The Class-Based Animus Requirement of 42 U.S.C. 1985(c): A Suggested Approach

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Note

The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach

I. INTRODUCTION

Section 1985(c)1 was originally enacted in 1871 as part of the Reconstruction-era civil rights legislation.2 Popularly known as the Ku Klux Klan Act,3 section two of the statute granted a civil remedy to any person or class of persons injured by a conspiracy to deprive them of equal protection of the laws or of equal privileges or immunities under the laws.4 As its

1. 42 U.S.C. § 1985(c) (1976). The statute provides in relevant part:
   If two or more persons . . . conspire or go in disguise on the high-
way or on the premises of another, for the purpose of depriving, either
directly or indirectly, any person or class of persons of the equal pro-
tection of the laws, or of equal privileges and immunities under the
laws . . . in any case of conspiracy set forth in this section, if one or
more persons engaged therein do, or cause to be done, any act in fur-
therance of the object of such conspiracy, whereby another is injured
in his person or property, or deprived of having and exercising any
right or privilege of a citizen of the United States, the party so injured
or deprived may have an action for the recovery of damages, occa-
sioned by such injury or deprivation, against any one or more of the
conspirators.

Prior to 1976, section 1985(c) was codified as 42 U.S.C. § 1985(3). Although this Note will refer to the section as section 1985(c), many of the cases and secon-
dary sources cited throughout this Note refer to the section as section 1985(3).

tion were enacted after the Civil War to guarantee enforcement of the rights
secured by the thirteenth, fourteenth, and fifteenth amendments: Act of Apr. 9,
1866, ch. 31, 14 Stat. 27 (outlawing Southern Black Codes); Act of May 31, 1870,
433 (protecting voting rights); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (the Ku
Klux Klan Act); Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial dis-
crimination in public accommodations).

3. The Act was originally entitled, “An Act to enforce the Provisions of the
Fourteenth Amendment to the Constitution of the United States, and for

4. Section two provided in relevant part:
   That if two or more persons within any State or Territory of the United
States . . . shall conspire together, or go in disguise upon the public
highway or upon the premises of another for the purpose, either di-
rectly or indirectly, of depriving any person or any class of persons of
the equal protection of the laws, or of equal privileges or immunities
under the laws . . . each and every person so offending shall be
deemed guilty of a high crime, and, upon conviction thereof . . . shall

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popular name suggests, the Act was designed to provide a remedy for Klan violence that many states refused or were unable to provide in the lawless conditions that existed in southern states during the post-Civil War period.\(^5\)

The statute lay dormant for many years,\(^6\) due primarily to the strict constructionism of a notably hostile Supreme Court.\(^7\) The Court's tendency to narrowly construe the civil rights statutes became evident soon after their enactment. In *United States v. Harris*,\(^8\) the Supreme Court declared the criminal analogue to section 1985(c)\(^9\) unconstitutional on the ground that

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be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor . . . or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured . . . or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages . . . against any one or more of the persons engaged in such conspiracy . . . .

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5. The Ku Klux Klan Act provided both civil and criminal penalties for deprivation of federal rights and gave the President the power to suppress violence when states failed to do so in certain situations. President Grant's message to Congress illustrates one of the main concerns behind the Act:

To the Senate and House of Representatives:

A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . That the power to correct these evils is beyond the control of State authorities I do not doubt . . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.


9. The criminal analogue to section 1985(c) provided:

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 . . . each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, 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.

REV. STAT. § 5519 (1875) (enacted during 1873-1874 congressional session). Section 5519 was originally part of section 2 of the Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).
the statute was beyond Congress' power to enact. In Collins v. Hardyman, the first Supreme Court case to directly consider section 1985(c), the Court imposed a state action requirement, reasoning that the statute could not reach conspiracies to deprive others of equal protection of the laws unless "some manipulation of the law or its agencies" was involved.

The Court's restrictive approach gradually eased, as evidenced by cases such as United States v. Price and United States v. Guest, which revitalized section 241, the closest remaining criminal counterpart to section 1985(c). Yet it was not

10. United States v. Harris involved an alleged conspiracy by twenty white men to deprive four arrested black men of equal protection by beating, wounding, and mistreating them. 106 U.S. at 629-31. The Court was operating under a strict severability rule, first applied in United States v. Reese, 92 U.S. 214, 221 (1876), which required the Court to find an entire statute unconstitutional if any construction of the statute exceeded Congress' power. In Harris, the Court reasoned that since the statute was directed at private conduct, it could not stem from the fourteenth amendment, and that since it could be extended to a conspiracy of two or more free white persons, it could not be authorized by the thirteenth amendment; therefore, it was held unconstitutional. 106 U.S. at 640-41. This method of constitutional analysis was later rejected by the Supreme Court in United States v. Raines, 362 U.S. 17, 24 (1960).

11. 341 U.S. 651 (1951). Collins involved an alleged conspiracy by private individuals to disrupt a political meeting called to adopt a resolution opposing the Marshall Plan. Id. at 653-54.

12. Id. at 661. The imposition of a state action requirement was clearly designed to avoid the "constitutional problems of the first magnitude" (i.e., lack of authority under the fourteenth amendment), id. at 659, that were recognized in United States v. Harris, 106 U.S. 629 (1882). See notes 8-10 supra and accompanying text. Although the Court did not directly confront the Harris precedent, which had struck down a virtually identical statute as unconstitutional, it must have recognized the need to either overrule Harris or distinguish the statute. The Court chose the latter alternative and distinguished section 1985(c) by imposing the state action requirement. See generally Gressman, supra note 7, at 1355-57.

13. 383 U.S. 787 (1966). Price involved an alleged conspiracy between law enforcement officials and fifteen private individuals to assault and kill three blacks who had been released from prison on an unpaved road in the middle of the night. The Court broadened the definition of state action to include all willful participants in joint activity with the state or its agents. Id. at 794.

14. 383 U.S. 745 (1966). Plaintiffs in United States v. Guest alleged a conspiracy by six private individuals to deprive blacks of the right to use state facilities, the right to engage in interstate travel, and the right to equal enjoyment of places of public accommodation. The majority of the Court found that private individuals who cause the arrest of blacks through false reports of criminal activity cooperate with the state for purposes of section 241. Id. at 756. It is also significant that six Justices, in two separate concurring opinions, found that section five of the fourteenth amendment enabled Congress to reach private conspiracies under section 241. See id. at 762 (Harlan, J., concurring); id. at 777 (Brennan, J., concurring).

15. At the time these cases were decided, section 241 provided:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or
until 1971, one hundred years after enactment, that the Court in *Griffin v. Breckenridge*\(^\text{16}\) would “accord to the words of the statute their apparent meaning”\(^\text{17}\) by interpreting section 1985(c) to reach conspiracies by private persons.\(^\text{18}\) Noting the “constitutional shoals that would lie in the path of interpreting [section 1985(c)] as a general federal tort law,”\(^\text{19}\) however, the Court imposed an important limitation by requiring that “there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator’s action.”\(^\text{20}\)

Because the Court confined its decision to the particular facts involved in *Griffin*,\(^\text{21}\) the opinion left many unanswered questions, and as a result has created a significant amount of confusion.\(^\text{22}\) This confusion is apparent in subsequent lower court decisions that have attempted to determine the extent of the protection afforded by section 1985(c). Apart from the class-based animus requirement, lower courts have narrowly defined the scope of the statute by restrictively construing the conspiracy requirements,\(^\text{23}\) requiring an illegal act independent

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16. 403 U.S. 88 (1971). The alleged conspiracy in *Griffin* was an attempt by white citizens to deprive black citizens of their right of interstate travel. Mistaking one of the blacks for a civil rights worker, a group of whites forced them out of their car, and assaulted and beat them. *Id.* at 89-91.

17. *Id.* at 96.

18. “It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985[ (c) ]’s coverage of private conspiracies.” *Id.* at 101.

19. *Id.* at 102.

20. *Id.* In addition to the class-based animus requirement, the Court set forth the four basic elements necessary to state a cause of action under the statute: (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, (3) an act in furtherance of the conspiracy, and (4) resulting injury or the deprivation of any right or privilege of a citizen of the United States. *Id.* at 102-03.

21. The Court stated that “since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.” *Id.* at 107.


23. Since *Griffin*, a successful claim under section 1985(c) must allege both a conspiracy and an overt act in furtherance of the conspiracy. *See* note 20 supra. Some lower courts have also applied an additional limitation, which precludes recovery when all defendants are employed by a single corporate en-
of the section 1985(c) violation, and limiting the scope of federal rights protected against private conspiracies.

One obvious way in which the ultimate reach of section 1985(c) is affected is through a determination of which federal rights are protected. In Griffin, the Court held that thirteenth

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amendment rights and the right to interstate travel were protected by the statute against private interference, but specifically declined to state whether Congress had the power under section five of the fourteenth amendment to reach private conspiracies to deprive persons of their fourteenth amendment rights. Subsequent lower court decisions have been divided on this issue, and the most recent Supreme Court case, Great American Federal Savings and Loan Association v. Novotny, failed to resolve it. The question of which federal rights are protected by section 1985(c) is a critical one, because

application of Section 1985(3) to First Amendment Rights, 54 N.C. L. Rev. 677 (1976).

27. 403 U.S. at 105.
28. Id. at 105-06.
29. Id. at 107 ("In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment."). The Court's refusal to decide this issue, coupled with its failure to directly overrule Collins, left open the question of whether the requirement of state action still exists when a fourteenth amendment right is involved.

30. The Courts of Appeals for both the Fourth and the Seventh Circuits have held that Congress does not have the power to reach private conspiracies that violate the fourteenth amendment. The primary rationales for this approach have been: (1) to limit the scope of federal power in a traditionally state area; and (2) to avoid adopting a different approach without a Supreme Court pronouncement on the issue. Under this view, section 1985(c) can reach conspiracies to violate rights protected by the fourteenth amendment only if state action is involved. Private conspiracies to violate rights that stem from other provisions of the Constitution, such as the right to vote, the right to travel, and the right to be free of the badges and incidents of slavery, may still be reached by section 1985(c). See Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 506-07 (4th Cir. 1974); Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972).

The Eighth and Fifth Circuit Courts of Appeals have held that, through section five of the fourteenth amendment, Congress does have the power to reach private conspiracies to violate fourteenth amendment rights. See Westberry v. Gilman Paper Co., 507 F.2d 206, vacated en banc per curiam as moot, 507 F.2d 216 (1975); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971). Westberry has been followed by lower courts in the Fifth Circuit. See, e.g., Puentes v. Sullivan, 425 F. Supp. 249 (W. D. Tex. 1977). The theory that Congress can reach private conspiracies through section five is based primarily on United States v. Guest, 383 U.S. 745 (1966), in which six Justices (though not the plurality opinion) expressed the view that the section could be so construed. See id. at 763 (Clark, J., concurring); id. at 772 (Brennan, J., concurring).

31. 99 S. Ct. 2345 (1979). Novotny involved a white male who was allegedly fired by a private employer because he advocated equal employment opportunities for women. Id. at 2347.

32. The Court of Appeals for the Third Circuit held in Novotny that the commerce clause empowers Congress to provide sanctions against private conspiracies to interfere with title VII rights, but declined to confront the section 5 issue: "Inasmuch as we need not rest on the Fourteenth Amendment to justify the application of § 1985[(c)] to this case, it is not necessary at this time to re-
of the interrelationship between the rights protected under the statute and the definition of protected classes.\textsuperscript{33} Despite this connection, separate consideration of the class-based animus requirement is warranted, since the \textit{Griffin} decision requires proof of such animus in all section 1985(c) cases.\textsuperscript{34}

This Note will examine the requirement of invidiously discriminatory class-based animus as it has been applied since \textit{Griffin v. Breckenridge}. While the class-based animus requirement is superior to other limitations designed to prevent the creation of a general federal tort remedy because it gives full effect to the original congressional purpose, it has also been the most elusive and inconsistently applied of the section 1985(c) elements. Three general questions will be addressed: (1) what classes are protected by the statute, (2) what relationship the plaintiff must have to a protected class, and (3) what facts must be alleged and proven to establish that the defendants were motivated by an invidiously discriminatory animus toward the particular class. In conclusion, the Note will suggest how the class-based animus requirement could best be utilized to solve the scope of its Fourteenth Amendment foundation." Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1255 (3d Cir. 1978).

Similarly, the Supreme Court majority decided only the limited issue of whether a person injured by a conspiracy to violate section 704(a) of title VII of the Civil Rights Act of 1964 is deprived of the "equal protection of the laws" within the meaning of section 1985(c). See 99 S. Ct. at 2349. The concurring opinions did address the issue of which rights section 1985(c) protects somewhat broader terms. Justice Powell suggested that section 1985(c) was limited to only those fundamental rights derived from the Constitution and not subsequently created statutory rights. See id. at 2352-53. Justice Stevens directly confronted the section five issue, asserting that there can be "no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the state." Id. at 2355.

The dissent, authored by Justice White and joined by Justices Brennan and Marshall, concluded that the Court had an obligation to honor the terms of section 1985(c) apart from title VII, and that Congress had sufficient power under the commerce clause to prohibit and provide a remedy for invidious private conspiracies to deny title VII rights. \textit{Id.} at 2361 & n.20.


vide an effective, constitutional remedy for discriminatory actions that violate federal rights.

II. INVIDIOUSLY DISCRIMINATORY CLASS-BASED ANIMUS

The Griffin Court held only that discrimination motivated by racial bias was actionable under section 1985(c), reserving the question of whether other discrimination was covered by the statute. Lower courts have not hesitated to expand section 1985(c) to reach other class-based motives; but while virtually all lower courts have agreed that failure to allege any class-based animus is a fatal defect, there is no uniformity regarding what is required beyond mere allegation of such animus.

A. DETERMINATION OF PROTECTED CLASSES

The determination of which classes are protected is a key variable in defining the reach of section 1985(c). Despite the narrow holding in Griffin, every appellate court that has considered the issue has concluded that the section is not limited to classes defined by race. This conclusion was tacitly approved by the Supreme Court in Novotny when the majority of the Court assumed that classes based on sex were also actionable, without directly addressing the class-based animus requirement.

Since Griffin, most lower courts have extended protection to clearly defined classes such as those based on religion or sex. In cases involving less easily defined classes, however,

35. See 403 U.S. at 102 n.9 ("We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable . . .").
36. See, e.g., Poirier v. Hodges, 445 F. Supp. 838, 846 (M.D. Fla. 1978), and cases cited therein; note 34 supra and accompanying text.
38. Although Griffin v. Breckenridge . . . did not reach the issue whether discrimination on a basis other than race may be vindicated under § 1985(c), the Court correctly assumes that the answer to this question is yes. The statute broadly refers to all privileges and immunities, without any limitation as to the class of persons to whom these rights may be granted. It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(c) . . .

40. See, e.g., Life Ins. Co. of N. America v. Reichardt, 591 F.2d 499 (9th Cir.
lower courts have reached inconsistent results. For example, classes that have recently been held to be protected by section 1985(c) include the following: professors who talk to or associate with the CIA; local unions; demonstrators; supporters of a political candidate; nonunion workers and their employers; persons voting for a sham candidate; supporters of a predominantly white Catholic church disrupted by human rights demonstrators; and persons attempting to furnish advice, information, and services to migrant workers in agricultural labor camps.

Far more classes have been denied the protection of section 1985(c): employees who file complaints against their employer; bankrupts; land developers; tenant organizers; doctors who testify in malpractice suits; homeowners raided by federal drug enforcement agents; nonlawyers; and white

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47. See Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).
54. See Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976).
As the above cases illustrate, there is often no immediately discernible difference between classes that have been found to be covered by the statute and those that have not. These dichotomous results may stem from the fact that in many cases the question of class receives only cursory treatment or is simply ignored. Even courts that have offered a rationale for their decisions have found it difficult to develop a definition of class that can be uniformly applied to section 1985(c) cases. A more systematic approach is clearly warranted.

1. Legislative History of Section 1985(c)

The language of both section 1985(c) and its predecessor statute is very broad, and provides no indication that Congress intended to reach only particular classes. Congressional debates and the original statute's popular title both suggest that protection of groups terrorized by the Ku Klux Klan—white Union sympathizers and blacks—was of prime concern. During the debate on the original statute, Senator

56. See Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).
58. Compare Seizer v. Berkowitz, 459 F. Supp. 347, 350 (E.D.N.Y. 1978) (plaintiff's inability to specifically identify other class members or to prove similar conspiracies directed at such class members does not prevent finding of a protected class) with McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75 (8th Cir. 1976) (failure to allege that defendant's conduct was directed at a significant number of persons on the basis of their shared characteristics removes plaintiff's claim from the reach of section 1985(c)).
59. The language of section two of the Ku Klux Klan Act was substantially the same as the language of section 1985(c). Compare note 1 supra with note 4 supra.
60. Representative Shellabarger's remarks indicate that the purpose of the statute was to provide a remedy for the violation of the equality rights of any American citizen: "any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871), quoted in Griffin v. Breckenridge, 403 U.S. 88, 100 (1971) (emphasis in original). See notes 141-155 infra and accompanying text. Cf. Monroe v. Pape, 365 U.S. 167, 201-02 (1961) (legislative history of section 1985(c) indicates that Congress did not intend the statute to reach only activities of the Ku Klux Klan, but any conspiracy of two or more persons).
Pratt noted that laws failed "when a man of known Union sentiments, white or black, invokes their aid." Representative Perry described the Klansmen's operations as "directed chiefly against blacks and against white people who by any means attract attention as earnest friends of the blacks."

Although the protection of Ku Klux Klan victims was the most immediate concern, both proponents and opponents of the Act understood that the statute would cover other groups as well. Senator Hoar described the purpose of section 1985(c) as ensuring "that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights." Senator Edmunds' comments, later cited in the *Griffin* opinion, further illustrate the approach to the class issue that Congress originally envisioned:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

The Act also inspired extensive congressional debate over the effect that the statute might have on the federal-state balance. The *Griffin* Court was concerned about this balance as

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66. Consider, for example, the statements made by Senators Thurman and Morton during congressional debates:

> The constitutional question involved is as to the power of Congress to go into a State and punish offenses, not against the laws of the United States . . . but merely to punish . . . ordinary crimes, such as are punishable by the State law. Whenever that question shall come . . . I will show you by the decisions of the Supreme Court of the United States, as well as by the plain text of the Constitution, that you have no such power at all.


But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do
well, and clearly did not intend that by removing the state action requirement, section 1985(c) would be extended to every conceivable class. Lower courts have subsequently sought to balance the need to provide a federal remedy for discriminatory violations of federal rights with the need to prevent section 1985(c) from becoming a federal tort law. In fact, most lower courts have assiduously, if not overzealously, guarded against a broad interpretation of the statute. Although few decisions have specifically drawn from the legislative history for guidance, a variety of criteria have been proposed to define the classes covered by the statute.

2. Clearly Defined Groups

Perhaps the broadest proposed criterion to limit the type of classes covered by the statute has been the requirement that the class be clearly defined. Under this approach, if a plaintiff can show that he was denied the protection of the law because of his membership in any clearly defined group, he has established an actionable claim. Although it is desirable to require clearly defined classes, to prevent the statute from becoming a general federal tort law, a more restrictive approach is necessary. As one court aptly stated:

When the court in Griffin suggested that [class-based animus] might suffice to activate the Ku Klux Klan Act, it did not intend to sweep into that Act any conspiracy that was aimed at two or more people with a single common trait. If the statute were that panoramic, then a conspiracy directed at pedestrians who walk on a certain street, at motorists who drive on a particular road, or at people who wear blue shirts... would be equally embraced.

not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs.


67. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others... The constitutional shoals that would lie in the path of interpreting [§ 1985(c)] as a general federal tort law can be avoided by... requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.


68. See notes 49-56 supra and accompanying text.

69. See, e.g., Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) ("§ 1985((c))'s protection reaches clearly defined classes, such as supporters of a political candidate"); Bricker v. Crane, 468 F.2d 1228, 1233 (1st Cir. 1972) (no cause of action when class is neither "readily recognizable" nor one traditionally protected by the Civil Rights Act); Scott v. Moore, 461 F. Supp. 224, 229 (E.D. Tex. 1978) (discriminatory crimes must be directed towards a "discernable and definite class").


Accordingly, the requirement that the class be easily defined is merely a starting point in determining the scope of protection afforded by the statute.

3. **Groups That Possess an Intellectual Nexus Between Individual Members**

A more detailed approach to defining the scope of section 1985(c) was adopted by the Fifth Circuit Court of Appeals in *Westberry v. Gilman Paper Co.* In *Westberry*, the plaintiff alleged that defendants fired and planned to murder him because of his environmental views and related activities. The court's proposed definition of class was obviously structured with this specific allegation in mind:

> There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. ... At least [the class] must have an intellectual nexus which has somehow been communicated to, among and by the members of the group.

Section 1985(c) was thus extended to cover an employee deprived of his rights because he expressed a minority philosophical viewpoint and was associated with a group of environmentalists. Although the application of the Fifth Circuit's definition to the facts in *Westberry* has some appeal, applying such an amorphous definition to restrict the scope of section 1985(c) in future cases would have limited practical utility. Uniformity would be difficult to achieve unless a more precise definition of what constitutes an "identifiable body" and an "intellectual nexus" can be developed.

4. **Well-Established, Easily Recognized Groups**

The *Westberry* case demonstrates the difficulties inherent in a definition of class based on political or ideological belief. In an effort to avoid vagueness, some courts have allowed recovery only where a traditionally recognized or well-established group exists. For example, the court in *Silkwood v. Kerr*

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73. 507 F.2d at 209.

74. *Id.* at 215.
McGee Corp. refused to recognize a class of union organizers to which the plaintiff belonged, but acknowledged that classes such as Jehovah’s Witnesses, persons of Japanese origin, or Democrats might be protected by section 1985(c). The distinction that the court attempted to draw between union organizers and Democrats appears to revolve around the idea that a class of union organizers is defined by the plaintiff’s activities vis-à-vis the defendants, rather than by the plaintiff’s ideology or belief alone. This is a fine distinction, however, and one that is difficult to apply on a case-by-case basis.

Other courts have required that the class be an identifiable group of a certain size. In Rodgers v. Tolson, the plaintiffs alleged that they belonged to a class composed of those who are outspoken in their political and philosophical opposition to town commissioners. The court denied recovery because the plaintiffs did not “define a larger group that could be objectively identified by an observer. It is impossible to determine who besides the [plaintiffs] belong [sic] to this class; indeed, the [plaintiffs] cannot identify any other members.” Recovery has also been denied where the plaintiff admitted that “he might be the only class member in New Hampshire,” and

75. 460 F. Supp. 399 (W.D. Okla. 1978). In Silkwood, the plaintiff alleged that the owner of the nuclear power facility at which she was employed conspired with the FBI to deprive her and other workers of their equal rights through force, violence, and intimidation because of their union organizing activities, and because they filed complaints against their employer with the Atomic Energy Commission. The court denied recovery on the ground that there was neither a class-based animus nor a protected federal right involved. Id. at 407, 411.

76. Id. at 407.

77. Cf. Arnold v. Tiffany, 487 F.2d 216, 218 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974) (no section 1985(c) claim when plaintiff newspaper dealers were injured financially by defendant newspaper company, since plaintiffs “were not injured because they were newspaper dealers... but because of their activities in attempting to maintain a dealer association”); Hughes v. Ranger Fuel Corp., 467 F.2d 6, 10 (4th Cir. 1972) (no section 1985(c) claim when defendants’ attack on plaintiff was “spontaneous,” motivated by plaintiffs’ activities on that particular occasion rather than by racial or other class-based animus).

78. For example, Phaby v. KSD-KSD-TV, Inc., 476 F. Supp. 1051 (E.D. Mo. 1979) (memorandum opinion), involved the dismissal of a political reporter for KSD television who was a member of a ward Democratic club that did not endorse the sheriff. The sheriff allegedly conspired with KSD to injure the plaintiff, who had continued to cover the election for the station. Arguably, the animus involved was triggered by plaintiff’s actions vis-à-vis defendants, but the court held that plaintiff’s claim was sufficient. Id. at 1053.

79. 582 F.2d 315 (4th Cir. 1978).

80. Id. at 318.

81. Bricker v. Crane, 468 F.2d 1228, 1233 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973) (claim by a doctor who was allegedly dismissed from a hospital because he testified in a malpractice case).
where the plaintiff did not allege that defendant's conduct was "directed at a significant number of persons." Although the term "class" implies an entity of more than one person, at least one court has declined to impose the requirement that the plaintiff specifically identify other class members.

5. Groups Defined by a Trait Other than Being a Victim of the Same Conspiracy as Plaintiff

Courts have also refused to find a protected class where the group involved cannot be defined by characteristics other than merely having suffered from the same conduct as the plaintiff. For example, in *Harrison v. Brooks*, the plaintiffs asserted that they belonged to a class consisting of certain property owners allegedly injured by the rezoning actions taken by the city council. The court denied recovery, finding no relationship between the class members other than their status as victims of the allegedly discriminatory rezoning. Similarly, in *Askew v. Bloemker*, a case in which the alleged class was comprised of citizens whose homes were raided by federal drug enforcement agents on one particular night, the plaintiffs' claim was dismissed:

Plaintiffs' class members shared no common characteristics prior to the defendants' action. Indeed, their status as a "class" of victims depends entirely upon the defendants' actions, and it is not possible for defendants to have conspired to discriminate against a class that did

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82. McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75 (8th Cir. 1976), cert. denied, 429 U.S. 855 (1976) (citing McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 877 (5th Cir. 1976), aff'd in part, vacated in part, 545 F.2d 919 (5th Cir. 1977)). In *McNally*, a case in which a prisoner sued a newspaper publisher, prison officials, and a reporter for publishing a portion of a psychiatric report that was not read at a court hearing, the court found no section 1985(c) claim. *See* 532 F.2d at 69. In *McLellan*, the court held that an employee's discharge for bankruptcy did not give rise to a section 1985(c) claim. *See* 545 F.2d at 933.

83. *See* Selzer v. Berkowitz, 459 F. Supp. 347, 350 (E.D.N.Y. 1978) (plaintiff, a professor, alleged that he was denied reappointment with tenure and promotion because he had talked to the CIA; plaintiff's inability to identify other class members or prove similar conspiracies did not prevent the court from finding a section 1985(c) class). *Cf.* Azar v. Conley, 456 F.2d 1382, 1386-87 n.5 (1972) ("the protection of Section 1985[c] extends not only to . . . racial minorities but to any person [who] is the object of invidious discrimination").

84. *See*, e.g., Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975) (allegation by "legal workers" that employer and "illegal [alien] workers" conspired to subject the "legal workers" to substandard working conditions did not give rise to a section 1985(c) claim); Polier v. Hodges, 445 F. Supp. 893, 846 (M.D. Fla. 1978) (allegation by hearing aid dealer that state employees conspired to destroy his business by suspending his license did not give rise to a section 1985(c) claim).

85. 519 F.2d 1358 (1st Cir. 1975).

86. Id. at 1360.

87. 546 F.2d 673 (7th Cir. 1976).
not exist until after they had acted. As one court has stated, the class must not be a "congeries of persons who become a 'class' by virtue of the denial to them of some advantage or their involvement in a single common kind of action." Even if there is a community of interest allowing the class to be certified under rule 23 of the Federal Rules of Civil Procedure for purposes of a class action, it does not follow, according to one court, that "animus against such a group can be considered class-based, [when the group members] share no other trait—racial, religious, ethnic, sexual, geographic, or economic." Although these limitations help to avoid a general federal tort remedy, additional criteria are necessary to positively identify groups protected by section 1985(c).

6. Groups That Possess Discrete, Insular, and Immutable Characteristics

Some courts have suggested very narrow definitions that positively identify groups under the statute's protection. One court has even suggested that section 1985(c) extends only to members of a racially oppressed group or a group serving involuntarily. A more widely accepted requirement is that a class must possess "discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin, and sex." Courts base this definition on the principle that individuals should not be discriminated against because of traits for which they bear no responsibility. While this is a laudable rationale, courts appear to use it primarily to avoid overexpansion of federal jurisdiction or to ensure uni-

88. Id. at 678.
90. Kimble v. D.J. McDuffy, Inc., 445 F. Supp. 269, 274 (E.D. La. 1978) (oil industry workers who were allegedly blacklisted for making personal injury claims not protected under section 1985(c)).
94. See, e.g., Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975); Means v. Wilson, 522 F.2d 833, 842 (8th Cir. 1975) (Webster, J., dissenting); Heyn v. Board of Supervisors, 417 F. Supp. 603, 607 (E.D. La. 1976).
form application. If the definition of protected classes were the sole limitation on section 1985(c) claims, the requirement that classes be defined by immutable characteristics might be justifiable. Coupled with the other elements required by Griffin—a conspiracy, an overt act, and the violation of a protected federal right—this definition is not only overly restrictive, but it is also inconsistent with Congress' original intent. The clearly voiced concern of Congress for Union sympathizers, for example, would not be recognized under this approach.

7. **Minorities That Have Suffered Past Discrimination**

A similar, but broader definition of a protected class includes groups that have been discriminated against in the past and that constitute a minority akin to a racial minority. This concept of class has been used to allow recovery for discrimination against both women and religious groups. Although women are not a numerical minority, the Third Circuit has suggested that "[t]he fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality," is sufficient reason to include women as a group comparable to a racial minority. Similarly, the comparison of religious minorities to racial minorities can be supported on the ground that membership in a minority religious group, like membership in a minority racial group, has historically excited the "fear, hatred and irrationality of the majority."

A requirement that the class be akin to a racial minority and subject to past discrimination is defensible in light of Congress' primary purpose—to afford citizens protection from Ku Klux Klan activity—and the persistently voiced concern throughout the Congressional debates for the protection of minority rights in general. Jews, Native Americans, Hispanics,

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96. See note 20 supra.
97. See notes 61-62 supra and accompanying text.
98. See, e.g., Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1978); cases cited in note 40 supra.
99. See cases cited in note 39 supra.
102. See notes 61-65 supra and accompanying text.
and Chinese, as well as women and blacks, would certainly be protected classes under this definition. Furthermore, the notion of suspect-like classes could also be used to extend protection to groups such as aliens, ex-convicts, and the handicapped.

If past or historical discrimination is required, however, most groups defined by ideology or political belief would be excluded from the scope of section 1985(c). 103

8. The Local 1 Definition

An expanded definition of protected class was proposed in Local 1 (ACA), Broadcast Employees v. International Brotherhood of Teamsters. 104 The court allowed a local union to recover under section 1985(c) for retaliation by the international union because of the local's opposition to a merger and because of the local's support for the international's former president. 105 The court stated that "a distinction is 'invidious' and thus unlawful if it adversely affects a traditionally disadvantaged group along 'suspect' lines, is insufficiently 'rational' in light of the respective interests of each party, or unnecessarily burdens free exercise of a 'fundamental right.' "106 "A traditionally disadvantaged group along suspect lines" is virtually synonymous with the "akin to racial minority" definition of protected classes described above. In addition to groups such as women, Jews, and Native Americans, however, the Local 1 definition also reaches classes subject to an "insufficiently rational" distinction and classes engaged in the exercise of a fundamental right, if the defendant's actions unnecessarily burden the exercise of that right. 107 The inclusion of insufficiently rational classes adds little to the substantive reach of section 1985(c) if the traditional rational basis test is applied, since under that test, the defendant need only demonstrate one reasonable ground for the clas-

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103. If a past or historical discrimination requirement is imposed, many plaintiffs currently accorded status by lower courts as members of protected classes would be denied a remedy for conspiratorial discrimination. See notes 41-48 supra and accompanying text.
105. Id. at 276-77.
106. Id. at 277 (footnotes omitted).
107. Id. The court cited traditional equal protection cases as examples: Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (law that conditioned right to receive free county medical care on duration of residence abridged right to travel and was therefore unconstitutional); Graham v. Richardson, 403 U.S. 365 (1971) (discrimination against aliens, a suspect class); Dandridge v. Williams, 397 U.S. 471 (1970) (classification based on family size rationally related to the state's interest in equitable distribution of limited welfare funds). Id. at 277 nn. 24-26.
sification for recovery to be denied.\textsuperscript{108}

The court in \textit{Local I} focused primarily on the fundamental right aspect of its definition, finding a violation of the local union’s federal right to free speech,\textsuperscript{109} and therefore a prima facie section 1985(c) claim.\textsuperscript{110} This approach effectively expands the scope of section 1985(c) protection to include classes defined by ideology or belief, although there are obvious problems in accurately determining how “unnecessarily burdened” a class must be to warrant protection. These problems are not insurmountable, however, and as one court commented, A conspiracy to deprive a person of his right to free expression merely because he is a member of a group advocating an unpopular position or supporting the election of an unpopular candidate can certainly be classified as a conspiracy based on an invidiously discriminatory animus, as required by \textit{Griffin}.\textsuperscript{111}

Although the \textit{Local I} definition might not receive the approval of a Supreme Court that is hostile to federal jurisdiction over a potentially large number of section 1985(c) claims,\textsuperscript{112} the inclusion of ideological as well as suspect-like groups, if applied in concert with other requirements,\textsuperscript{113} would not open the floodgates to recovery. A federal tort law would still be avoided.

9. \textit{Protected Classes: A Proposed Definition}

As illustrated above, the Supreme Court has not set out specific criteria for determining which classes of discrimination victims fall within the purview of section 1985(c). Given the

\textsuperscript{108} \textit{See}, e.g., \textit{Dandridge v. Williams}, 397 U.S. 471, 485-86 (1970). For example, if higher rates for disability insurance for women are found to be reasonably related to women’s longer life expectancy, a discrepancy between male and female insurance rates would be rational. \textit{Cf.} \textit{Johnson v. City of Cincinnati}, 450 F.2d 796, 798 (6th Cir. 1971) (traditional standard for evaluating employment classifications based on sex has been rational basis test). \textit{But see} \textit{Life Ins. Co. of N. America v. Reichardt}, 591 F.2d 499, 502-05 (9th Cir. 1979) (insurance company’s higher rates and fewer benefits for women gave rise to a valid section 1985(c) claim). Similarly, if a private employer fires an employee because of his political beliefs and activities, relief could be denied on the ground that the dismissal was necessary to avoid a conflict of interest. \textit{Contra}, \textit{Phaby v. KSD-KSD-TV, Inc.}, 476 F. Supp. 1051 (E.D. Mo. 1979) (plaintiff’s discharge because of his membership in a Democratic organization gave rise to a valid section 1985(c) claim). In short, the rational basis standard is easily met.

\textsuperscript{109} \textit{Free speech is secured to members of labor organizations by section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) (1976).}


\textsuperscript{112} \textit{See}, e.g., \textit{Great Am. Fed. Sav. & Loan Ass’n v. Novotny}, 99 S. Ct. 2345, 2352 (1979) (“deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c)”).

\textsuperscript{113} \textit{See note 20 supra.}
confusion and inconsistency among lower court decisions, a more uniform approach is desirable. A definition of protected classes that included only easily recognized or well-established classes would aid in uniformity of application, but would only afford protection to some groups exercising first amendment rights. Although the plaintiff should be required to establish the existence of a class other than one composed of victims of the same tort, more is necessary to identify the groups protected by section 1985(c).

The most viable definition to effectuate the intent of the statute and yet limit its scope is a modified version of the approach in Local 1. The plaintiff would have a section 1985(c) cause of action if he could demonstrate that the defendants conspired against him because of his membership in a group that is (1) suspect-like or akin to a racial minority, or (2) engaged in the exercise of a fundamental right and the defendant's actions unnecessarily burden the exercise of that right. This definition falls between the requirement that the class possess discrete, insular, and immutable characteristics, an approach that is too restrictive in light of Congress' intent to protect all groups subject to the organized lawlessness of the Klan, and the definition suggested by the Westberry court, requiring that the plaintiff demonstrate an "intellectual nexus" between himself and an identifiable body, an approach that is both vague and difficult to apply.

Under the first element of the definition, the fact of past discrimination could be used to determine the degree of similarity between the proposed class and a suspect class such as a racial minority group. Thus, suspect-like classes would potentially include groups defined by race, sex, national origin, religion, physical disability, and affectional preference. Under the second element, courts could apply a balancing test to determine whether a fundamental right has been unnecessarily burdened. Such a test has been suggested by one commentator to determine the federal rights protected by section 1985(c), but

114. See notes 69-71 supra and accompanying text.
115. See notes 84-90 supra and accompanying text.
116. See note 105 supra and accompanying text.
117. See notes 63-65 supra and accompanying text.
118. See notes 72-74 supra and accompanying text.
119. See Comment, Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co., 90 HARV. L. REV. 1721, 1731-32 (1977) (limitation of section 1985(c) could be accomplished by "establishing a sphere of private autonomy which is removed absolutely from the purview of the statute, or
it is equally applicable to a determination of classes covered by the statute.

Several courts have suggested this balancing approach. In *Crawford v. City of Houston*, the plaintiff alleged that city officials discriminated against him because of his expressed views on the nonaddictive nature of marijuana. The court denied the defendant's motion to dismiss, noting that "[t]he validity of the distinctions drawn by the defendants will depend on whether, and the degree to which, governmental interests are furthered by this differentiation." Similarly, in *Glasson v. City of Louisville*, the court found a valid section 1985(c) cause of action where city police officers destroyed the plaintiff's protest sign because its message was critical of the President. The court examined the government's interest in preventing the provocation of the crowd on a motorcade route, found that this was only a minor consideration, and concluded that the classification of persons whose signs opposed the President was invidious. Therefore, the court reasoned, section 1985(c) applied.

A balancing test could be utilized in all cases involving classes defined by the exercise of a fundamental right. In *Brown v. Villanova University*, for example, the plaintiffs alleged that among the students who participated in a mass violation of a dorm visitation rule, more severe punishment was imposed on members of the "Ad Hoc Committee" that presented student grievances to the University administration. Under the proposed definition, the members of the "Ad Hoc Committee" would be protected by section 1985(c) if a court found that the students' right to free speech outweighed the University's interest in maintaining the status quo.

by balancing privacy and associational interests against the government's interest in preventing discrimination in each situation.

121. Id. at 194.
123. 518 F.2d at 912.
125. Id. at 343-44.
126. It should be noted that some courts have denied recovery under section 1985(c) for private infringement of first amendment rights because of the absence of state action. See, e.g., Doski v. M. Goldsiker Co., 539 F.2d 1326, 1333 (4th Cir. 1976); Murphy v. Mount Carmel High School, 453 F.2d 1189, 1193-95 (7th Cir. 1976); Baer v. Baer, 450 F. Supp. 481, 492-96 (N.D. Cal. 1978). Other courts have allowed recovery in such situations, reasoning that section five of the fourteenth amendment authorizes congressional action to protect free speech from private conspiracies. See, e.g., *Action v. Gannon*, 450 F.2d 1227, 1233-37 (8th Cir. 1971); *Puentes v. Sullivan*, 425 F. Supp. 249, 251-53 (W.D. Tex. 1977).
Groups defined by religious belief could be protected under either the suspect-like class or the fundamental rights approach. Although a minority religious group may be considered akin to a racial minority, the notion of suspect-like classes would have to be stretched considerably to reach the conclusion in *Action v. Gannon*,\(^\text{127}\) that a white Catholic parish can be protected under section 1985(c).\(^\text{128}\) The more appropriate analysis in that case, which the court arguably adopted, is an analysis of whether the church members' religious freedom was unnecessarily burdened by the black militants' disruption of church services.\(^\text{129}\)

Political and union activists would also be protected under this definition. In *Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe*,\(^\text{130}\) a case in which supporters of one candidate allegedly infringed on the voting rights of supporters of an opposing candidate by tampering with the election results, the court found no class-based animus.\(^\text{131}\) Under the proposed definition, section 1985(c) would apply because of the burden on the exercise of voting, a fundamental right. In both *Arnold v. Tiffany*\(^\text{132}\) and *Silkwood v. Kerr-McGee Corp.*,\(^\text{133}\) union organizers were not af-

\(^{127}\) 450 F.2d 1227 (8th Cir. 1971).

\(^{128}\) It seems clear from the facts in this case that the defendants were stimulated to disrupt the church services by racial and economic motives. . . . [The defendants] made these demands to a predominantly white parish [and] to other white churches. . . . The premise underlying the selection of [these] targets is that these churches have substantial amounts of money, the use of which [defendants] hoped to control for the benefit of economically deprived black people. *Action v. Gannon*, 450 F.2d 1227, 1232 (8th Cir. 1971).

\(^{129}\) See id. at 1232-33.


forded class protection under section 1985(c).\textsuperscript{134} Union organizers would, however, qualify as members of protected classes under the proposed definition if their freedom of association was unnecessarily burdened by defendants' retaliatory actions. Similarly, in \textit{Phaby v. KSD-KSD-TV, Inc.},\textsuperscript{135} a case in which the court held that membership in a Democratic club was sufficient for purposes of section 1985(c), the issue under the proposed analysis would be whether an individual's right to political affiliation outweighs the employer's interest in preserving the appearance of political impartiality.\textsuperscript{136}

This proposal would not dramatically expand the scope of section 1985(c), since it would require the plaintiff to demonstrate that the defendants conspired against him because of his membership in a suspect class or a group engaged in the exercise of a fundamental right. These limitations would deny section 1985(c) protection to alleged classes that are merely the products of "imaginative" pleading,\textsuperscript{137} and groups that are clearly beyond the intended scope of the statute. Bankrupts,\textsuperscript{138} newcomers,\textsuperscript{139} and nonlawyers,\textsuperscript{140} for example, would remain unprotected classes under the proposed definition.

B. PLAINTIFF'S MEMBERSHIP IN A PROTECTED CLASS

In addition to establishing that the class is protected under

\textsuperscript{134} [This court rejects] claims of class-based animus allegedly directed towards groups which did not tend to exist prior to the occurrence of the events set forth in the complaint and which tend to be defined by one particular activity or by plaintiff's individual situation. [If the court were to hold that] animus directed against employees... who were organizing a union [provides the necessary motivation element], § 1985(3) could become applicable to all conspiratorial interferences with the rights of others... .

\textit{Id.} at 407.

\textsuperscript{135} 476 F. Supp. 1051 (E.D. Mo. 1979) (memorandum opinion).

\textsuperscript{136} \textit{Phaby} involved a private television station that fired one of its political reporters, allegedly because of the reporter's membership in a ward Democratic club. \textit{Id.} at 1053. Since the reporter was removed from the political beat at the behest of the city's sheriff, a candidate for political office, the court was able to find a conspiracy involving state action. \textit{See id.; note 126 supra.}

\textsuperscript{137} Several courts have expressed concern with the potential proliferation of classes. \textit{See, e.g.,} Silkwood v. Kerr-McGee Corp., 460 F. Supp. 399, 407 (W.D. Okla. 1978) ("there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation"); Kops v. New York Tel. Co., 456 F. Supp. 1090, 1095 (S.D.N.Y. 1978) ("§ 1985[(c)] is not to be extended to every class which an imaginative pleader can contrive"),\textit{ aff'd mem.}, 603 F.2d 213 (2d Cir. 1979).

\textsuperscript{138} \textit{See} McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

\textsuperscript{139} \textit{See} Morgan v. Odem, 552 F.2d 147 (5th Cir. 1977).

\textsuperscript{140} \textit{See} Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978).
section 1985(c), the plaintiff usually must also demonstrate a relationship to that class. The plaintiff could argue, however, that neither the language of section 1985(c) nor its legislative history require the injured party to have any relationship to the class of persons that defendants seek to deprive of equal protection, since class-based animus addresses the defendant’s motive rather than the plaintiff’s class membership. Several courts have recognized this argument and have held that an individual who is an advocate for, but not a member of, a class may recover if the other elements necessary to state a cause of action are present. For example, in *Richardson v. Miller*, although the court recognized that “unlike Griffin the plaintiff is not a member of the class allegedly discriminated against,” it found a prima facie section 1985(c) claim because the plaintiff was an advocate for racial equality. Similarly, the court in *Pendrell v. Chatham College* held that “discrimination because of advocacy of the rights of a racial or otherwise

141. Section 1985(3) provides for a cause of action in any instance where “in furtherance of the object of” a proscribed conspiracy an act is done “whereby another is injured in his person or property." By its terms, the statute gives no hint of any requirement that the “other” must have any relationship to the “person or class of persons” which the conspiracy seeks to deprive of equal protection, privileges or immunities. Novotny v. Great Am. Fed. Sav. & Loan Ass’n, 584 F.2d 1235, 1244 (3d Cir. 1978), vacated and remanded on other grounds, 99 S. Ct. 2345 (1979). At least one court has suggested that membership in a class is not required by section 1985(c):

> While it is true . . . that [section 1985(c)] was immediately aimed at the protection of blacks . . ., Congress chose the words “any person or class of persons.” It is not unreasonable, therefore, to assume, that the protection of [the statute] extends not only to blacks and other racial minorities but to any person or group that is the object of invidious discrimination.


142. See Cong. Globe, 42d Cong., 1st Sess. 188 app. (1871) (remarks of Rep. Willard), quoted in Griffin v. Breckenridge, 403 U.S. 88, 100 (1971) (“the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws”) (emphasis added). The *Griffin* Court noted further that “full effect to the congressional purpose [can be given] by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by [Congress].” 403 U.S. at 102 (emphasis in original).


144. 446 F.2d 1247 (3d Cir. 1971).

145. Id. at 1249.

146. Id.

class-based group is sufficient to come within the scope of the statute. The Third Circuit has stated that since a close reading of Griffin reveals "no intimation that, had one of the plaintiffs... been a white civil rights worker, he would have been denied the cause of action which his black compatriots were granted," an advocate for women's rights could, by analogy, maintain a section 1985(c) cause of action.

On the other hand, the First Circuit has interpreted Griffin to require that defendants must have conspired against plaintiffs because of their class membership. At least one lower court has denied recovery to plaintiffs who were "innocent-bystander victims of... racial prejudice," because they lacked the inherent, immutable characteristics that identified the particular class. Such a limitation is not defensible, especially when it is indisputable that the alleged animus was both class-based and invidiously discriminatory. In light of the language and legislative history of section 1985(c), it should suffice that a plaintiff's injuries resulted from an invidiously discriminatory animus. At a minimum, if the defendants believed that the plaintiff was associated with the class, recovery should be allowed.

C. INVIDIOUSLY DISCRIMINATORY ANIMUS

The final, and perhaps most important issue in the determination of class-based animus involves plaintiff's burden of proving that defendants' actions were motivated by an invidious bias against a protected class. The Supreme Court has not clearly stated what the plaintiff must allege in his pleadings to make out a prima facie case or what the plaintiff must subsequently prove at trial. Lower courts have developed differing approaches that have produced anomalous results. For example, although one court has found that a conspiracy to deprogram followers of the Reverend Moon satisfies the ani-

148. Id. at 348.
150. Id.
151. See Harrison v. Brooks, 519 F.2d 1358, 1359-60 (1st Cir. 1975).
152. DesVergnes v. Seekonk Water Dist., 448 F. Supp. 1256, 1262 (D. Mass. 1978), rev'd on other grounds, 601 F.2d 9 (1st Cir. 1979) (water district's refusal to extend water to plaintiff-housing developer's subdivision, allegedly because officials had misrepresented to voters that subdivision would serve low-income blacks, did not give rise to a valid section 1985(c) claim).
153. Id.
154. Id.
155. See notes 141-142 supra and accompanying text.
mus requirement, another court has held the reverse when faced with a similar fact situation.

While courts agree that the defendants' motives must be invidiously discriminatory, courts disagree about what "invidiously discriminatory animus" means in specific contexts. Some courts have found it difficult to separate the protected class issue from the motivation issue. For example, in *Uston v. Hilton Hotels Corp.*, the court denied recovery to a plaintiff who alleged that the defendant casino operators had conspired to deprive him of the opportunity to play "21." The court noted that the plaintiff had failed to prove an invidiously discriminatory motive in excluding "better than average blackjack players" from the casino. This case might be more accurately explained, however, on the ground that "better than average blackjack players" are not a protected class under section 1985(c).

Other courts have emphasized that the invidiously discriminatory motive must be attributed directly to the defendants.

156. See Baer v. Baer, 450 F. Supp. 481, 491 (N.D. Cal. 1978). The court stated:

[T]he allegation [that] the Foundation holds itself out to be a "business" dedicated to deprogramming members of certain religious "factions" satisfies the class-based animus requirement, insofar as it may be inferred from this alleged purpose . . . that its agents and plaintiff's parents conspired to deprive plaintiff of his constitutional rights because of his status as a member of such a religious group.

Id. at 490.

157. [Defendants acted primarily because of] maternal concerns of Plaintiff's mother. [Plaintiff's mother's] actions . . . arose not from her abhorrence of the Unification Church per se, but rather arose directly from the willfulness which a mother holds for her daughter's health and well-being. Defendants as agents of [plaintiff's mother], derived their motivation from this same maternal solicitude.


Confusion has also resulted because often the discussion of the issues is limited to a one-sentence description of the court's conclusions. See, e.g., Scott v. Moore, 461 F. Supp. 224, 230 (E.D. Tex. 1978) ("It is obvious . . . that the acts of violence upon these individuals . . . are manifestations of the ill-will and hatred these union members harbor toward non-union individuals."); Guerra v. Roma Independent School Dist., 444 F. Supp. 812, 816 (S.D. Tex. 1977) ("We find no cause of action under § 1985(3)."); Bradley v. Clegg, 403 F. Supp. 830, 833 (E.D. Wis. 1975) ("I believe that the plaintiffs' allegations of a conspiracy directed against a class of picketing, striking teachers are sufficient to state the discriminatory intent required by 42 U.S.C. § 1985.").


159. Id. at 120.

160. Id.
themselves; an animus in others is not sufficient. For example, in *Smith v. Ross*, an interracial band left town after a deputy sheriff had told their landlord that the police would not protect the building from townspeople who had threatened to burn it down. The court denied recovery because the discriminatory animus motivated not the sheriff or his deputies, but the townspeople, none of whom were named as defendants.

In *Scott v. University of Delaware*, a black assistant professor alleged conspiratorial racial discrimination on the part of University officials after the professor was assigned to teach unfamiliar course material, denied use of staff or equipment for NAACP activities, and harassed by students. The court denied recovery because “[a]t best, these factual allegations indicate unlawfully discriminatory activity by an unspecified number of students, and possibly by some unidentified members of plaintiff’s department. The complaint in no way implicates any member of the Board of Trustees, the President of the University, or the Vice President for Academic Affairs.”

The courts’ conclusions in *Smith* and *Scott*—that the defendants did not themselves possess the requisite animus—may have been hasty. In both cases one could argue that by condoning or, as in *Smith*, directly participating in discriminatory activities, the defendants did in fact act with class-based animus. In these situations, the plaintiff should be given the opportunity to prove such a connection between the defendant and others possessing the class animus.

The most frequently and most appropriately invoked section 1985(c) requirement since *Griffin* is that defendant’s motives must be class-based. Indeed, many plaintiffs have been denied recovery where no discriminatory animus has been alleged, or successfully proven. The statute provides a

161. 482 F.2d 33 (6th Cir. 1973).
162. Id. at 34-35.
163. Id. at 36.
165. Id. at 945.
166. Id.
168. *Cf.* *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978) (complaint dismissed where it did not charge a conspiracy directed at nonlawyers as a class).
169. See, e.g., *Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 227-28 (6th Cir. 1977) (although nonunion employee was allegedly fired because of his antipathy toward the union, there was no allegation of class-based animus); *O’Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1144-45 (6th Cir. 1973) (although black doctor was dismissed from hospital staff for opposing merger that would harm the black community, there was no allegation of class-
cause of action only where the alleged conspiracy is directed against a person as a member of a class; personal animus is not sufficient.\textsuperscript{171}

Specific allegations of class-based discrimination are also required; a pleading that contains only conclusions will be dismissed.\textsuperscript{172} In \textit{Spencer v. Community Hospital},\textsuperscript{173} for example, a black physician who was opposed to the merger of two hospitals because, in his view, the merger would have an adverse effect on the black community, brought suit under section 1985(c) when his staff privileges were revoked. The court dismissed his complaint for failure to allege facts demonstrating that the deprivation of his privileges was motivated by his race or by his opposition to an intentionally discriminatory hospital merger.\textsuperscript{174}

Other courts have recognized that some forms of racial discrimination are more difficult to support with specific allegations than others. In \textit{Croswell v. O'Hara},\textsuperscript{175} the court stated:

\begin{quote}
Proof of racial motivation depends on an overall analysis of the totality of factual circumstances... and such matters normally do not lend themselves to more than conclusory allegations. ... Certainly the fact that plaintiff and defendants were of different races gives rise to the possibility that defendants' acts were racially motivated. A great deal more is needed to prove the issue, but, in the absence of a more adequate method of pleading, I conclude that plaintiff's allegation in this case is sufficient.\textsuperscript{176}
\end{quote}

\textsuperscript{170.} See, e.g., \textit{Herrmann v. Moore}, 576 F.2d 453, 457 (2d Cir.), \textit{cert. denied}, 439 U.S. 1003 (1978) (although plaintiff was attacked by defendants while photographing them for the purpose of prosecuting their employer under the Refuse Act, there was no allegation of class-based animus).

\textsuperscript{171.} See, e.g., \textit{Herrmann v. Moore}, 576 F.2d 453, 457 (2d Cir.), \textit{cert. denied}, 439 U.S. 1003 (1978) (although tenured black law professor was allegedly fired because of racial discrimination, there was no proof of animus); \textit{Potenza v. Schoessling}, 541 F.2d 670, 672 (7th Cir. 1976) (although plaintiffs allegedly were fired because of their criminal records, there was no proof of class-based animus); \textit{Schoonfield v. Mayor of Baltimore}, 399 F. Supp. 1068, 1086-87 (D. Md. 1975), \textit{aff'd mem.}, 544 F.2d 515 (4th Cir. 1976) (although white person was allegedly fired because of racial discrimination, there was no proof of animus).  


\textsuperscript{173.} \textit{393 F. Supp. 1072 (N.D. Ill. 1975)}.  

\textsuperscript{174.} \textit{Id. at 1079}.  

\textsuperscript{175.} \textit{443 F. Supp. 895 (E.D. Pa. 1978)} (alleged false arrest and beating of black woman by four white policemen).

\textsuperscript{176.} \textit{Id. at 897-98}.
Similarly, in *Paschall v. Mayone*, the court denied a motion for summary judgment to a white deputy sheriff who allegedly beat a black plaintiff and denied him medical care, reasoning that the plaintiff might be able to develop proof of a past history of discriminatory beatings and ultimately recover.\(^{178}\)

Even if a prima facie case is established and a summary judgment for defendants thereby avoided, the plaintiff still must successfully prove the existence of a discriminatory motive in order to recover damages. Courts have not agreed on the standard of proof required of plaintiffs, although most courts have refused to infer class-based motive without a strong causal relationship. As the court in *Croswell* emphasized, mere proof that the plaintiff is black or an advocate of black concerns has not been sufficient to prove racial animus.\(^{179}\)

In *Phillips v. Fisher*, the court found no proof of class-based animus where an interracial couple alleged that movers stole their belongings because of a bias against interracial marriages. The court explained:

> We do not say today that a plaintiff who seeks relief from alleged racial discrimination must allege facts which inescapably lead to the finding of a race-based animus on the part of a defendant. There are situations where the facts alleged themselves lead to a reasonable inference that the motive behind a defendant's actions may have been race. For example, if a black man is refused service in a restaurant, an allegation that the cause thereof was racial prejudice squares with the common experience of men in everyday life, and the causative inference is a logical one to draw. On the opposite end of the continuum is the situation where the wrong committed is not of a sort which is likely to be motivated by race. If a black man is arrested fleeing the scene of a bank robbery, it does not comport with the common experience of men to infer that the motive or cause for his arrest is his race . . . .\(^{181}\)

Some courts go beyond these basic requirements and make the plaintiff's burden of proving class-based motive more difficult. For example, some courts require the plaintiff to show that the defendant's motivation was such that persons not in the plaintiff's class would have been treated differently in the same fact situation. In *Taylor v. Nichols*, for example, a policeman who sued the city attorney under section 1985(c) for prosecuting him on an assault and battery charge arising out of a traffic arrest was denied recovery for failure to prove that

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178. Id. at 1299.
179. See text accompanying note 176 supra.
181. Id. at 556.
182. 558 F.2d 561 (10th Cir. 1977).
nonpolice personnel had not been prosecuted in similar cir-
cumstances.\textsuperscript{183} In \textit{900 G.C. Affiliates, Inc. v. City of New}
\textit{York},\textsuperscript{184} the city revoked plaintiff's cabaret license allegedly be-
cause the cabaret's patrons were black. The court stated that
the plaintiffs had offered no proof that "persons similarly situ-
ated—\textit{e.g.}, owners of discotheques frequented by whites—are,
or would have been, treated in a different manner."\textsuperscript{185} While
different treatment of those similarly situated is the essence of
discriminatory activity, it is overly rigorous to require a plaintiff
in each case to demonstrate that different treatment has in fact
occurred.

Several courts have found that proof only of a spontaneous
reaction or an isolated incident is insufficient to allow recov-
ery.\textsuperscript{186} For example, in \textit{Croy v. Skinner},\textsuperscript{187} the court held that
the defendant's statement that he "was sick and tired of Jews
taking advantage of honest white people"\textsuperscript{188} fell short of show-
ing the class-based animus necessary under section 1985(c).
Requiring proof of a history or pattern of discrimination, how-
ever, is overly burdensome when motive can be proven in other
ways. Because discrimination may take many forms, the ques-
tion of proof will necessarily vary in each case. Any set of facts
that permit a reasonable inference of discriminatory motive
should suffice to shift the burden of proof to the defendant to
demonstrate that there was no class-based animus.

An additional problem arises if more than one motive is es-
ablished. Although one court has held that class-based dis-
crimination need not be the sole motive,\textsuperscript{189} the majority of
courts have been reluctant to allow recovery when other mo-
tives are present, especially when discrimination other than on
racial grounds is involved. In \textit{Johnson v. University of Pitts-

\textsuperscript{183} \textit{Id}. at 568.
\textsuperscript{185} \textit{Id}. at 5.
\textsuperscript{186} There is no averment in the complaint that the defendants at-
tacked the plaintiffs because the latter were environmentalists, as has
been suggested in this Court; the allegations of the complaint are spec-
ific that the assault was sparked solely by the instant reaction of the
defendants. ... Theirs was a purely spontaneous act, not alleged to be
a part of any general pattern of discriminatory action directed to any
class. ... Hughes v. Ranger Fuel Corp., 467 F.2d 6, 10 (4th Cir. 1972).
\textsuperscript{188} \textit{Id}. at 125.
\textsuperscript{189} Payne v. Bracher, 582 F.2d 17, 17 (5th Cir. 1978) (defendant's failure to
rent plaintiff's apartment because of racial discrimination gave rise to a valid
section 1985(3) claim, even though other motives were present).
The court found that since defendants articulated legitimate and nondiscriminatory reasons for failing to grant promotion and tenure to plaintiff, a female professor, no section 1985(c) claim could be maintained, even if sex discrimination might also have been involved: "[I]n the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia."\textsuperscript{191} The approach in this case, however, is not consistent with the purpose of the statute. Section 1985(c) was designed to prohibit and deter class-based, invidiously discriminatory actions and to facilitate a remedy if injury has occurred. Recovery should therefore be allowed whenever an invidiously discriminatory motive is proven and all of the other \textit{Griffin} elements are satisfied, despite the presence of additional motives.

While no specific criteria or test can be advanced to guide courts in their determination of whether class-based motives are sufficiently alleged and proven, a general approach can be suggested. Although an animus in others alone is not sufficient, a plaintiff should be given the opportunity to demonstrate a connection or concerted action that links the defendant to those possessing the animus. Similarly, personal animus alone should not be sufficient to allow recovery under section 1985(c); but courts should find that the animus requirement has been satisfied whenever a class-based motive is established, despite the presence of additional motives. In addition, courts should dismiss an action at the pleadings stage only when it appears certain that the plaintiffs are entitled to no relief under any interpretation of the facts that could be proved to support their claims.\textsuperscript{192} Certainly mere proof of the plaintiff's membership in a class is not sufficient to establish that the defendant acted with a discriminatory motive. Motive, however, is an inherently elusive concept, and plaintiff's burden should not be made an impossible one. The plaintiff should not be required to prove that persons in a different class would be treated differently or that there is a pattern of past discrimination. Instead, any facts that permit a reasonable inference of a class-based, invidiously

\textsuperscript{191} \textit{Id.} at 1371. The court also reasoned that it was "beyond its field of expertise" to determine qualifications for promotion and tenure and thus could not allow plaintiff to recover. \textit{Id.} It should go without saying that lack of expertise is no excuse for permitting discrimination that has been proven to exist. Courts should not dodge difficult questions merely because they are difficult.
\textsuperscript{192} \textit{See} Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
discriminatory motive should be sufficient to shift the burden of proof on the issue of motive to the defendant.

III. CONCLUSION

The application of the class-based animus requirement is one illustration of how the potentially broad implications of the *Griffin* decision have been significantly narrowed by lower courts' divergent attempts to carve out section 1985(c)'s "constitutionally permissible periphery." While the concept of class-based animus cannot, and indeed should not, be mechanically applied, a more uniform approach is necessary to afford protection in appropriate cases and prevent overexpansion of federal jurisdiction. The analysis appropriate to determine the existence of a section 1985(c) cause of action is three-pronged: first, whether the class is protected by section 1985(c); second, whether the plaintiff is a member of the class or sufficiently associated with the class; and third, whether the defendant's motives are in fact class-based.

To determine whether a class is protected by the statute, the court should consider whether the alleged group is akin to a racial minority, or whether the group is engaged in the exercise of a fundamental right and defendant's actions unnecessarilly burden the exercise of that right. Past discrimination is one indication of the degree of similarity between the proposed class and a suspect-like or racial minority group. A balancing of the rights involved should be used to determine whether the exercise of a fundamental right is unnecessarily burdened. Once it is established that a class is protected, the plaintiff should only need to prove that he is associated with or an advocate for the class; membership in the class should not be required. Few concrete criteria can be proposed to adequately define the final element, the proper standard for the allegation and proof of defendants' bias against the class. Allegations should be liberally construed and courts should acknowledge common-sense inferences that circumstances may suggest. The burden of proof on the question of motives should shift to the defendant whenever the facts presented by the plaintiff permit a reasonable inference of an invidiously discriminatory, class-based motive.

The purpose of section 1985(c) as originally enacted was to provide a remedy for invidious, discriminatory conspiracies

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that violated fundamental federal rights. The definition of class-based animus proposed in this Note would effectuate this purpose and yet prevent section 1985(c) from becoming a general federal tort remedy.