit granted by the government discriminatorily, did not focus on the citizen's body, their being. While Brown signaled the death of state segregation, it did not itself involve discriminatory prohibitions on individual behavior. Roe, on the other hand, involved state declarations of how a woman might use her body. It is, for its faults and the controversy surrounding it, a quintessential "rights" case in the traditional sense: Jane Roe may either have an abortion or the state may stop her.

Roe is, as such, closely bound to basic understandings of rights in liberal theory. In Roe, the content of the social contract which justifies the state

Shapiro notes: "The American debate over abortion is both passionate and relentless. Rooted in powerfully held beliefs, it seems to pit irreconcilable world views against one another. Religious convictions that a fetus is a person, and abortion therefore is murder, run headlong into categorical insistence that life begins at birth." Abortion: The Supreme Court Decisions 1 (Ian Shapiro ed., 1995). Shapiro continues:

[T]he most striking feature of the modern abortion debate is its interminable character. The views that are pitted against one another are "conceptually incommensurable" in that, although they are internally consistent, they rest on rival premises which "are such that we possess no rational way of weighing the claims of one as against the other."

Id. (quoting Alasdair MacIntyre, After Virtue: A Study in Moral Theory 6-8 (1984)). Though Roe seemed to resolve the debate, it has in fact only intensified the controversy. The Supreme Court's pronouncements on abortion since Roe have symbolized not only a difficult constitutional issue, but a typical intersection of legal, political, and social debate of the sort often related to rights arguments.


206. The primary components of liberal theory are, I believe, well depicted by Professor Shapiro in his discussion of Thomas Hobbes' Leviathan and John Locke's Two Treatises of Government. Shapiro dubs the contributions of these works the "Transitional" and "Classical" moments in the development of liberal ideology of rights. Shapiro, supra note 81, at 23-148 (describing Hobbesian and Lockean viewpoints in historical context). Shapiro regards Hobbes' contribution to liberal ideology on rights as generally consistent with C.B. Macpherson's characterization that Hobbes conceived of the individual as "as essentially the proprietor of his own person or capacities, owing nothing to society for them." Id. at 69 (quoting C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 3 (1962)). Importantly, Hobbes envisioned individual propriety in the context of a powerful, if limited, state:

For Hobbes, the state distributes transmissible private property rights (and so rejects and undercuts feudal land law). It creates and enforces a system of bilateral reciprocal contracts (and is thus by definition in opposition to large areas of medieval private law
is at question, juxtaposing the state and the individual. If "rights" are to be taken seriously in such a society, some means of vindication of rights must exist. While the invalidation of contrary law, such as in Roe, is perhaps adequate, it may not sufficiently deter the state. Monroe births a § 1983 model that still prevailed in Hobbes's England. It grants all individuals equal "negative" freedom where the law is silent (and thereby implies the illegitimacy of the obligations embedded in both feudal private law and absolutist public law . . . ).

Id. at 77. Hobbes' state is a modern state, supplanting the feudal order and creating new rights and relations. Shapiro explains that, while Hobbes' conception of the state is not as clearly libertarian as it has been characterized, "Hobbes conceives of social relations as essentially private, their form, but never their content, regulated by the state." Id. at 39. Thus, despite the awesome power Hobbes gives to the regulative state, he provides the conceptual tools for perpetual attacks on it. Much of his account reinforces the liberal vision of the state as an intruder on the privacy of the individual. The equation of freedom with toleration and privacy from government rather than participation in it . . . served to make the legal and moral status of the state intrinsically questionable, on the grounds that it threatened the private-law rights whose protection had become its raison d'être.


The dilemma in Roe is characteristic of this aspect of Hobbes. If the state is to limit only the forms of relations between individuals, it cannot remain legitimate and tell a woman what to do with her body; however, if it recognizes a fetus as a person, it creates a situation in which it cannot be legitimate. Privacy is an illusory aid to abortion rights advocates, however. It may delegitimize a state which prioritizes unborn fetuses over living women. But it makes such a state and abortion rights advocates appear to have in fact made a choice between concern for women and fetuses.

Shapiro attributes to Locke the coalescence of the familiar and central components of much liberal democratic theory: "[Locke] offers an account of natural rights according to which every person, in virtue of the law of nature, is entitled to life, liberty, and property in order that he may survive and thrive." Shapiro, supra note 81, at 82. Departing from Hobbes, Locke ties the legitimacy of a government to its preservation of these fundamental natural rights:

Whereas Hobbes's sovereign was never obligated to its subjects because it never contracted with them, emerging instead as a byproduct of the citizens' mutual agreements one with another, government for Locke is bound by a contract with the people. If it violates its fiduciary trust the citizen's natural right to revolution is activated.

Id. This relationship served as a basis of a negative libertarian view of rights that, once "portrayed as natural, embodied in and dictated by the laws of nature, a theory of objective interests requiring that the state be comfortable to those laws amounted to a rational imperative for the state to foster and maintain those social relationships. Locke, therefore, provided no less than a natural-law justification for a capitalist state." Id. at 144; cf. Epstein, supra, at 9-15 (reviewing Locke's challenges to Hobbes in his justification of private property rights and their centrality to limited government).

The liberal state, in order to maintain its legitimacy, must, as is now the familiar demand placed on states, preserve and promote life, liberty, and property. The individual citizen subjects of these rights are, under this view, owed by their state these rights by nature, whether private recourse for violations is available or not. The emergence of such actions under a Constitution read to embrace a Lockean theory of government and exemplified most readily by the Monroe regime, makes the vindication of individuals' rights a threshold requirement of political legitimacy. This is the particular sense in which Roe represents a basic understanding of right.
that seeks to accomplish this vindication by remediencing, if not preventing, right violations.

However central to liberal understandings, Roe-rights are flawed, obscuring fundamental conceptual and political difficulties inherent in justifying particular rights in a democracy. When the recognition of a right, such as abortion, meets with any significant disagreement over its existence, importance, or terms, that disagreement precipitates the disintegration of the very notion of “rights” which the Roe formulation claims to recognize and protect. By exposing the dependence of rights claims on the often shifting balance of political opinion and highlighting the relative paucity of satisfactory moral justifications for rights (in particular or general), such a narrow rights formulation, as Roe represents, is deprived of its underlying and conceptual support. “Natural rights,” which this formula sought to advance, collapse into political bromides.

Abortion illustrates this collapse. Social contract theories, which not surprisingly support a right to privacy and control over one’s body such as that which underlies the abortion right, have been understood to call for a non-interventionist state, absent, perhaps, arguments concerning the common good.207 The abortion debate invokes these underlying assumptions about rights. Roe has been controversial because it rests the abortion right on an imputed sacrosanct individual autonomy, not just because it is based on the malleable scientific evidence Professor di Leonardo is concerned with.208 Shrouded as it is in mutually exclusive absolutist contentions about the sanctity of individual autonomy or life, the abortion question continues to demand a choice between women and fetuses, even as Roe, the penultimate articulation of the Constitution’s collective values on that issue, appears to have made that choice. Simultaneously cast in terms of the disconcerting implications regarding the utility of usurping women’s wombs or allowing fetal extermination, neither substantive choice is amiable to the understanding of rights Roe ultimately stands for. The abortion question, unlike less controversial “moral” issues the law confronts (such as the nature of in-

207. Typically, these arguments have been associated with utilitarians. However, some libertarian theories, usually considered opposed to utilitarianism, authorize state action for the greater good, though restricted generally to force/fraud exceptions to a larger non-intervention principle. Such a libertarian position is advanced by Robert Nozick’s moral philosophy, see Robert Nozick, Anarchy, State and Utopia 26-35 (1974) (suggesting that moral constraints call for limited “night-watchman state”), and Richard Epstein’s foray into public law, see Epstein, supra note 185. Epstein’s Forbidden Grounds has been criticized for combining, or choosing selectively between, libertarian and utilitarian justifications. See Lea Brilmayer, Lonely Libertarian: One Man’s View of Antidiscrimination Law, 31 San Diego L. Rev. 105, 107-08 (1994) (arguing that Epstein applies utilitarian criticisms only when discussing costs of Title VII); Donohue, supra note 188, at 1589-90 (arguing that Epstein’s non-utilitarian approach to social costs excludes consideration of benefits). But cf. Richard A. Epstein, Standing Firm, On Forbidden Grounds, 31 San Diego L. Rev. 1, 2-5 (1994) (explaining basis for his book and for his peculiar political theory).

208. See Brown Symposium, supra note 197, at 718 (comparing Brown to Roe in applying wrong emphasis on victims’ feelings).
VINDICATING RIGHTS

1996]

tent),209 is difficult because Roe has come to represent the view that an individual's rights are inviolable, while the decision itself refuses to determine (except on an ad hoc basis) which rights—women’s or fetuses’, privacy or life, natural rights or social welfare—should be inviolate.210

The contradictions inherent in the abortion controversy duplicate neo-Kantian and utilitarian bases for rights, put forth with some regularity in the past thirty years in attempts to justify a reborn natural rights regime.211 These contradictions tend to collapse narrow rights arguments into incoherence. This is illustrated by conservative syndicated columnist Cal Thomas's response to the very reasonable request of gay and lesbian citizens for basic equality of citizenship. Decrying what he considers unjustified mass media support of the gay rights movement, he laments, "[t]hose who believe that the gay lifestyle is a choice (and a wrong one), and that the homosexual political agenda is counterproductive to the general welfare, are stereotyped . . . as unreconstructed homophobes and fundamentalist fanatics."212 With these comments, Thomas both expresses a view popular among opponents of gay rights and illustrates the vulnerability of even minimal rights claims to attack.

Thomas's views are rhetorically significant for two reasons that duplicate the planes on which the abortion battles are fought. First, Thomas denies right as a matter of autonomy by arguing that being gay is a choice. In effect, he dismisses the possibility that gay rights can be natural rights deserving of protection from the minimal state, which were central to the Roe approach. Second, Thomas, in utilitarian fashion, transforms the debate into one of "public welfare" as social utility. This change supplements the first—if not a "right," the claim is to be treated as a matter of better policy, for which his argument is that gay rights are not good policy—but is also an independent denial of the right claim. Unfortunately, the more malign the group claiming rights or the more unconventional the right claimed, the easier it is to reject the claim in the manner employed by Thomas.213


210. This seems to be the import of Sylvia Law's difficulty with the "rhetoric of privacy, as opposed to equality." Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984). As Law observes, the reference to medical opinion in Roe transforms the question from both the autonomy issue presumably represented by privacy and the equality notion that drives it, leaving only a general welfare argument in support of the statute. See id. at 1021 (noting that "asserted right to murder" would be unsupported by privacy or equality). This second order justification has, as di Leonardo indicates, allowed whatever right to be subverted. See Brown Symposium, supra note 197, at 718 (suggesting Court undermines its own intent by using psychological argument).

211. E.g., Dworkin, supra note 81, at 176-83 (defending Rawls' assumptions of natural rights on basis of social contract from "original position" of ignorance); Rawls, supra note 81, at 130-35 (arguing formal constraints of concept of rights). Cf. Ackerman, supra note 61, at 327-48 (defending liberalism against "false community" spirit of utilitarians).


213. Only the difference in the public's current views of gay and lesbian men and women
To opponents of gay rights, Thomas’s view, paralleled in Bowers v. Hardwick, likely seems “correct” precisely because it allows them to maintain allegiance to the notion of human equality even as such equality is in fact denied to gay and lesbian Americans. Rights conceived only in this narrow way require the identification of human nature, the elements of citizenship, or some similar notion. This requirement makes rights claims susceptible to denial on conceptual bases that say the right is not “human” or not “civil.”

As outlined by Catherine MacKinnon in Difference and Dominance, or earlier by Karl Marx in On the Jewish Question, individual rights claims both define and presuppose an equality of citizenship. While Roe is properly criticized for protecting only limited equality of citizenship, what is often missed is the prior requirement that rights arguments be first accepted as premised on humanity. In less enlightened days, it sufficed simply to deny humanity to non-whites and women; in our own time, it is a matter of transforming issues of humanity from the immutable to the elected. The move takes the issue out of the realm of natural rights and shifts authority to the state to legislate in the interest of the public (or, as is the case here, to not legislate in the interest of ensuring equality).

In sum, Roe-rights are less than substantial. Their value is realized only when generally accepted; their necessity is obvious only when their existence is significantly threatened. In either case, their self-evidence is apparent only to their supporters. Cast in absolute terms, not even a epistemological constitutional source can completely justify Roe-rights in the face of organized opposition denying their constitutional origin, inherent human relation, or social wisdom. Rather than advancing social equality or guaranteeing inherent rights, this most narrow conception of right provides only a forum for the manifestation of rights as they become generally accepted. The benefit obtained by individuals is transitory at best; its limitation on the state illusory when present. In practice, rights so narrowly conceived prove inadequate when opposition to them is most significant and unnecessary when widely accepted. In the end, it is insufficient to say rights that exist will be vindicated; Roe-like rights fail because they protect only what least needs protection.

and black folk and women explains the different abilities of rights arguments to survive these and similar attacks.


216. See KARL MARX, On the Jewish Question, in EARLY WRITINGS 1, 21-26 (T.B. Bottomore trans. & ed., 1963) (arguing that community participation is central to equal citizenship rights and American and French revolutionary leaders wrongly reduced citizenship to “a mere means for preserving those so-called [individual] rights of man”).

217. See Law, supra note 210, at 986-87 (arguing that sex equality doctrine has diverged from its constitutional interpretation).
2. Brown and Public Values

Brown represents an effort to change governmental and societal practices to conform with a wider vision of "right" understood in terms of "public values." This description of Brown and its legacy is eloquently described by Professor Fiss as his structural reform model of adjudication. Brown, so understood, transcends the mechanical reliance on moral theory to justify its pronouncements. Instead, the articulation of "public values" invokes the political process, albeit indirectly through the judiciary, in order to divine important societal concerns and conform the practices of the government and significant quasi-public institutions to those values.

While it maintains an individual conception of the victim, Brown focuses on the intermediary entities between the individual and state. Post-Brown cases, therefore, turn on an assessment of whether the defendant (rights violator) is sufficiently akin to the state,\(^{218}\) whether the violator's action is fairly attributable to the state,\(^{219}\) whether the violation is caused by the state actor asked to remedy it,\(^{220}\) or simply what is the state.\(^{221}\) While the question of the state action requirement long predates Brown, it is only in the Brown era that a government institution's officers' actions could be understood as violating rights. Indeed, Monroe countenanced the possibility of state institutional incentives to violate rights without legislation.\(^{222}\) Once invoked, Brown marshals a judicial power aimed at remedying departures from public values in the context of institutional interests and incentives. State action and individual harm remain necessary,\(^{223}\) but only as means of confining this view to a relationship between the governed and the governor.

Throughout the Revival period, the Brown model has been the predominant model of rights. The spirit of Brown has informed the identification of numerous rights designed to counteract the formidable power of modern institutions.


\(^{221}\) See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159-60 (1978) (statute permitting private self-help sale of goods in storage does not delegate state privilege to storage company). In some cases, these questions merge. E.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-30 (1982) (finding that corporate creditor attaching property under color of state law was state actor for § 1983 purposes).


\(^{223}\) For example, in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), even structural reform supporter Justice Marshall accepted some individual injury as necessary to trigger the court's case or controversy based power. Id. at 129 (Marshall, J., dissenting). Once invoked, however, Marshall would not have required such injury for each and every remedy, as the Court did in Lyons. Id. at 130-31 (Marshall, J., dissenting).
state bureaucracies. It has produced aggressive remedial schemes and very often empowered the previously powerless. However, to the extent § 1983 cases have followed the Brown structural reform model, they have met increasingly severe resistance, the main focus of which has been the broad judicial powers and hands-on management necessitated by the structural injunction.224 Cases in the Roe line, through their emphasis on the individual, avoid these difficulties and affirmatively oppose the Brown line of cases when courts seek to compel the state to make an inter-institutional change affecting an individual, no matter what the intervening reason.225

While an improvement on Roe, Brown is no more sufficient a means of protecting rights. Judges, Brown-rights’ human error, may encounter difficulty managing complex cases or may merely refuse to enforce structural reform. Moreover, even where judges are able to manage the multifaceted litigation of structural reform cases, the structural reform model provokes conflict between the judiciary and recalcitrant defendants.226 In the face of resistance, the structural reform court fights a battle of attrition227 that detracts from the court’s overall legitimacy. Thus, while significantly more capable of advancing “rights” through the advancement of public values, Brown fails, as perhaps school desegregation efforts show, to overcome the very institutional resistance it aims at eliminating.

B. Griffin and Understandings of Rights

Griffin,229 although in no way as influential as Brown or Roe, presents a third model for the vindication of rights that transcends the tension inherent in 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,

224. See, e.g., id. at 95 (recognizing difficulties of implementing broad injunctive relief plan); Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 90-106 (1979) (critiquing the capacity of judges to manage structural reform cases).

225. This conflict is seen most clearly in the dilemma framed by the Court in Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978), but has been expressed with force most recently in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and Martin v. Wilks, 490 U.S. 755 (1989). Professor Fiss’s discussion of Wilks is illuminating in this regard and serves as the foundation of this sub-section. See Fiss, supra note 61, at 966-74 (discussing barriers to structural decrees under Wilks).


227. E.g., Missouri v. Jenkins, 115 S. Ct. 2038, 2049-50 (1995) (preventing district court from imposing interdistrict remedies where only one school district was to be desegregated); Board of Educ. v. Dowell, 498 U.S. 237, 248-49 (1991) (permitting desegregation decree to be dissolved after finding of good faith compliance). These decisions, in effect, released school systems from desegregation supervision despite their failure to achieve “unitary” status.

228. See generally Jonathan Kozol, Savage Inequalities (1991) (describing persistent disparities between predominantly white and predominantly minority school systems).

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. 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.

If § 1985(3) outlines a unique right and Griffin articulates and limits that right in an innovative manner, the Griffin Court's treatment of Eugene Griffin's allegations proves especially novel. More than supporting an internally limited right to equality, the Griffin decision represents a revised view of rights, the identification of their violation, and the constitutional authority for each.

Justice Stewart began his opinion in Griffin in an unusual way, by duplicating paragraphs 2 through 8 and paragraph 12 of the plaintiffs' complaint.²³⁰ Acknowledging the Fifth Circuit's reluctance to recognize a cause of action for private action in light of the Supreme Court's opinion in Collins,²³¹ Justice Stewart dismissed the Circuit's concern in a five part opinion. The first two parts refuted the state action requirement of Collins and extended § 1985(3) to prohibit private conspiracies. Part III, explaining this prohibition, is the linchpin of the opinion.

1. Griffin's Part III

In Part III of his Griffin opinion, Justice Stewart attempted to allay the concerns of the Collins Court by explaining the nature of a private deprivation of equal protection of the laws and equal privileges and immunities under the laws. Conceding that the Fourteenth Amendment makes such a deprivation difficult to understand,²³² he located support for the statute's private coverage in the statutory language, construction of companion statutes, and legislative history.²³³

[T]here is nothing inherent in the phrase ['equal protection of the laws, or of equal privileges and immunities under the laws'] that requires the action working the deprivation to come from the state. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source.²³⁴

Stewart seemed to place some importance on Representative Coburn's statements in favor of modifying the 1871 Act by adding what became § 1985(3).

²³⁰ Id. at 89-92.
²³¹ Id. at 92-93.
²³² Id. at 96-97.
²³³ Id. at 97-101.
²³⁴ Id. at 97 (citation omitted).
Coburn apparently understood § 1985(3) to be less intrusive on state authority than other approaches to vindicating rights, arguing, “[i]f we can deal with individuals, that is a less radical course, and works less interference with local governments.”

But the language of the statute, on first blush, still appears to threaten state authority. Relying on the concerns of Congressmen who offered limiting amendments to the section, Justice Stewart gave the statute the full sweep of its words while limiting its coverage. This construction, described above, outlined a completely different conception of rights. If the Act was to cover all private conspiracies to deprive persons of equal protection of the laws and equal privileges and immunities under the laws, it was to do so only when “deprivations . . . attack the equality of rights of American citizens.”

Justice Stewart focused on intent as the key requirement of the statute. “[T]he path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring . . . the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.”

Justice Stewart continued, in oft-quoted language, to require “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” Subsequent courts and commentators have taken this language to require action based on suspect classifications borrowed from Fourteenth Amendment jurisprudence. This is a poor reading of Griffin and § 1985(3). Stewart’s opinion requires “racial . . . invidiously discriminatory animus.” A racial basis is neither necessary nor sufficient. It is the invidiousness of the discriminatory motivation, its tendency to cause discontent or animosity, that triggers the act. The “perhaps otherwise class-based” phrase describes an alternative to “racial,” not the animus itself. Stewart’s concern was not that Griffin and his associates were beaten because of their race, or even that the Breckenridge brothers who assaulted them on that Mississippi highway were filled with hate for black Americans. There is nothing in the opinion to that effect. Rather, the Act was triggered by the nature of the animus itself, its divisive capacity and subordinating effect on its victims, which, when manifested through the conspiracy, injured the plaintiffs.

Griffin’s animus argument is a subtle one. Animus as intentional action

235. Id. at 101 (quoting CONG. GLOBE, 42nd Cong., 1st Sess., app. 459 (1871) (statement of Rep. Coburn)).
236. Id. at 99 (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 478 (1871) (statement of Rep. Shellabarger)).
237. Id. at 102.
238. Id.
239. E.g., Great Am. Fed. Sav. & Loan Ass’n v. Novotny, 584 F.2d 1235, 1246-47 (1978) (declining to impose general federal tort regime that would allow courts to establish codes of conduct where unequal protection is alleged). See also Janis L. McDonald, Starting From Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus, 19 CONN. L. REV. 471, 495-98 & n.93 (1987) (citing misperception of Fourteenth Amendment as source of Congress’ power to enact § 1985(3) and listing examples of misguided interpretations).
or hateful action alone, would not operate to modify § 1985(3)'s apparently broad reach. Animus as intentional act requires too little; in fact, as little as many state tort violations. Animus as hate proves irrelevant, since that hate might have no relation to the plaintiff's enjoyment of equal protection of the laws or equal privileges and immunities under the laws. Hate alone, even if racial hate, would not necessarily constitute motivation. Justice Stewart's opinion seems to require the more complex desire to subordinate, a motivation that, though often hateful, need not involve the emotion normally associated with Nazis, Klansmen, and fringe racists.

Animus as suspect class would similarly fail to cabin the statute as Justice Stewart, and the Reconstruction Congressmen he cited, intended. A suspect classification, even race, is both over- and underinclusive. Actions based on a suspect class may not be motivated by, or have the effect of, depriving a person of equal protection of the laws or equal privileges and immunities under the laws. Similarly, actions completely depriving persons of meaningful enjoyment of a system of laws may be occasioned without the trappings of a suspect classification. Most importantly, if the statute is invoked only on the basis of a suspect classification, it potentially covers any conspiracy by members of one class against members of another, necessitating additional limiting devices unnecessary in Griffin. The importation of the suspect classification approach from state action cases, moreover, proves unnecessary.

If there is a bad basis (like race), it is perhaps easier to identify the bad effect (invidiousness) of a desire (animus) to deprive a person of the benefit of a system of laws. However, it is the invidiousness that matters. As Representative Shellabarger put it, "the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." Section 1985(3) thus provides for a substantive protection of a person's enjoyment of a system of laws.

2. Griffin's Part IV

Part IV of Justice Stewart's opinion emphasized this reading of Griffin. It did not explain how to determine when a person's enjoyment of the system of laws is infringed, only indicating that the facts of Griffin represented such a case. Rather than describing the workings of the victims' minds or the
sanctity of their autonomy as in Brown or Roe—thereby necessitating reference to scientific exposition of the consequence of each—Stewart invoked the alleged situation. "We return to the petitioners' complaint," observed Justice Stewart in Part IV. 242 Invoking his extensive quotation of the complaint, Justice Stewart suggested that, under the circumstances presented by the plaintiffs, their enjoyment of full citizenship had been compromised. We are to understand, therefore, that Eugene Griffin and R. G. Grady, black citizens of Mississippi and Tennessee during a time of violent opposition to the end of Jim Crow, had been deprived of full and equal citizenship when Lavon and Calvin Breckenridge pulled their car over, held them at gunpoint, and "terroriz[ed] them to the utmost degree" 243 under the mistaken belief Grady was a civil rights worker.

Justice Stewart's cursory Part IV suggests that the harm was accomplished even though the Breckenridge boys were mistaken in their view of Grady and despite the fact that they never thought of Griffin as anything but a fellow DeKalb County, Mississippi citizen. Understood in the context of the time, circumstances, and social atmosphere, the complaint's "allegations clearly support[ed] the requisite animus to deprive the petitioners of the equal enjoyment of legal rights." 244 The defendants' actions diminished the plaintiffs' equality. "Indeed, the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." 245

Section 1985(3)'s language supports this view. The section is triggered by acts in furtherance of the conspiracy "whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'" 246 This requirement might prove confusing given its similarity to the phrase "privileges and immunities" that appears in other places in the section and in the Constitution. The language might mistakenly be taken as meaning less in light of the treatment of the Fourteenth Amendment's privileges and immunities language in the Slaughter-House Cases. 247 However, the language, if taken seriously, operates differently from both the Fourteenth Amendment's language and the conspiracy section's reference to privileges and immunities of citizenship. If each triggering event is taken seriously, the section should be read as properly invoked by both (1) persons injured in property or person by the conspiracy, and (2) persons deprived of having or exercising a right or privilege of citizenship. Each defines recoverable injury: (1) injury to person and property; (2) injury to either (a) the having of rights generally (the equal privileges and immunities under the laws) or (b) the exercise of particular rights.

242. Id. at 102.
243. Id. at 91 (quoting Petitioners' complaint).
244. Id. at 103.
245. Id.
246. Id.
247. 83 U.S. (16 Wall.) 36 (1872).
(equal protection of the laws).\(^{248}\) Both the fact of physical injury and the diminution of equal citizenship give rise to a right to recovery.

The section’s focus on acts in furtherance of injuring “another” further supports this broad right to recovery. Any person, other than co-conspirators, injured by the conspiracy or deprived of having or exercising rights or privileges has a right to recover. Section 1985(3)’s coverage is not limited to injuries connected to acts in furtherance of the conspiracy, but any injuries occasioned by the conspiracy, properly motivated, and for which there is an act in furtherance. What matters is the effect of the conspiracy on the plaintiff’s enjoyment of the system of laws. While standing requirements and the section’s limitation of recovery to “damages, occasioned by such injury or deprivation” require the plaintiff to show injury from the conspiracy, the acts in furtherance need not cause the injury.

Importantly, this component of the section does not require that plaintiffs be deprived of any type of right, only that such plaintiff experience a loss from an insidiously motivated conspiracy. The focus on animus in Part III of Griffin is confusing if viewed as the motivating factor for a constitutional right deprivation. It is comprehensible only when seen on Griffin’s terms as the description of a vile conspiracy; the section sanctions the perpetrators of these vile conspiracies to the utmost, for any and all deprivations caused by the insidiously conceived plan.

So far this construct appears to focus on bad thoughts—the motivation of the conspirators. However, Griffin seems properly understood to embrace a more complex view of a prohibited conspiracy: its concern with the situated person against whom the conspiracy is aimed makes animus a shorthand method for identifying those conspiracies which are fairly understood as threatening the rule of law by depriving some of full citizenship. The concern is clear: the situated person, who is in fact affected by invidiously motivated conspiracies, is provided a cause for relief. Rather than conceiving of right as a duty owed by the government (Roe) or a value to be ensured against the state’s subordinate or related institutions (Brown), Griffin envisions a guarantee of equal participation in the polity by the prohibitions of conspiracies aimed at diminishing the value of persons’ governance by laws.

3. **Griffin’s Part V**

So novel a construction, like that of Brown and later Monroe, requires some argument that a statute so constructed is constitutional. Dismissing the applicability of the Court’s invalidation of Revised Statute § 5519 (the criminal counterpart of § 1985(3)) in 1883 in United States v. Harris,\(^{249}\) Justice Stewart read the constitutional inquiry as only “identifying a source of congressional power to reach the private conspiracy alleged by the complaint in

\(^{248}\) The dual reference to right and privilege may be understood as the act of a Congress that still understood the Fourteenth Amendment to protect both equal protection and equal privileges and immunities under the laws.

\(^{249}\) 106 U.S. 629, 633 (1883).
this case."\textsuperscript{250} Avoiding unnecessary constitutional discussion, Justice Stewart referred to the right to interstate travel and the Thirteenth Amendment as fully adequate to justify the application of the statute to the alleged facts, but cautioned that this by no means limited the statute to these constitutional bases.\textsuperscript{251} Justice Stewart's justification of his opinion is, therefore, contingent and curious. Presumably there are applications that fall outside the justifying power of these and other bases. Also, there must be different circumstances under which the section may be invoked under different authority.

The concerns that the section might lack constitutional authority in some applications is likely overstated. Having just constructed the statute to reach diminutions of full citizenship, the Thirteenth Amendment authority seems fully adequate if read to reach situations akin to slavery. This understanding of the statute might provide a remedial scheme to support Amar and Widawsky's argument for understanding child abuse as slavery.\textsuperscript{252} If, however, the Thirteenth Amendment is understood to reach only the historically contingent circumstance understood as America's enslavement of Africans, such support might limit the statute to race-based diminutions of rights. In this regard, the "perhaps other class-based" language in Justice Stewart's Part III might be given significance. The Court can, perhaps properly, be understood as reluctant to extend the Thirteenth Amendment beyond race.\textsuperscript{253}

Justice Harlan indicated in his sole concurrence that, given the facts and the reading of the statute in \textit{Griffin}, the additional justification of the statute rooted in "the right of interstate travel" is unnecessary, at best.\textsuperscript{254} Inclusion of the right to interstate travel as a basis for the act is probably best understood as the Court's invocation, without so establishing, that Congress possesses the power to legislate in order to ensure generalized rights of national citizenship. This power was rehearsed in \textit{United States v. Guest},\textsuperscript{255} in which six Justices argued that Congress had the power to legislate against private actors in order to secure Fourteenth Amendment rights,\textsuperscript{256} but where it was also suggested that Congress's power was more extensive. As the petitioner in \textit{Griffin} argued:

[M]any of the rights infringed in this case are rights of national citizenship. As to them, Congress derives authority to legislate form sources other than the Thirteenth and Fourteenth Amendments. "Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced" by Congress, and because

\textsuperscript{250} \textit{Griffin}, 403 U.S. at 104.
\textsuperscript{251} \textit{Id.} at 104-07.
\textsuperscript{253} This reluctance was given meaning in \textit{Runyon}'s limitation of § 1981 to race. \textit{Runyon v. McCrary}, 427 U.S. 160, 167-68 (1976).
\textsuperscript{254} \textit{Griffin}, 403 U.S. at 107 (Harlan, J., concurring).
\textsuperscript{255} 383 U.S. 745 (1966).
\textsuperscript{256} \textit{Id.} at 761, 774.
Congress' power with respect to these rights does not stem from the Fourteenth Amendment, there can be no real question that its legislation can bear directly on private individuals.\textsuperscript{257}

The Court was clearly reluctant to engage this significant constitutional question, arguing that constitutional authority to reach the action presented in Griffin was clear. In any case, the inclusion of the right to interstate travel as a constitutional basis for the opinion remains illuminating because it highlights two complementary views of the section. Under the section's "equal privileges and immunities under the laws" language and its focus on the diminution of citizenship or right, writ large, the Thirteenth Amendment is a complete authorization (even if it is possibly limited to race). When specific, identified rights are violated, however, this reading suggests that the statute might draw its justification from the underlying right violated. Remember, the "right to interstate travel" is a constitutional "right," presumably more authoritative than the less specific equality right identified in § 1985(3), a statute. Under § 1983, the deprivation of such a right may be compensated if effected under color of state law. Accordingly, conspiracies that are furthered by the deprivation of a constitutional right are punishable under the authority of the right itself.\textsuperscript{258}

Thus, Justice Stewart's Part V articulates two distinct bases for authorization of the section. When private citizens effect a deprivation, provided it is accomplished by a conspiracy aimed at diminishing a person's full citizenship, which violates identified federal rights, the underlying right itself authorizes the section. But when the private citizens' conspiracy is furthered by actions indistinguishable from the invidious animus itself, such as race or other invidiously discriminatory reasons, it may be justified by the Thirteenth Amendment or some other constitutional basis. In Griffin, as Justice Stewart's Part V intimates, no extensive discussion of the basis for the reading of § 1985(3) is needed because both of these justifications appear together. Federal (and state) rights were violated when Eugene Griffin and Lamont Grady were stopped and beaten. However, it should not be forgotten that this is a conspiracy statute, responding to the conspiracy itself. Acts in furtherance may not themselves constitute deprivations of rights, but might de-

\textsuperscript{257} Brief for Petitioners at 7-8, Griffin v. Breckenridge, 403 U.S. 88 (1971) (70-144) (quoting In re Quarles, 158 U.S. 532, 535 (1895); citing United States v. Guest, 383 U.S. 745, 759-60 n.17 (1966) & Twining v. New Jersey, 211 U.S. 78, 97 (1908)).

\textsuperscript{258} These two bases are rarely distinguished, perhaps because subsequent courts have focused almost exclusively on Griffin's animus requirement, ignoring the injury clauses of the section. Without a distinction between the animus and injury components of § 1985(3), the various violations alleged by the Griffin plaintiffs can be grouped together and justified as a single unit under either the Thirteenth Amendment or the right to travel. This approach implies that different facts might require an application of the statute unjustified by the constitution. Indeed, Novotny and Scott proceed under these very assumptions. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 833-34 (holding that § 1985(3) claim cannot be based on violation of First Amendment unless State was involved in or affected by violation); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) (holding that § 1985(3) cannot be employed to remedy violations of Title VII).
prive a person of the value of their citizenship. Part V of Griffin concerns only the basis for prescribing a particular conspiracy, defined therein by the nature of the act in furtherance. Justice Stewart's construction finds § 1985(3) authorized where no independent right is violated but where the conspiracy nevertheless has the effect of substantially devaluing the victim's citizenship.259

The right in § 1985(3) is complex. Certain conspiracies are prohibited. The act provides remedies in response to injuries caused by three types of acts in furtherance of the prohibited conspiracies: first, remedies for the diminution of citizenship produced by a conspiracy;260 second, remedies for violations of rights occasioned by conspiracies aimed at invidiously diminishing citizenship;261 and third, remedies for injuries to property and person occasioned by such the illegal conspiracies. The section's violation thus operates on two levels: the requirement of animus in the conspiracy and the requirement of certain types of injuries to trigger recovery. It is, similarly, justified on dual bases: the guarantee of citizenship in the anti-slavery amendment operates to authorize the application of the statute where the illegal conspiracy (aimed at a person such as to diminish that person's citizenship) causes injuries to person or property or diminution of citizenship; rights violated in the furtherance of the illegal conspiracy themselves justify the application of the section to remedy the violations.

IV. The Efficacy of the Griffin Right

Griffin's identification of a unique right, central to our constitutional system, accomplishes little if that right merely duplicates the problems of the more commonly understood rights, represented by Roe and Brown and adjudicated under § 1983's direct approach. The piquant right outlined in Griffin

259. This might be the case where the only rights violated were state law rights but where the "racial, or perhaps otherwise class-based" deprivation produced a substantial reduction in the value of the victim's citizenship. While this construct obviously may be invoked in a circumstance where there is clearly a state law, it is not the violation of the state law but the reduction in citizenship and the related threat to the legitimacy of the federal government that triggers the section.

260. On the face of the section, remedies are available even if this is the only act in furtherance of the conspiracy. See 42 U.S.C. § 1985(3) (providing remedy if two or more people "conspire... for the purpose of depriving" someone of their rights as citizens). The section is not as readily available as this might imply. The value of citizenship must be substantially affected. In this regard, the statute is redundant: Substantial diminution of citizenship limits the instances when an illegal conspiracy will be recognized and substantial diminution provides the basis of acts in furtherance which authorizes the application of the Act.

261. Here, it is the injury caused by the violation of a right (identified elsewhere) that triggers the section's protection. Again it must be emphasized that it is still the conspiracy that is illegal and that this conspiracy must be invidiously based (causing great damage to citizenship because of the situated identity of the intended victim). Recovery is, however, limited to the actual damages occasioned by the diminution of the plaintiff's rights. There is, indeed, no necessary connection between the intended victim, whose citizenship the conspirator's invidious plot diminishes, and the plaintiff whose rights were violated in furtherance of the plot, although such a requirement would not necessarily do violence on the act.
negotiates the crisis of moral justification and the process of political representation that leave the Roe and Brown approaches unsatisfying. The Griffin right promised to supplement the Roe and Brown approaches, extending the assurance of full participation in the democratic polity to instances of private infringement. Moreover, Griffin's application to public infringements, freed from the state action myth that allows rights vindication against state officers under § 1983, offers a more appropriately constructed process of vindication in certain circumstances.

A. Avoidance of Conceptual Traps

Griffin's approach to § 1985(3) is not premised on an interest or autonomy theory of natural rights. Rather, it takes seriously the positivist assumption that the Constitution forms a democratic government of equal citizens. In doing so, Griffin transcends the inadequacies of contemporary moral philosophy that prove fatal for Roe-rights. Griffin's concededly reductionist theory of equality avoids the Roe-like tendency to obscure the political nature of rights, while respecting the federalism and separation of powers problems that have left many uncomfortable with the engaged judicial management of Brown-based structural injunctions. Taking the dispute resolution model of adjudication that is so dear to many jurists, and adding the bottom-line governmental concern with legitimacy, Griffin provides remedies for those private conflicts that can fairly be understood as threatening the legitimacy and existence of the democratic union.

The identification of rights in Roe is, at base, the core of its difficulties. For students of International Human Rights, this dilemma, presented in the absence of a constitutional authority, is very familiar. Numerous commen-

262. State action loses its official character when that action is illegal. However, under Ex Parte Young, 209 U.S. 123, 159-60 (1908), that behavior continues to be considered state action for the purposes of invoking constitutional protection.

263. Louis Henkin's view of human rights portrays the international consensus for the protection of human rights, memorialized in the United Nations Charter and its various conventions, covenants, and treaties, in constitutional terms:

The contemporary version [of human rights] does not ground or justify itself in natural law, in social contract, or in any other political theory. In international instruments representatives of states declare and recognize human rights, define their content, and ordain their consequences within political societies and in the system of nation states. The justification of human rights is rhetorical, not philosophical. Human rights are self-evident, implied in other ideas that are commonly intuited or accepted ends—societal ends such as peace and justice; individual ends such as human dignity, happiness, fulfillment.

Henkin, supra note 81, at 2. While this view may be easily accepted, any such “constitution” remains an agreement among nations, not individuals. Difficulties in identifying binding rights in international law derive from the curiosity of agreements between states being the source of individual rights. National constitutions are less curious, since a nation's individuals presumably are the subjects of the agreement, but the identification of rights is no less difficult. Federal constitutions, such as the United States Constitution, replicate the difficulty of identifying rights on both levels. The first order of inquiry focuses on identifying which rights, memorialized in the Constitution, the nation's citizen contractors recognize(d). The second order of inquiry focuses,
tators have struggled with defining the content of basic, inherent human rights. Efforts to give meaning to concepts as ambiguous as “privacy,” for example, prove difficult, even if the sanctity of the concept is generally accepted as fundamental to humanity. A formative constitution expressly providing for the sanctity of the concept does not avoid this difficulty (although the acceptance argument is sometimes avoided). That is, even as the constitutional text aids in establishing a point of reference for many rights arguments, the content of rights remains controversial. Even if particular rights are accepted as fundamental natural, human, or constitutional rights, arguments over the availability of the rights on a particular issue are only shifted from questions about the rights’ importance to debates over their content and reach. While Roe-rights prove fundamental to a polity that takes the protection of constitutional rights seriously, Roe-rights arguments still require philosophical justification and some degree of political agreement over the content and availability of the rights. As Roe-like cases proclaim the sanctity of rights, the precariousness of those rights becomes more glaring.

This complex identification exercise proves unnecessary under Griffin. The citizen is guaranteed no particular right, but ensured the more fundamental enjoyment of “equality of rights as contrasted with his and other citizens’ rights.” Controversial disagreement over the identification, and subsequent absolute enforcement of such rights against the state, is avoided. The “right” protected by the section, therefore, suffers no justification trauma. Nor is it hobbled by the requirement that it elevate certain principles above normal politics, an act self-referentially bound to the whims of the general political mood.

Indeed, Griffin does not require that any particular right be identified under the Constitution in order to operate. The existence of any legal right, claim, or state obligation, premised on the existence of government and government of law, gives rise to the expectation, supported by Griffin, that a person’s access to that system of laws will not be compromised by otherwise co-equal beneficiaries of that system. As such, Griffin requires no identification of what is inherent in humanity, the Constitution, or concepts expressly recognized therein. It only requires what is fundamental to all these constitutional right identification exercises—that the constituent citizens of the union be equal.

like the international law of human rights, on the rights by which party states have agreed to be bound. Taken together, these questions demand a balance between “rights” of the first order and federalism, “rights” in light of the second order of inquiry.


266. This is, of course, exactly contrary to the Court’s ruling in Novotny. See Great Am. Fed. Sav. & Loan Ass’n v. Novotny, 442 U.S. 366, 377-78 (1979) (holding that deprivation of “rights” created by Title VII is not actionable under § 1985(3)).
Griffin, like the structural reform model of Brown, expressly recognizes the role of politics in the development and articulation of "rights." Griffin avoids the troubles, presented by Roe and carried over by Brown, attendant to identifying these rights, a task necessarily accomplished by judges with increasing difficulty along the continuum from Roe to Brown. Although structural reform cases grant the political nature of "public values," the articulation of these values has long discomforted those who see the Court as threatening its own legitimacy and overstepping its authority by presuming to know the public's values, absent democratic responsibility.267

The irony of the Brown construction is that, as it moves from Roe-like rights absolutism, invoking political consensus to transcend the moral crisis of that absolutism, it undercuts the justification for rights in a democracy—that is, rights' role as a check on the majoritarianism of normal politics. The values articulated in such cases are cast by their opponents as bad politics and unjustified judicial activism. This point is made by Professors Daniel Farber and Philip Frickey, who expressed concern that, if Brown rests on Carolene Products' protection of minorities, "it divests Brown and related cases of much of their normative power while simultaneously rendering them vulnerable to attack as rooted in weak political science."268 Farber and Frickey further argue that, through a modification of Professor Ackerman's readings of the role of interest groups in the political process, Justice Scalia has been able to transform Carolene Products into a theory for protecting the diffuse majority, by protecting the majoritarian political process.269 If this argument, which appears to provide an excellent explanation of Justice O'Connor's majority opinion in Shaw v. Reno,270 is accepted, the Brown model turns on itself. Not only is the basis for checking majoritarian hegemony lost, but the substantive concern for the less powerful and vulnerable persons is affirmatively invalidated in favor of the status quo.

This difficulty illustrates the problem of entrusting judges with significant authority in manifesting public values. Although the Brown model remains compelling as a means of remedying and preventing rights deprivations by state bureaucracies, charges that it relies excessively on judges are formidable. The public values that may have seemed transcendent in the height of the civil rights revolution now appear far less independent of majoritarian whims.271 Brown-rights are vulner-
able to a collapse of the distinction between public values and majoritarian prejudices, duplicating the moral justification problem of Roe-rights, when judges reach out to conform with the ever-shifting sands of public opinion.

It is, therefore, significant that Griffin avoids this problem in important ways. With a focus on equality under a system of laws, Griffin need not rely on judges to find public values. Indeed, it requires the identification of public values as little as it necessitates the identification of the source or justification of rights. With no such requirement, Justice O'Connor's view in Shaw v. Reno that a government practice aimed at helping eliminate minority exclusion from the political process resembles "apartheid" is of little consequence; what matters is the effect of conspiracies on the general equality of their victims.272

Admittedly, perhaps obviously, Griffin's focus on the victim reinvites judges' whims. Judges must still identify when a person's equality is compromised and that task is at least as subject to the predilections of a jurist as her sympathy to specific rights. However, the role of the judge here is more akin to what judges are accustomed to doing—deciding whether the facts of a particular allegation meet the requirements of the law. The fulfillment of the judge's task is limited by all the factors Fiss invoked in defense of the judge's role in structural cases,273 but in a more familiar and manageable context. Indeed, Griffin suggests a complex inquiry for judges that ensures sensitivity to subtle social realities without significantly challenging judges' competence.

B. The Griffin Inquiry

Griffin avoids the conceptual problems evident in Roe- and Brown-rights approaches through a subtle and complex inquiry implied by the Griffin opinion. The Griffin decision instructs judges confronted with a § 1985(3) case to pay special attention to the facts of the case. Rather than a charge merely to search for "suspect categories" as the "racial or perhaps other class-based animus" language has been taken to require,274 the Griffin judge

272. Professors Farber and Frickey illustrate this vulnerability. See Farber & Frickey, supra note 144, at 692-93 (examining precedent showing that actionable discrimination results from its actual impact on minority and not by political strength of minority in issue).

273. Fiss, supra note 61, at 6. Compare Diver, supra note 224, at 90-101 (conceding that institutional limits exist on judges' whims, but questioning judges' ability to manage structural reform cases).

must determine both the narrow and the broad effect on the plaintiff. The narrow component, easily articulated but not so easily shown, requires the showing of a diminution of citizenship. This narrow showing is, however, combined with the more demanding broad inquiry: Judges must determine whether, because the diminution of citizenship was done on an invidiously discriminatory basis, the claimed diminution threatens the legitimacy of the state.

The nature of this dual approach can be illustrated by an early post-
*Griffin* case that troubled many commentators, *Action v. Gannon*.275 In *Action*, a black reparations group confronted predominantly white St. Louis churches, disrupting the services of one church on four occasions in June and July of 1969, and warning of an intention to conduct unannounced demonstrations over a six-month period.276 An injunction was issued against *Action*, the reparations group, under the authority of § 1985(3).277 Upholding the injunction, the Eighth Circuit panel invoked the formal categories of race, religion, and speech to guide its inquiry. Race allowed it to invoke § 1985(3)278 and religion allowed it to overcome discomfort with censuring speech.279 The Eighth Circuit’s only concern was whether the court possessed the constitutional authority to act. The defendants argued that state action was required, but the court rejected that argument. Because of its focus on the category of race and religion, the Eighth Circuit rested its decision on the Fourteenth Amendment,280 a holding rejected a decade later in *Scott*. The court relied on *Griffin*, but by concerning itself exclusively with questions of constitutional categories and authority, it missed *Griffin’s* concern with the position and relation of the parties.

*Griffin’s* narrow inquiry would demand only that the churchgoers in *Action* allege that their inability to worship undisturbed diminishes the benefit of living under a system of laws. This showing would not have been difficult.

---


277. Id. at 1231.

278. See id. at 1232 (noting that defendants were motivated by racial animus).

279. See id. at 1234-35 (stating that Fourteenth Amendment clearly protects from state action the First Amendment right to worship).

280. See id. at 1235-37 (arguing that § 5 of Fourteenth Amendment gave Congress power “to enforce the rights guaranteed by the [First] Amendment against private conspiracies”).
However, it is important to highlight that Action's theory that white churches owed black Americans reparations for their complicity in justifying slavery would have been only marginally related to the plaintiff churchgoers' allegations of diminished value of citizenship. Twenty-seven years and over one-thousand miles away from the protests, it might be imprudent to speculate, but such an allegation (that pathetic demands for reparations unsupported by any method of enforcement\textsuperscript{281} diminished the value of the churchgoers' citizenship) may have simply been absurd.

In any case, Griffin's broad inquiry does most of the work in a § 1985(3) case. The broad inquiry contains both subjective and objective components. The subjective part of the broad inquiry recognizes that an individual's personal pain is a significant part of any determination of whether the value of that person's citizenship is in fact substantially diminished. The subjective component embraces those cases where the individual understands her suffering to be especially significant because it fits into a historical legacy of oppression that informs the victim's worldview, making some incidents diminutions of equality while others remain ordinary trials of life (even jokes!). The obvious case here is the effect of Ku Klux Klan terror on black Americans. This broad subjective inquiry recognizes the obvious: there can be a difference in a racially-charged world between black people referring to one another in racially derogatory terms than when done by the black person's white associates or, more clearly, a hooded Ku Klux Klan member.

In Action, the relevant inquiry is not whether the victims of Action's protests were unconvinced by the group's arguments or even deprived of rights to religious worship (although the deprivation of such rights are likely relevant in identifying an act in furtherance and possible remedies). Rather,

\textsuperscript{281} Calls for reparations for black Americans were widespread in the late 1960s. See, e.g., Manifesto to the White Christian Churches and Jewish Synagogues of America and All Other Racist Institutions (leaflet) (Apr. 26, 1969), reprinted in Black Protest Thought in the Twentieth Century 536 (1987) (demanding reparations, as Action did, for white churches' complicity in justifying slavery and segregation). These often came alongside demands that the nation be partitioned into black and white countries. See, e.g., Robert H. Brisbane, Black Activism: Racial Revolution in the United States, 1954-1970 183 (1974) (discussing Republic of New Afrika and other black separatist groups active during late 1960s and early 1970s); Chokwe Lumumba, Short History of the U.S. War on the R.N.A., The Black Scholar, Jan.-Feb. 1981, at 72 (discussion of black nationalist group, Republic of New Afrika). With the benefit of time, it is now clear that most of these demands were advanced by relatively obscure groups and isolated, albeit influential, individuals. For example, the Manifesto to the White Christian Churches and Jewish Synagogues was delivered by James Foreman, then a recent former president of the important civil rights group, the Student Nonviolent Coordinating Committee (SNCC), and an obviously noteworthy figure. It is also apparent that, even if not targeted and subverted by the Federal Bureau of Investigations and local law enforcement agencies, as these groups usually were, they had little means of enforcing their demands of achieving separate states for the races or payment of reparations.

While the demands of Action and similar groups may have been pathetic, the arguments for reparations are not unconvincing and, even at the time of the Action protest, claimed widespread support from black and white alike. See, e.g., Boris I. Bittker, The Case for Black Reparations (1973) (arguing case for reparations).
the question is whether the conspiracy left its objects with the subjective view that they were deprived of full participation in society. Such a finding, like the narrow component of the Griffin inquiry, is also easy to articulate but it may be difficult to sustain if the churchgoers are the leading citizens of St. Louis (whatever their race) and the protesters the city's dispossessed citizens. More simply put, inconvenience or discomfort alone is not sufficient to state a § 1985(3) claim.

As Critical Race theorists correctly argue, current approaches to rights, represented by both Roe and Brown, tend to devalue the experience of the oppressed, because the static categories that constitute "rights" presume different victims receive suffering similarly whether it is premised on race, religion, gender, or other factors. Formal categories treat all deprivations exactly the same. In contrast, Griffin's broad subjective inquiry is more comprehensive, significantly incorporating the legacy of an oppressive history or present.

The victim's perspective urged by Critical Race theorists is, nevertheless, dangerous. Relevant history or experience must be chosen to be recognized. Even as the Critical Race theorists argue that the victim's story ought be considered, they do not offer any basis for deciding how to choose between terrible stories of suffering. Critical Race theorists begin from and require a theory of truth and yet offer none. Law, unfortunately, is funda-

---

282. Central to the diverse writings of Critical Race theorists is an emphasis on considering the victim's perspective—in other words, considering the view of the oppressed. "Critical race theory is grounded in the particulars of a social reality that is defined by our experiences and the collective historical experiences of our communities of origin. Critical race theorists embrace subjectivity of perspective and are avowedly political." Charles R. Lawrence, III et al., Introduction, in Matsuda et al., Words that Wound, supra note 15, at 3. In their bibliography of Critical Race Theory, Richard Delgado and Jean Stefancic list ten themes prevalent in the work of Critical Race theorists. Among these themes are: (1) a "critique of liberalism," defined as "discontent with liberalism as a means of addressing the American race problem;" (2) "naming one's own reality," explained as opposition to "the bundle of presuppositions, received wisdom, and shared cultural understandings persons in the dominant group bring to discussions of race;" and (3) "structural determinism [focusing on] the ways in which the structure of legal thought or culture influences its content, frequently in a status quo-maintaining direction." Richard Delgado & Jean Stefancic, Critical Race Theory: An Annotated Bibliography, 79 Va. L. Rev. 461, 462-63 (1993).


284. Critical Race theorists do, of course, offer the notion of "oppression" to resolve cases. Unfortunately, they prioritize "naming one's own reality." Delagado & Stefancic, supra note 282, at 462. The reference to oppression, therefore, only puts off a crisis inherent in determining what experience of oppression is authentic (i.e., historically justifiable, closely related to cultural identity, sufficiently deeply felt, "real," etc.). It might here be persuasively argued that history is the Race theorists' basis for deciding, but it is far from clear that such a prioritization of the values of Critical Race Theory is an accurate description of the movement's views. See id. at 463-64 (describing varied and divergent character of race theorists' postions). Moreover, in whatever manner the authenticity question is resolved, it remains far from clear that any sub-
mentally about a species of truth: while it can lay no superior claim to absolute truth, it dispenses daily its own truth—the truth of its often hidden violence.\textsuperscript{285} *Griffin*’s consideration of subjective harm avoids these problems. Importantly, *Griffin* allows judges to consider openly the victim’s suffering to determine truth without ascribing that suffering automatically to the intersection of static, formal categories or fluid and changing constructions of identity.

This approach is obviously susceptible to recalcitrant judges who might deny a plaintiff’s vision of the world. Unfortunately, this is what judges do. Indeed, most sophisticated legal systems, including our own, have mechanisms for evaluating the reasonableness of judges’ factual determinations and the application of those determinations to the law. Under the *Griffin* approach, the only “fact” questions are whether the conspiracy existed, did the act in furtherance occur, and so on. Whether a conspiracy was invidious and whether it had an effect on the value of the intended victim’s citizenship is intimately tied to reviewable determinations of law—that is, those questions concern the application of facts to law. In any case, a judge’s error, even if not reversed, affects only a single plaintiff since the inquiry in question is essentially *ad hoc*.

Victims’ subjective assessments of harm, moreover, are not completely dispositive, no matter how severe. The subjective component of *Griffin* continues to resemble the tort actions which the *Collins* court appropriately feared would be consumed by § 1985(3) litigation. The *Griffin* court was persuaded that the fears of the *Collins* Court were unwarranted precisely because it limited recovery only to those especially poorly situated.\textsuperscript{286} *Griffin*, perhaps before its time, thus counseled for recognition of an objective truth.

This broad objective part of *Griffin* focuses on the collective understanding of the victim’s position. The *Griffin* judge, like Fiss’s interpreter of public values,\textsuperscript{287} is to determine the nature of the plaintiff’s circumstances along with their feelings. A subtle but important component of *Griffin* is Justice Stewart’s reproduction of eight paragraphs of the plaintiff’s complaint. Little is said about the meaning of the plaintiff’s victimization in *Griffin*, but the mistaken belief of the Breckenridge brothers that the plaintiffs were civil rights workers evokes the larger world in which the beatings took place. The all-too widespread terror against black Americans attempting to organize politically to demand equal citizenship and franchise was in fact little different from the Ku Klux Klan night rides aimed at creating Jim Crow some one hundred years earlier.


\textsuperscript{286} See Griffin v. Breckenridge, 403 U.S. 88, 96 (1971) (finding statutory language of § 1985(3) sufficiently limited in applicability to allay concerns of *Collins* Court).

\textsuperscript{287} See supra notes 61, 198-200 and accompanying text for a discussion of Professor Fiss’s argument that judges act as interpreters of public values.
The most difficult hurdle for the *Action* plaintiffs was this broad objective requirement of the *Griffin*-inquiry. The *Action* plaintiffs needed to convince the Court that, in the context of the then recent end of Jim Crow, the assault on their church diminished the citizenship value of the church's members and those similarly situated. Indeed, such may have been the case, but this determination must be made. Only one completely unoppressed by the history of the civil rights movement, Deacons of Defense, freedom rides, or the Medgar Evers and Philadelphia, Mississippi murders could suggest that the *Griffin* plaintiffs' allegations of an abduction and beating on a Mississippi highway was a mere tort. Like so many acts of terror at the time, it was a signal not merely to Lavon Griffin and his friends but to all black Americans that Mississippi was not a land where all are created equal. Even granting the limitations inherent in retrospective analysis, it is not so readily apparent that Action's non-violent protests over a church's reputed involvement in justifying slavery conveyed an analogous message.

Still, *Griffin* continues to rely on judges to define the objective component of *Griffin*’s discriminatory animus requirement. Placing this assessment in the hands of judges remains all too obviously dangerous. The objective component of *Griffin* is continually at risk of deteriorating into its subjective component or devolving into the mechanical categories of rights identification. The responsibility possessed by judges in these cases is, as such, substantial. The *Griffin* right is, consequently, precariously dependent on judges' considered judgments. Criticisms that Fiss relies too heavily on judges, perhaps romanticizing them, apply equally here; like Fiss's structural

288. Janis McDonald blames the "class-based animus" component of *Griffin* for the deterioration of § 1985(3) into a suspect class jurisprudence, arguing that post-*Griffin* treatments of § 1985(3) have merged two distinct components of the class-based animus requirement—the intent of the perpetrators and the identity of the victim—into one. McDonald, supra note 11, at 493-94. It is this merger of distinct components of *Griffin* which McDonald views as responsible for the class-based animus requirement's transformation into suspect class analysis. *Id.* at 495 & n.92.

McDonald, because she conceives of the identity component of the class-based animus requirement as tantamount to suspect classifications, ultimately approves of courts' exclusive focus on animus as intent. *Id.* While she recognizes that such a singular focus risks deterioration into suspect class analysis, she argues that such a deterioration can be avoided by remembering the 42nd Congress's aims of "effect[ing] 'the goals of the [F]ourteenth [A]mendment and . . . other purposes.'" *Id.* at 497 (quoting the Civil Rights Act of 1871) (McDonald's emphasis).

However, full meaning cannot be given this section, nor deterioration of the animus requirement into suspect classification analysis avoided, unless both of McDonald's animus components are given full meaning. By excluding any inquiry into the identity, vulnerability, and status of the conspiracy's subjects (not necessarily the same as its victims or the § 1985(3) plaintiffs), McDonald conceives of a class-based animus requirement that can *limit* the terms of § 1985(3) only by employing suspect classifications. And, by refusing to allow courts to use suspect classifications, she is left to ask judges to exclude cases at their whim. In her universe, significant constitutional questions must be raised regarding the appropriateness of the section's application to given facts (especially when, such as seems the case in *Action*, the application of the section to certain facts strikes some as inappropriate or trivial). Only by engaging in the multifaceted analysis described in the foregoing text can the terms of § 1985(3) be given force. The linchpin is a limited consideration of the proposed victim's situatedness and experience.
reform argument, which justified deference to judges on the basis of the very modern dilemma of bureaucratic incentives, Griffin is justified by the peculiar effect of certain conspiracies.

Unlike Brown-modeled cases, an incorrect judge is wrong only once; Griffin jettisons the formal categories manifested through rights identification that lend precedential value to judges’ value judgments. Section 1985(3) is a special statute for a special, if frequent, circumstance. Born during a period when the legitimacy of the Union was enforced, though often ineffectively, at gunbarrel and bayonet, the statute seeks to ensure legitimacy among those given to abandon their faith in the Union at the urging of the terror of that Union’s detractors. Its victims, victims of informal insurrections of sorts, are contextually defined in order to ensure the nation’s legitimacy is preserved. Judges in Griffin are not Bickel’s usurpers of the democratic majority’s rightful authority. Rather, they are ensurers of the nation. They guarantee, through Griffin, against the “balkanization” Justice O’Connor feared in Shaw. They offer, as any political agent is obliged, a concession to those who might fear the hegemony of the majority, in order that they might continue to participate in the republic, in order that they

289. This is perhaps best represented by the riots commemorated by the Liberty Monument in New Orleans. The White League, an organization openly dedicated to the violent restoration of white supremacy launched a full-scale insurrection in New Orleans, hoping to install [defeated candidate John] McEnery as governor. On 14 September, 3,500 leaguers, mostly Civil War veterans, overwhelmed an equal number of black militiamen and Metropolitan Police under command of Confederate Gen. James Longstreet, and occupied the city hall, statehouse, and arsenal. They only withdrew upon the arrival of federal troops, ordered to the scene by [President Grant].


Racist violence during the twilight of Reconstruction was not focused only on black Americans. In 1891, for example, a mass lynching of Italian-Americans in New Orleans captured the attention of the national press. J. Alexander Karlin, The New Orleans Lynching of 1891 and the American Press, 24 LA. HIST. Q. 187 (1941). While Griffin does not decide how far its right might reach, the racial overtones of the 1891 lynching, see John E. Coxe, The New Orleans Mafia Incident, 20 LA. HIST. Q. 1067 (1937), would certainly be covered.

290. In this way, Griffin offers communitarian critics of liberalism a practical alternative to rights as community destroying, individual entitlements. See, e.g., Michael J. Sandel, Liberalism and the Limits of Justice 59-65 (1982) (liberalism’s focus on “atomic” individuals antithetical to community). Rather than rejecting rights in hopes of a romanticized participatory community, as communitarians have been accused of doing, see Derek L. Phillips, Looking Backward: A Critical Appraisal of Communitarian Thought 15-16 (1993) (describing communitarian theorists’ emphasis on special quality of people’s interactions), Griffin offers an
not deprive all of peace and tranquility as retribution for their own deprivation.

C. Griffin's Protection

The promise of the Griffin formula is that it gives § 1985(3) a broad reach while limiting its effect on state interests. Griffin is effective because it negotiates the mire of federalism while also providing an important guarantee of meaningful national citizenship. The preservation of a meaningful national citizenship rooted in the legitimacy-ensuring aspects of constitutional governance is essential if democracy is to be meaningful. That meaningful citizenship need be protected against intrusions by private conspiracies is evidenced by nothing less than the widespread movement to criminalize hate.291

In recent years, an upsurge in racial hostility and gender tension has been identified in apparently increasing incidents of hate crimes.292 In response, numerous local, state, and federal statutes, widely viewed as a type of civil rights legislation, have been enacted.293 This nascent wave of legislation

approach to rights that ensures that participation in a community is not frustrated by the terror of fellow citizens. Granted, Griffin does nothing to encourage participation, but it is not susceptible to the charge levied against other approaches to rights (especially the Roe-informed approach), that it fosters selfish individualism rooted in entitlement. Instead, the complex inquiry suggested by Griffin emphasizes that injury or victimization is not enough to invoke a rights remedy; injury of a participation-destroying character is needed.

291. See supra note 15 and accompanying text for a discussion of the current trend to criminalize hate, particularly through federal legislation.

292. E.g., Lawrence, et al., supra note 282, at 1. Matsuda and her co-authors begin their book by pronouncing that:

Of late, there has been an alarming rise in the incidence of assaultive speech. Although this is hardly a new phenomenon . . . it is a social practice that has gained new strength in recent years. Incidents of hate speech and racial harassment are reported with increasing frequency and regularity, particularly on American college campuses, where they have reached near epidemic proportions. The National Institute Against Prejudice and Violence in its 1990 report on campus ethnoviolence found that 65 to 70 percent of the nation's minority students reported some form of ethnoviolent harassment, and the number of college students victimized by ethnoviolence is in the range of 800,000 to 1 million annually.

Id. (citing Howard Ehrlich, Campus Ethnoviolence and the Policy Options (National Institute Against Prejudice & Violence, Institute Report No. 4, Mar. 5, 1990)).

293. Anti-hate legislation takes two broad forms: enhancement statutes and independent legislation. Enhancement statutes increase the penalties for violations of existing criminal enactments when motivated by a prohibited category. For example, California law states:

[any crime which is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in the state prison or in a county jail not to exceed one year . . . if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation . . . .

CAL. PENAL CODE § 422.7 (West Supp. 1996). See also CONN. GEN. STAT. ANN. § 53a-40a (West 1994) (providing greater penalties for repeat hate crime offenders); D.C. CODE ANN. § 22-2404.1 (Supp. 1995) (making racial animus aggravating factor in murder prosecution); FLA. STAT. ANN.
has emerged in the context of a vast expansion of penal legislation on the federal level\footnote{294} and a widespread movement to respond harshly to crime.\footnote{295}

\begin{quote}
§ 775.085 (West 1992) (enhancing penalties for defendants who act with racial animus); ILL. ANN. STAT. ch. 720, para. 5/12-7.1 (Smith-Hurd 1993) (providing enhanced penalties for "hate crimes"); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 1990 & Supp. 1996) (providing enhanced penalties when racial animus is shown in assault & battery cases); MINN. STAT. ANN. § 609.2231 (West Supp. 1996) (increasing degree of offense and enhancing penalties for assault motivated by bias); MO. ANN. STAT. 574.090 (Vernon 1995) (defining crime of "ethnic intimidation"); MONT. CODE ANN. § 45-5-222 (1993) (providing for sentence enhancement for hate crimes); N.H. REV. STAT. ANN. § 651:6 (1994) (providing for extended prison terms for commission of hate crimes); 18 PA. CONS. STAT. ANN. § 2710 (1995) (defining crime of ethnic intimidation); VT. STAT. ANN., tit. 13, § 1455 (1994) (defining "hate motivated crimes"); WIS. STAT. ANN. § 939.645 (West 1995) (same). Other statutes define the impermissible action independently of other penal enactments. See IDAHO CODE § 18-7902 (1995) ("It shall be unlawful for any person, maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin . . . ."); see also MD. ANN. CODE art. 27, § 470A (Supp. 1995) (providing for enhanced penalties when violation occurs because of race or religious beliefs); N.J. STAT. ANN. 2C:33-11 (West 1995) (providing for greater penalties for defacing property with symbols that threaten violence); N.Y. PENAL LAW § 240.30 (McKinney 1996) (making aggravated harassment on account of race a misdemeanor); OHSO REV. CODE ANN. § 2927.12 (Anderson 1995) (providing for greater penalties when crime involves ethnic intimidation); OKLA. STAT. ANN tit. 21, § 850 (West 1995) (same); OR. REV. STAT. § 166.165 (1994) (same); S.D. CODIFIED LAWS ANN. 22-19B-1 (1995) (prohibiting harassment because of victim's race, religion, ancestry, or national origin); UTAH CODE ANN. § 76-3-203.3 (1995) (outlining penalties for hate crimes); WASH. REV. CODE ANN. § 9A.36.080 (West 1995) (defining offense of "malicious harassment" as race-based offense); W. VA. CODE § 61-6-21 (1995) (making intentional violation of person's civil rights criminal offense). Both types generally define the unlawful act as acts motivated "because of" ("based on," "on the basis of," "by reason of," etc.) race, color, sex, religion, or sexual orientation. This form is similar to Title VII, the federal employment discrimination statute, a point Chief Justice Rehnquist invoked in upholding the Wisconsin statute. See Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993) ("Title VII, for example, makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin.' ") (quoting 42 U.S.C. § 2000e-2(a)(1)). These enactments are heavily influenced by, if not expressly modeled on, the Anti-Defamation League's Model Legislation. Anti-Defamation League's Model Legislation: A Primer for Action, reprinted in Bias Crime, supra note 15, at 206-09; ADL Model Legislation, reprinted in Bias Crime, supra note 15, at 210-13.


\footnote{295} This is evidenced in penology by the construction of so-called "super-maxi" prisons, such as California's Pelican Bay and the federal government's new prisons in Florida and Colorado, all of which offer long-term isolated detention to punish recalcitrant inmates. Recent years have seen incarceration rates in the United States rise to record levels, see Alexander Cockburn, Criminal Justice? Crime Bill Will Mean Packed Prisons, DETROIT FREE PRESS, Aug. 29, 1994, at 7A (noting rapid rise in prison population); a boom in prison construction, see T.J. Becker, Making Corrections: Raising Demand for Prisons Fortifies Role of Developers, CHI. TRIB., May 22, 1994, at Real Estate 1 (noting problems facing prison builders in time of high demand for more prisons); and a flood of tough, often draconian prison reform measures, characterized by longer terms under more austere conditions for convicts. See Peter Baker, Allen Offers Plan to Abolish Parole, WASH. POST, Aug. 17, 1994, at A1 (documenting high costs associated with "no-parole" proposal); Rick Bragg, Chain Gangs To Return to Roads in Alabama, N.Y. TIMES, Mar. 26, 1995, at A9 (documenting return of "chain gangs" among correctional methods); Crime is at Top of Many State Agendas: Bills Facing Legislatures Call for Tough Remedies, BOSTON GLOBE,
In this shadow, concern that civil rights legislation from the nineteenth-
and twentieth-century Reconstruction periods are inadequate to end, de-
nounce, or remedy hate-motivated violence has spawned a movement to
criminalize hate in the federal system and, informed by a tendency toward
stern criminal legislation, produced "enhancement statutes" which extend
criminal penalties for crimes motivated by hate. This approach has splin-
tered civil rights advocates, reinvigorated a long-banished free expression de-
fense for civil rights violations, and, perhaps most troublesome, given support
to those who would cast civil rights law as concerned fundamentally with
"hate"—a narrow and restrictive conception that would not only limit the
effectiveness of civil rights statutes, but also makes such statutes even more
susceptible to attack as restrictions on free expression.

Characteristic of this effort is the federal Freedom of Access to Clinic
Entrances Act of 1994. It provides criminal and civil penalties for acts of
violence against persons seeking to exercise their right to abortion. The stat-
ute responded to a real void in civil rights law, highlighted by the Supreme
Court's decision in Bray. While the Clinic Entrances Act also raises the
free expression concerns that have plagued anti-hate legislation, it and the
growing list of federal criminal enactments have further inspired criticism
highlighting the devastating effect such legislation is said to have on state
sovereignty in "Our Federalism."

Notwithstanding the urgency of responding to ethnic-related violence,
hate crimes, and other invidious conspiracies, the Court's reluctance to em-
ploy other civil rights statutes to meet this task has likely been well-founded.
In United States v. Guest, the Court was properly reluctant to sanction the
unqualified use of § 241 in response to private conspiracies of this sort be-
cause that section most closely resembles § 1983. The § 1983 model, as has

Jan. 24, 1994, at 6 (discussing public pressures on legislatures to craft anti-crime legislation); D.
Richard deSilva, Kelly Signs Law That Delays Parole for Violent Offenders, WASH. POST, June
23, 1994, at B1 (discussing D.C. law requiring violent offenders to serve greater portion of sen-
tence before being eligible for parole).

296. These efforts include a federal reporting statute, The Hate Crimes Statistics Act, 28
U.S.C.A. § 534, and most recently, Title IV of the Violent Crime Control and Law Enforcement

297. See supra note 293 for examples of the enhancement statutes recently enacted in a
number of states.

298. Free speech, despite the threat presented by anti-hate legislation, has emerged all the
more unassailable. Professor Franklyn Haiman's response to campus speech codes exemplifies
the strong defenses offered for broad free speech rights. See Franklyn S. Haiman, "Speech
Acts" and the First Amendment 81-86 (1993) (arguing that law cannot prohibit all that is
immoral in democratic state).


anti-abortion protesters did not discriminate against women as class when blocking access to
abortion clinics).


302. See id. at 760 (noting that conspiracy to impede interstate travel, regardless of racial
animus, is actionable under § 241).
been demonstrated, is unsuited to protecting broad citizenship rights precisely because its diminution of the role of state law cannot be restricted to that context.

The Griffin Court confronted a case brought under the appropriate statute and presenting a clear case of citizenship-diminishing terror. Cabining § 1985(3) by emphasizing its concern with "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment," the Court mastered the sundry dilemmas currently vexing defenders of anti-hate legislation. Griffin's approach to rights responds specifically to the delegitimization of government that ethnic-related violence of all sorts is said to present. Griffin's concern with delegitimization frees the statute from the troublesome concern with the perpetuation of "hate." Consequently, Griffin does not concern speech, as such, but rather the subjugation of the conspiracy's subjects.

Similarly, Griffin is freed of the often inapposite concern with state action. Its unique approach to rights allows federal courts to dispense with state action queries without subsuming state tort law into the statute. Griffin's broader and more appropriate coverage, in comparison with the state-action based § 1983, is illustrated by examining the beating of a person by several others.

In the easiest case, "The State Lynching," the victim is a member of an "oppressed" group, conforming with a protected classification, victimized for violating the conditions of that oppression. The perpetrators are a mob of oppressors, occupying government offices, intent on enforcing the subordination of the oppressive regime.

This staid tale easily represents a remediable violation of rights protected by § 1983. The beating precipitates the deprivation of equal protection and perhaps due process; its origin in the acts of state officers provides the state action. Importantly, however, the oppressor/oppressed identification is here generally irrelevant, apart from the secondary concern with the officer's intent. All that need be shown is their intent relative to the right deprived.303 The identity of the victim as a member of an oppressed group becomes relevant, and only somewhat so, for an allegation of deprivation of equal protection under the Fourteenth Amendment. The ease of application of the § 1983 model ends here, however. Any and all changes to these facts will weaken or destroy the rights claim.

If the crowd is no longer exclusively officers, or are acting under dubious authority, or are acting in contravention of express public policy, the ease of identifying or vindicating a right under the § 1983 model is immediately lost. Importantly, this second case, "The Semi-State Lynching," raises questions beyond that of the ability of the victim to receive monetary retribution from

the state. The Semi-State Lynching calls into question the very existence of a right because the attributability of the actions to the state is weakened.

Moreover, the § 1983 model requires articulation of the underlying right. Creating a potential third case, "The State or Semi-State Incident," any suggestion that the incident is not a constitutional violation, or is justified, or, in its equal protection form, is not motivated by the victim's identity operates to deprive the victim of § 1983's protection. This transformation, in turn, suggests that the federal government has no concern.

The second and third cases presuppose that no legitimacy interests are at stake. Because they operate on the margin of the § 1983 rights model, they become the font of formative disputes over appropriate state behavior and inherent human right. However, they also manifest the whims of public perceptions on these questions in the particular circumstance, placing the obligation of making these determinations on the relatively democratically-unresponsive judiciary. This unresponsiveness, of course, works in both directions, ensuring the vindication of unpopular applications of popular rights (like freedom of expression), but more often precipitating the popular application of non-rights (such as an alleged co-equal "right" of criminal victims alongside criminal defendants). In those cases, public biases are manifest, albeit less directly but perhaps more insidiously, to invoke the absolute and imprescriptible nature of "rights" in order to validate little more than the continued tyranny of the majority.

A fourth case, the "Incident," never becomes the topic of these debates since neither state action nor underlying rights are found. The victim of the incident is beaten perhaps, but by private individuals or in an effort to lawfully detain or restrain. The universe of these four cases suggests, by definition, their ability to cabin all significant threats to identifiable "rights" and all incidents of pending state illegitimacy. However, it seems improbable that such a view accurately depicts life during the Reconstruction era or represents an accurate picture of contemporary challenges to "right" and state legitimacy.

On matters of substantive right, the § 1983 approach is strained in such a way that claims of right prove increasingly valuable. Conceived under the Roe model, a claim of right invokes and works to construct a list of rights. Because these rights, once identified, imply their own imprescriptibility, the tension between rights and state tort law is aggravated, resulting in judicial resistance to add to an increasing list of rights. This resistance itself contributes to the perception that some rights infringe on state tort law, as similar circumstances are read differently, constituting recognized and unrecognized rights.

The Court's decision in Paul v. Davis is illustrative. In Paul, Justice Rehnquist characterized as "mere tort" the posting of the plaintiff's name

and image as an “active shoplifter” by local law enforcement officers. Due process was not violated, Rehnquist argued, because no recognized interest was deprived. What drove this assessment is the view that defamation is not a constitutional violation. However, it required the current Chief Justice to engage in spectacular verbal gymnastics to explain why limitations on the right to buy alcohol violate a protected interest while incursions on a criminal defendant’s reputation do not.

The questions are no easier when the Court views rights through the lens of Brown. Brown demands a showing of institutional disconformity with public values, an inquiry that all too often demands recalcitrant or conspiratorial public officers. Jurists, reluctant to invoke the mechanisms of structural reform, are also reluctant to recognize such complete infestation of lawlessness in political bodies, except perhaps in cases evidencing outright defiance of the federal judiciary.

For the run-of-the-mill case, therefore, § 1983 operates between these models. Courts locate violations, conceived of as the actions of particular officers, only when there is evidence of larger significance to take the discussion out of the realm of “mere tort.” Significantly, this is not an allegation of judicial reticence or bias precipitated by reluctant jurists, although jurists are reluctant to exercise federal power. Rather, the current status of post-Revival § 1983 doctrine itself manifests such an approach. In municipal liability cases, the focus has turned to who in an institution has the authority to make decisions, even if such decision-making power is not attributed to anyone in particular. In procedural due process cases, where attributability of the actions to the state is presumed, the court has resisted requiring a showing of “significance,” but has limited such actions to intentional behavior and excused them if post-deprivation remedies (state tort remedies) are available. Although perhaps reasonable on their own terms, these limitations doubtless confuse the uninitiated who, unprepared for the malleability of “rights,” reads § 1983’s simple language as providing a remedy for the deprivation of rights.

The Griffin construct proves more effective for its breadth and depth of coverage. It duplicates the § 1983 model’s coverage of the State Lynching, although importantly only because the effect can be said to diminish the

305. See id. at 679 (referring to plaintiff’s complaint as stating “classical claim for defamation”).
306. Id. at 712.
307. See Wisconsin v. Constantaneau, 400 U.S. 433, 437-39 (declaring statute which authorized posting of alcoholic’s identity to be violation of due process).
308. See Section 1983 Discourse, supra note 62, at 1750 (asserting that federal courts use tort doctrines to limit scope of § 1983).
310. See Hudson v. McMillian, 503 U.S. 1, 7 (1992) (rejecting requirement that plaintiff suffer significant injury for cognizable claim under Eighth Amendment).
value of a system of laws, as all lynchings do. The key difference between the models is the Griffin model’s focus on the effects of the beating, deprivation, or attempt. It sanctions efforts to diminish the benefits of a system of laws, not any selective number of important laws.

Importantly, it is in the marginal cases where the Griffin right proves most beneficial. The Griffin right covers, and seems to have been appropriately designed to cover, the perhaps frequent Reconstruction era cases where officers of Reconstruction governments defied the authority of their superiors and terrorized segments of the citizenry. The Griffin model, extending protection without the requirement of underlying rights violations, appropriately anticipates the delegitimization of the rule of law that might occur in the absence of such violations. Indeed, it also appears appropriate that the Griffin construct applies without a finding of discrimination, as such. Certainly, the value of a system of laws was slight for the former slave who sought to escape a Mississippi River Valley plantation for homesteading land in the territories but was stymied by other freedmen invested in maintaining the plantation economy. In terms of depriving the victim of equality of citizenship, it must have mattered little to such a person if their compatriot were motivated by race, or a more complex justification (however race-influenced), or even if they were acting on behalf of a former planter (whose motivations might vary as well).312

Griffin, in ensuring equality through the prohibition of conspiratorial limitations on that equality, escapes the public/private dilemma that demands

312. As political scientist Adolph Reed, Jr. described allegations against the Nation of Islam, the relative unimportance of shared race, even generally shared religious and political beliefs, to the diminution of individuals’ citizenship is clear:


The Uhuru Kitabu bookstore in Philadelphia, for example, was firebombed in 1970 when its proprietors—former Student Non-Violent Coordinating committee workers—refused to remove a Malcolm X poster from the store’s window after threats from local Muslims. . . . In 1972 strife within New York’s Temple Number 7 culminated in a three-hour fight and shootout that began in the mosque and spilled outside. A purge of remaining Malcolm X loyalist followed in New York and elsewhere, and factions within the Nation were implicated in assassinations of outspoken followers of Malcolm in Boston and in Newark, where the presiding minister of the Mosque were gunned down.

Most chilling, in January 1973 a simmering theological dispute with members of the Hanafi Islamic sect in Washington ignited into an attack of which only zealots or hardcore killers are capable. Seven Hanafis were murdered in their 16th Street residence, owned by Kareem Abdul-Jabbar; five of the victims were children, including babies who were drowned in the bathtub.

Adolph Reed, Jr., The Rise of Louis Farrakhan (Part I), Nation, Jan. 21, 1991, at 52-54. If true, these incidents imply more than mere murder and errant terror. They suggest a program of political and ideological suppression, antithetical to a democratic society. The victims of this violence can in no way be said to be capable of full participation in a society of laws or a democratic polity. No further speculation is necessary on the motivations of the Nation of Islam’s Fruit of Islam, the Hasidic Shorim in Williamsburg Brooklyn, see infra note 313, or any private security service from warehouse guards to neighborhood watches. What is clear is the effect these groups or errant conspiracies might have on citizens’ ability to access the system of law under which we presumably live, if their force is used invidiously.
state action to protect indistinguishable individuals. It first gives meaning to
a rights-based constitutionalism in a society fraught with parochial divi-
sions, and does so without disrupting the federal balance. Section 1983,
however powerful a tool for enforcing rights (especially individual rights),
has proved less than up to the task of resolving the deep and pervasive biases
that have made some of this Constitution's citizens less than equal. Section
1983's failure has come not on the hugely consequential and equally funda-
mental social class divisions in society, but on the concededly problematic
invidious bases of race, gender, national origin, and religion. In these cases,
regrettably, constitutional rights adjudication turns a color-blind eye to rea-
ality in order to artificially oppose the individual to the state.

Importantly, § 1983 claims are not superseded but supplemented by this
construction. The Griffin reading is not a comprehensive enforcer of rights,
but neither is the § 1983 approach. The Griffin construction cannot aid vic-
tims deprived of their rights or injured where those deprivations are not in-
vidiously-based. Under Griffin, § 1985(3) might offer protection in any of
the above listed cases. What matters is the invidiousness of the conspiracy,
and the related effect on the enjoyment of the system of laws. This might
prove to be a substantial limitation for some, most notably prisoners. This

313. Griffin easily provides a remedy for such cases without the need for specific anti-hate
legislation and where § 1983 fails. Griffin's remedy, moreover, remains available where the
harm is to the victim's ability to participate in the political community but where “hate” as such
would be difficult or impossible to prove.

Consider, for example, inter-community tension in plural communities like those of Brook-
that the “Shorim,” a volunteer Hasidic patrol group, “terrorized” them in that shared
community. If true, § 1985(3) could be invoked without having to show that Hasid or Shorim members
hate Hispanics. If they were municipal officers, the group's claim “We're fighting crime, not
Hispanics,” Pamela Newkirk, Ice Slowly Thawing Ethnic Tension Seen Lessening, Newsday,
July 28, 1991, at 1, might prove an insufficient explanation of the alleged beatings of fellow
citizens, whatever racial motivation might underlie it. However, to prevail under § 1983, state
action must be shown, which is an unnecessary showing under Griffin. Although the failure of
the New York City police to protect Hispanic citizens from bad treatment could be alleged as a
basis of a § 1983 claim, thus providing the state action requirement, similar arguments have
already been rejected as the basis for such suits. See Deshaney v. Winnabago County Dep't of
Soc. Serv., 489 U.S. 189, 197-203 (1989) (rejecting argument that failure of state officials to pre-
vent child abuse constitutes state action for § 1983 purposes).

Griffin would, perhaps more importantly, aid where the focus of the terroristic activity was
a fellow community member accused of siding with the hated other or just holding the wrong
view. All too often the price of diversity in a pluralistic polity is forced allegiance within particu-
lar sub-communities. The Brooklynites' § 1983 case would be weaker if the victims had not been
Hispanic. In such a case, even where state action is presumed, neither equal protection claims
based on race nor the underlying “significance” showing demanded by the current substantive
views of rights is satisfied. The presumption in all circumstances is that the value of the person's
equality before the law is unaffected if the beating is not manifested by Bull Connor's police
force. In effect, § 1983 doctrine has increasingly demanded exceptional circumstances; Griffin
gives such circumstances full credit for their insidious and detrimental effect on citizens.

314. Prisoners might not be able to avail themselves of § 1985(3)'s protection, so read, as
they have categorically already been deprived of the greater part of their citizenship. Nor could
free citizens, no matter how severe their loss, employ § 1985(3) absent a showing that the dimi-
determination is difficult, but it is not unlike other determinations judges (and perhaps fact-finders) regularly make. For those who can make the showing—a substantial injury, enough to be said to diminish their equal citizenship—the fundamental basis of constitutional citizenship, equality, ought be protected. Absent both of these showings, however, § 1983 remains an important, if limited, remedy.

Conclusion

Section 1985(3) protects equal citizenship; § 1983 protects equal enjoyment of rights. Together, the citizenry is protected from wholesale diminution of rights and specific, if incremental, deprivations thereof. Without the Griffin reading of § 1985(3), the citizen risks the manufacture of inequality though insidious private action which threatens the social contract inherent in standard understandings of constitutionalism, breeding distrust in the federal government and thereby the very Union the Civil War was fought to unite and the Reconstruction sought to preserve (on new terms).

In Novotny, Scott, and Bray, the Supreme Court has hamstrung Griffin, making it, at best, a dead letter. The paradox is that, during the same time that the § 1983 approach has come to be regarded as excessive and unbounded by some Justices, the same conservative Supreme Court Justices have imported it to § 1985(3) adjudication to deprive that statute of Griffin’s unique balance. The result is the worst of both worlds: § 1983 is artificially restricted to the worse cases; § 1985(3) is left with virtually no scope of coverage. It is transformed into a limited “know it when I see it” statute that deprives civil rights adjudication of the semblance of “law” in favor of an amorphous, unprincipled, and potentially unbounded ad hoc characterization of rights deprivation that the very courts responsible for this transformation now criticize civil rights law for being. Contrary to the intuition of some, this move to an ad hoc approach has meant the death, not the revitalization, of the statute.

---

315. See Marx, supra note 216, at 12 (arguing that while state may abolish discrimination, private actors continue to operate in discriminatory manner).