Washington and Lee Law Review

Volume 39 | Issue 2 Article 16

Spring 3-1-1982

Vi. Constitutional Law & Civil Rights

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Recommended Citation

Vi. Constitutional Law & Civil Rights, 39 Wash. & Lee L. Rev. 540 (1982).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss2/16

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VI. CONSTITUTIONAL LAW & CIVIL RIGHTS

A. Equal Opportunity and Reverse Discrimination

As the United States has progressed toward the goal of equality for all citizens, the difficulties inherent in eradicating the effects of three centuries of racial and ethnic bigotry have led to a new problem, loosely referred to as "reverse discrimination."[1] The dilemma of reverse discrimination arises when a decisionmaker, in either the public or private sector, chooses a course of action designed to give preferential treatment to members of a disadvantaged minority group.[2] The decision to give preferential treatment to minorities normally entails imposing some burden on members of the white majority.[3] Recently, the Fourth Circuit Court of Appeals decided a case, *Talbert v. City of Richmond*,[4] which involved a decision by the Richmond, Virginia Police Department to promote a black officer instead of an arguably better qualified white officer under circumstances that could constitute reverse discrimination.[5]

In *Talbert*, the Fourth Circuit reversed the district court's holding that the city had violated constitutional mandates by refusing to promote the plaintiff because of his race.[6] The plaintiff, William A. Talbert, a white police captain, challenged the procedures used by the city in 1978 to fill three vacancies at the rank of major.[7] Pursuant to the Richmond City Charter,[8] the official responsible for making these appointments[9] considered eight candidates certified for possible promotion from captain to major by the city's personnel assessment center.[10] Along with

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[1] *See generally* B. GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY (1977) (definition and philisophic analysis of reverse discrimination).

[2] *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 197-99 (1979) (private affirmative action plan for blacks); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 273-76 (1978) (preferential medical school admissions program); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 679-81 (6th Cir. 1979) (affirmative action program for police promotions).

[3] *See* Young, *Racial Classification In Employment Discrimination Cases: The Fifth Circuit's Refusal To Prescribe Standards*, 11 CUM. L. REV. 347, 349 n.4 (1981).

[4] 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3532 (U.S. Jan. 12, 1982).

[5] *See id.* at 926.

[6] *See id.*

[7] *See id.* at 926-27.

[8] RICHMOND, VIRGINIA CITY CHARTER, § 9.03(b)(1) (1975). The Richmond City Charter mandates a "rule of five" whereby the number of candidates considered for any promotion equals the number of openings at the higher level plus five. *See id.*; 648 F.2d at 927.

[9] *See* 648 F.2d at 927. The official designated to make police promotion decisions was the Director of Public Safety. *See id.*

[10] *See id.* The Richmond city personnel assessment center utilized a complex evaluation formula to grade each candidate on eleven separate factors relating to police functions and past performance. *See* Joint Appendix at 166, Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981) [hereinafter cited as Joint Appendix]. The personnel assessment center used subjective evaluations derived from oral examinations and personal history rather than written tests. *See id.* at 161.

the ratings given by the assessment center, the appointing official received the recommendations of the Chief of Police.[11] The Chief of Police recommended the two white officers with the highest scores among the eight candidates,[12] but failed to recommend Captain Talbert, who ranked third on the personnel center's evaluation list.[13] Instead, the Chief of Police recommended that the third vacancy be filled by Captain Laurel M. Miller, a black officer ranked eighth on the evaluation list.[14] Captain Miller subsequently received the promotion to major.[15]

In reaction to the city's failure to promote him, Talbert filed suit in federal district court alleging violation of his civil rights by the city and its officials.[16] Talbert based his claims on the fourteenth amendment to the United States Constitution[17] and federal civil rights legis-

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[11] *See* 648 F.2d at 927. The letter of recommendation sent by the Chief of Police to the Director of Public Safety outlined his general evaluation of the past and potential performance of each candidate as well as the Chief's personal recommendations for promotion. *See id.*

[12] *See id.*

[13] *See id.* The Chief of Police, in his letter of recommendation, viewed Captain Talbert very favorably and emphasized his abilities in the field. *See id.* The Chief of Police's letter of recommendation specifically stated that he would have no qualms about recommending Talbert for any future openings at the rank of Major. *See id.* Talbert received an evaluation score of 39.5 from the personnel assessment center. *See id.*

[14] *See id.* The Chief of Police gave a moderately enthusiastic assessment of Captain Miller's past performance. *See id.* The letter of recommendation emphasized that Miller's current assignment as Acting-Major Inspector qualified him for promotion to that rank on a permanent basis. *See id.* Additionally, the Chief of Police stated that the promotion of a black officer to a high rank in the Richmond Police Force could have favorable consequences in the racially divided city. *See id.* Richmond previously had not considered a black officer for promotion to major and the Chief of Police stated that Miller had reached his present position solely on his own merit. *See id.* Captain Miller received an evaluation score 5.5 points lower than that received by the plaintiff, a point differential not considered decisive by the Chief of Police. *See id.* The letter of recommendation also erroneously referred to Richmond's Affirmative Action plan as further justification for Miller's promotion. *See id.* The City of Richmond has no Affirmative Action Plan setting out specific goals for minority hiring or promotion. *See id.* n.1. Rather, the city has adopted an Equal Opportunity Plan which calls for a general policy of non-discrimination in all aspects of city employment. *See id.*

[15] *See id.* at 927.

[16] *See id.*

[17] U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* Jurists and commentators have debated whether the framers of the fourteenth amendment intended its protections to apply to all citizens or only the newly freed slaves. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978) (Powell, J., separate opinion) (framers thought fourteenth amendment to protect blacks); Butcher's Benevolent Ass'n of New Orleans v. Crescent City Livestock Landing & Slaughterhouse Co. (Slaughter-House Cases), 83 U.S. (16 Wall.), 36, 71 (1873) (pervading purpose of fourteenth amendment to guarantee freedom of blacks); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 18-19 (1977) (fourteenth amendment designed to guarantee blacks limited set of fundamental rights); *and* Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing*

lation.[18] In his complaint, Talbert alleged not only that the city had violated its constitutional duty not to discriminate against white officers,[19] but also that the failure to promote the plaintiff resulted from retaliation for a previous suit Talbert had brought against the city.[20] Talbert further alleged that the preferential treatment inherent in the decision to promote Captain Miller violated the terms of a consent decree entered into by the City of Richmond in a previous case of alleged discrimination involving the police department.[21] Talbert sought a declaratory judgment

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Arguments, 22 U.C.L.A. L. REV. 343, 357 (1974) (fourteenth amendment enacted to benefit freed slaves), *with* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment universal guarantee of equal protection) *and* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60-63 (1955) (framers understood fourteenth amendment to apply to all citizens). Despite the debate over the scope of the fourteenth amendment's coverage, the Supreme Court has expanded the number of groups within the amendment's purview. *See* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (Mexican-Americans protected); Truax v. Raich, 239 U.S. 33, 41-42 (1915) (Austrian resident aliens); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (Irish) (dictum).

[18] *See* 648 F.2d at 926. Talbert based his statutory claims on the civil rights guarantees contained in 42 U.S.C. §§ 1983, 1985(3), 1986, and 1988. *See* 648 F.2d at 926; 42 U.S.C. §§ 1983, 1985(3), 1986, 1988 (1976). Section 1983, based on the Civil Rights Act of 1871, 17 Stat. 13, authorizes civil actions against any person acting under color of governmental authority, who violates another person's civil and constitutional rights. 42 U.S.C. § 1983 (1976); *see* Schacter v. Whalen, 581 F.2d 35, 36-37 (2d Cir. 1978). *See generally* Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258 (1977). Section 1985, enacted as part of the Civil Rights Act of 1871, 17 Stat. 13, authorizes civil suits against any two or more persons who conspire to violate the civil or constitutional rights of another person. 42 U.S.C. § 1985(3) (1976). Section 1985 creates no new rights but serves only to remedy violations of other constitutionally guaranteed civil rights. *See* Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979). *See generally* Note, *The Scope of Section 1985(3) Since* Griffin v. Breckenridge, 45 GEO. WASH. L. REV. 239 (1976). The guarantees contained in Section 1986 of the Civil Rights Act of 1871, 17 Stat. 15, authorize civil actions against any person who, having the power to do otherwise, neglects or refuses to prevent a conspiracy to violate civil rights guaranteed by 42 U.S.C. § 1985 (1976). 42 U.S.C. § 1986 (1976). Section 1988 describes the nature and governing laws of civil rights proceedings and authorizes discretionary grants of attorney's fees in certain types of actions. 42 U.S.C. § 1988 (1976).

[19] *See* 648 F.2d at 926.

[20] *See* Joint Appendix, *supra* note 10, at 9. Plaintiff Talbert had filed a previous suit alleging reverse discrimination by the City of Richmond in its failure to promote him to the rank of captain in 1975. *See id.* Talbert's prior reverse discrimination suit was settled before trial by an agreement to promote Talbert to captain. *See id.* The constitutional and statutory guarantees on which Talbert based his claims do not prohibit specifically retaliation for opposition to discrimination. *See* notes 17 & 18 *supra*; *see also* 42 U.S.C. 2000e-3(a) (1976) (prohibiting employer retaliation for opposition to discrimination under Civil Rights Act of 1964). Proof of purposeful retaliation could, however, provide evidence of the discriminatory intent necessary to establish an equal protection violation. *See* Washington v. Davis, 426 U.S. 229, 240-41 (1976) (equal protection violation must entail discriminatory intent).

[21] *See* Joint Appendix, *supra* note 10, at 10. In settlement of a discrimination suit initiated by black policemen, the city entered into a consent decree mandating that the police force maintain an absolute non-discrimination policy in regard to police employment. *See* Richmond Black Police Officers Ass'n v. City of Richmond, No. 74-0267-R (E.D. Va., July 3, 1975) (consent decree).

that the city had violated his rights and an order permanently enjoining the city from refusing to promote him to the rank of major.[22] Furthermore, the plaintiff sought an award of back pay and other benefits that he would have received with the promotion, punitive damages, costs and attorney's fees.[23]

The district court reviewed the relevant evidence but refused to make any qualitative judgments regarding the relative abilities or potential performance of the two officers.[24] Neither did the court discuss Captain Miller's current assignment as Acting Major-Inspector.[25] Instead, the trial court focused on the scores the two men received from the personnel assessment center, assuming that these scores had valid predictive ability.[26] Although recognizing the value that a black man in a high police position could have in a city with a population approximately one-half black, the court nevertheless found that the city based the decision not to promote Captain Talbert solely on the basis of race.[27] Finding a violation of the plaintiff's constitutional rights, the district court ruled in favor of Talbert.[28] Since the court found that the city had violated the plaintiff's constitutional rights, the district judge found it unnecessary to determine the statutory claims raised by Talbert.[29]

On appeal of the constitutional issues decided below, the Fourth Circuit reversed the district court's holding.[30] The appellant city argued that the case was controlled by Justice Powell's opinion in *Regents of the University of California v. Bakke*.[31] In *Bakke*, the plaintiff contended that a special admissions program, that reserved 16% of the available positions in the entering class of the University of California at Davis Medical School for minority applicants,[32] violated Title VI of the Civil Rights Act of 1964[33] and the fourteenth amendment.[34] The medical school

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[22] *See* 648 F.2d at 926. Subsequent to the instigation of his suit against the City of Richmond, plaintiff Talbert received promotion to the rank of Major. *See id.* at 929. Talbert maintained his suit against Richmond despite his promotion to Major. *See id.* at 926.

[23] *See id.* at 927. Talbert demanded $25,000 in compensatory damages and $200,000 in punitive damages. *See* Joint Appendix, *supra* note 10, at 12.

[24] *See* 648 F.2d at 927. The district court did not issue a written opinion, only findings of fact and conclusions of law.

[25] *See id.*

[26] *See id.*

[27] *See id.* at 927-28. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (Powell, J., separate opinion) (constitution forbids foreclosing opportunities solely on basis of applicant's race); Setser v. Novack Inv. Co., 638 F.2d 1137, 1144 (8th Cir. 1981) (employer may not base hiring decision solely on race of applicant).

[28] *See* 648 F.2d at 928.

[29] *See id.*; note 18 *supra*.

[30] *Id.* at 926.

[31] *See id.* at 928; 438 U.S. 265 (1978) (Powell, J., separate opinion).

[32] *See* 438 U.S. 265, 272-77 (1978) (Powell, J., separate opinion).

[33] 42 U.S.C. § 2000(d) (1976). Title VI of the Civil Rights Act of 1964 forbids discriminatory acts by organizations receiving any federal funding. *Id.*

[34] *See* 438 U.S. at 277-78; U.S. CONST. amend. XIV, § 1.

twice rejected the application of the plaintiff, a white male,[35] even though his ratings, based on the general criteria employed by the school, exceeded those of some minority applicants accepted under the special admissions program.[36] The Supreme Court, in *Bakke*, issued several fragmented and confused opinions,[37] which left unclear the legal status of reversed discrimination.[38] Although the *Talbert* court found numerous distinguishing features which separated *Talbert* and *Bakke*,[39] the Fourth Circuit ruled that the similarity of the appellant city's arguments to Justice Powell's analysis justified reliance on Justice Powell's *Bakke* opinion.[40]

In analyzing the various issues raised in *Bakke*, Justice Powell held that any classification based on race was inherently suspect[41] and subject

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[35] *See* 438 U.S. at 276.

[36] *See id.* at 276-77. The medical school admissions committee involved in *Bakke* evaluated applicants in terms of their undergraduate grade point averages, placing emphasis on grades received in science courses. *See id.* at 273-74. The admissions committee further considered the applicant's score on the Medical College Admissions Test, letters of recommendation, and participation in extra-curricular activities. *See id.* Plaintiff Bakke had an overall grade point average approximately one point higher than the average student accepted under the special admissions program and significantly higher scores on his medical school boards than the minority students accepted to the medical school. *See id.* at 277 n.7.

[37] *See* 438 U.S. at 269-324 (Powell, J., announcing decision of court and separate opinion); *id.* at 324-79 (Brennan, White, Marshall, Blackmun, J J., concurring in part and dissenting in part) (preferential admissions constitutional to remedy past discrimination); *id.* at 379-87 (White, J., separate opinion) (addressing only private right of action under Title VI); *id.* at 387-402 (Marshall, J., concurring in part and dissenting in part) (history of black subjugation demands preferential treatment); *id.* at 402-08 (Blackmun, J., concurring) (university has special need to consider race); *id.* at 408-21 (Stevens, Burger, Stewart, Rehnquist, J J., concurring in part and dissenting in part) (statutory, not constitutional, grounds control case). This spider's-web of opinions resulted in an order requiring the admission of the plaintiff although no majority of the Justices agreed on the basis of this result. *See id.* at 271 (Powell, J., separate opinion).

The Court has refused to adopt any of the rationales set out in the various *Bakke* opinions. *See* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980). *See also* Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 21 (1979) (*Bakke* court failed to give clear meaning to constitutional guarantees); Morris, *The* Bakke *Decision: One Holding or Two?*, 58 ORE. L. REV. 311, 334 (1979) (*Bakke* decision so fragmented as to have no precedential value). *See generally* Voros, *Three Views of Equal Protection: A Backdrop to* Bakke, 1979 B.Y.U.L. REV. 25 (1979).

[38] *See generally* Bell, *Introduction: Awakening After* Bakke, 14 HARV. C.R.-C.L. L. REV. 1 (1979) [hereinafter cited as Bell]; McCormack, *Race and Politics In the Supreme Court:* Bakke *to Basics*, 1979 UTAH L. REV. 491.

[39] *See* 648 F.2d at 928. The *Talbert* court found that in the instant case, unlike *Bakke*, there existed no explicit policy adopted by the defendant authorizing racial quotas or exclusionary policies. *See id.* Furthermore, the City of Richmond, unlike the University of California medical school, did not base the challenged decision on a desire to remedy past discrimination. *See id.*

[40] *See id.* at 928-29.

[41] *See* 438 U.S. at 291 (Powell, J., separate opinion), *quoting* Korematsu v. United States, 323 U.S. 214, 216 (1944) (laws aimed at one racial group "immediately suspect"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (racial distinctions inherently repugnant and suspect).

to the strictest judicial scrutiny.[42] Justice Powell would accept race-conscious remedial efforts initiated after specific findings by a competent judicial, legislative, or administrative body that discrimination had occurred in the past.[43] Although Justice Powell wrote that race may not

[42] *See* 438 U.S. at 291 (Powell, J., separate opinion). The Supreme Court has recognized two types of judicial scrutiny applicable to equal protection cases. If the classification in question relies on racial criteria the case merits strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (allowing racial classification for national security); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J., concurring) (first expression of strict scrutiny standard). Under the strict scrutiny test, the government must show that a compelling state interest demands the suspect classification. *See In re* Griffiths, 413 U.S. 717, 721-22 (1973); Kramer v. Union Free School District, 395 U.S. 621, 626-27 (1969); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Strict scrutiny also applies to governmental actions which infringe on fundamental liberties. *See* Police Dept. of Chicago v. Moseley, 408 U.S. 92, 101 (1972) (statute limiting first amendment right demands strict scrutiny); Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (strict scrutiny for laws restricting right to travel); Kramer v. Union Free School Dist., 395 U.S. 621, 626-27 (1969) (property limitation on right to vote requires strict scrutiny). For a law infringing citizens' rights to receive strict scrutiny, the asserted right must explicitly or impliedly derive from the Constitution. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30-35 (1973) (right to equal education not constitutionally based); *but see id.* at 100 (Marshall, J., dissenting) (certain non-constitutional rights deserve strict scrutiny).

If the governmental action challenged on equal protection grounds does not entail a suspect classification or infringe on fundamental liberties, the courts only will require that the challenged classification bear a "rational relation" to the legitimate desired goal. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); R.E.A. Inc. v. New York, 336 U.S. 106, 110 (1949). Since the Court does not desire to usurp the legislative function of determining the efficacy of the chosen means of reaching a legitimate goal, government actions will pass the rational relation test if any possible justification exists for a challenged decision. *See id.* at 126. *See generally* Comment, *Reverse Discrimination: The Balancing of Human Rights*, 12 WAKE FOREST L. REV. 852, 855-58 (1976).

Despite the Supreme Court's insistence that only two levels of scrutiny exist for equal protection analysis, some cases have turned on an intermediate level of scrutiny which balances the importance of the interest sought and the invidiousness of the basis of the challenged classification. *See, e.g.*, Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 173 (1972) (recognizing intermediate standard for laws penalizing illegitimacy); Reed v. Reed, 404 U.S. 71, 76 (1971) (recognizing intermediate standard for sex discrimination claims). Justice Marshall has stated that a sliding-scale of review incorporating the intermediate level of scrutiny would provide the courts greater flexibility in all equal protection matters. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 124 (1973) (Marshall, J., dissenting); *but see id.* at 31 (sliding scale of review would allow courts to usurp legislative function). One commentator has suggested that an intermediate level of review is appropriate in reverse discrimination cases, given the unique nature of such litigation. *See* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences In Law School Admissions*, in REVERSE DISCRIMINATION 219 (B. Gross, ed. 1977) (reverse discrimination claims demand analysis weighing government interest against non-racial means of achieving same result) [hereinafter cited as Greenawalt]; text accompanying notes 95 & 96 *infra*.

[43] *See* 438 U.S. at 307 (Powell, J., separate opinion). Justice Powell in *Bakke* held that specific findings by a competent government body could serve as the basis of a compelling state interest allowing the use of racial criteria. *See id.* at 307-09; note 42 *supra*. *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 367-76 (1977) (judicial determination of past discriminatory employment practices justifies imposition of racially oriented remedial action); United Jewish Organizations v. Carey, 430 U.S. 144, 155-56 (1977)

serve as a sole basis for classifying an individual,[44] he ruled that the interest of a university in achieving a diverse student body is sufficiently compelling to allow race to serve as one consideration in an admissions process.[45] Allowing race to serve as one factor among many considered in evaluating an individual applicant meets Justice Powell's criteria of constitutionality unless the plaintiff can demonstrate that discriminatory intent actually motivated a racially oriented selection process.[46]

Accepting the city's proposition that the promotional decision at issue in *Talbert* only considered the candidates' race as one factor in the overall assessment process, the Fourth Circuit proceeded through the analysis *Bakke* established to determine if an invidiously discriminatory purpose underlay the supposedly non-discriminatory decision.[47] A Supreme Court case prior to *Bakke* set forth the criteria for determining the existence of invidious discrimination in equal protection litigation.[48] Following this analysis, a court searches for discriminatory intent by ex-

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(past discrimination finding by legislature justifies electoral redistricting to increase black voting strength); Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 15 (1971) (court may order busing of school children to remedy past discrimination); *see generally* Dixon, Bakke: *A Constitutional Analysis*, 67 CALIF. L. REV. 69 (1977) [hereinafter cited as Dixon].

[44] *See* 438 U.S. at 318.

[45] *See* 438 U.S. at 314-15 (Powell, J., separate opinion). In *Bakke*, Justice Powell wrote that the compelling interest of a diverse student body necessitated some form of racial classification. *See id.* at 315. A suspect classification will pass the strict scrutiny test if necessary to the achievement of a compelling state goal. *See In Re* Griffiths, 413 U.S. 717, 721-22 (1973); note 42 *supra*. *See also* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (diverse student body in law school important state interest).

[46] *See* 438 U.S. at 289 n.27 (Powell, J., separate opinion), *citing* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

[47] *See* 648 F.2d at 929-31; 438 U.S. at 318-19 (Powell, J., separate opinion); *see also* Jefferson v. Hackney, 406 U.S. 535, 547-49 (1972) (discriminatory intent necessary for equal protection claim). During the 1960's and 1970's, the Supreme Court issued a number of opinions which seemed to demand only evidence of a disproportionate racial impact, rather than a discriminatory intent, in order to establish an equal protection claim. *See, e.g.*, Wright v. City of Emporia, 407 U.S. 451, 461-62 (1972) (discriminatory motive irrelevant); Palmer v. Thompson, 403 U.S. 217, 224 (1971) (court will not invalidate law on basis of bad motive); United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (effect, not motive, key to equal protection claim); *see generally* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). In 1976, however, the Court ruled that a plaintiff must prove discriminatory intent to challenge a government action not discriminatory on its face. *See* Washington v. Davis, 426 U.S. 229, 239-41 (1976). The requirement of intent arose from judicial fear that a simple impact requirement would invalidate innumerable valid measures which tended to overly burden minority groups, such as regressive bridge tolls and sales taxes. *See id.* at 248. *See generally* Note, *Discriminatory Purpose: What It Means Under the Equal Protection Clause*—Washington v. Davis, 26 DE PAUL L. REV. 650 (1977).

[48] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); *see generally* Schwemm, *From* Washington *To* Arlington Heights *and Beyond: Discriminatory Purpose In Equal Protection Litigation*, 1977 U. ILL. L.F. 961 (1977) [hereinafter cited as Schwemm]; Comment, *A Last Stand On* Arlington Heights: *Title VIII and the Requirement of Discriminatory Intent*, 53 N.Y.U. L. REV. 150 (1978).

amining the impact of the challenged decision on a racial group, the historical background of the controversy, deviations from normal procedural or substantive norms, and the statements of the officials charged with discrimination.[49]

In examining these four factors, the *Talbert* court initially noted that the failure to promote the plaintiff had no disproportionate impact on the plaintiff's race as a whole.[50] Two other white officers had received appointments to the rank of major at the time of the alleged violation of the plaintiff's rights.[51] Furthermore, only white officers, including Talbert, had received promotions to major subsequent to the promotion of Captain Miller,[52] thereby evidencing the slight impact the decision not to promote the plaintiff had on other whites. The court admitted that the decision to promote the black captain had an impact on the plaintiff as an individual,[53] but discounted the weight of this racial impact in determining the existence of discriminatory intent.[54]

The court next examined the historical background of the alleged violation.[55] The *Talbert* court initially considered the effect of a consent decree previously entered into by the City of Richmond in another controversy involving the police department.[56] In that decree, the city, while not explicitly admitting discriminatory practices, agreed to a policy of employment without regard to race.[57] The Fourth Circuit observed that the city government had made a conscientious effort to remove obstacles that blocked the progress of black officers.[58] The court also noted that the city did not have a history of discriminating against white policemen.[59] The court cited no concrete evidence, other than the consent

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[49] *See* 429 U.S. at 266-68, 648 F.2d at 929.

[50] *See* 648 F.2d at 929. The *Arlington Heights* court tended to denigrate the importance of racial impact. *See* 429 U.S. at 266. In an extremely blatant case, however, where racial animosity constitutes the only feasible explanation for clearly disproportionate impact on one race the disproportionate impact may serve as the sole basis of discriminatory intent. *See id.*; Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960) (redistricting almost totally eliminating blacks from electoral district shows intent to discriminate); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (consistent discretionary decisions against Chinese unconstitutional).

[51] *See* 648 F.2d at 929.

[52] *See id.*

[53] *See id.*

[54] *See id.*, *quoting* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977) (impact not dispositive).

[55] *See* 648 F.2d at 929-30.

[56] *See id.*; Richmond Black Police Officers' Ass'n v. City of Richmond, 74-0267-R (E.D. Va., July 3, 1975) (consent decree); note 21 *supra*.

[57] *See* 648 F.2d at 930.

[58] *See id.* The *Talbert* court's finding that the city consciously removed stumbling blocks to black progress undercuts the findings of past non-discrimination in police employment and lack of remedial intent on the part of the city. *See id.*; note 39 *supra*.

[59] *See* 648 F.2d at 930.

decree of 1975, to support its generalized findings of non-discrimination in the recent history of the Richmond police force.[60]

The *Talbert* court then examined the trial record for deviations in procedure or departures from regular substantive criteria that may have distinguished this controversy from other promotions and thereby revealed discriminatory intent.[61] The record showed that the scores given the candidates by the personnel assessment center merely qualified them for the promotion eligibility list and did not serve as the sole basis of promotion.[62] The court assumed that the lack of specific instruction given to Richmond police officials concerning any predictive insight of the assessment center's evaluations[63] undercut the significance of the candidates' rankings on the eligibility list.[64] Trial testimony of the Director of Public Safety that the testing scores did not determine his promotional choices re-enforced the court's finding that the city based its promotions on a number of factors unrelated to the candidates' numerical rankings.[65] The Fourth Circuit acknowledged that no previous promotion had gone to a candidate with a score more than one point lower than another, unpromoted, candidate.[66] The court found, however, that the departure from normal substantive criteria utilized for police promotions was unsubstantial.[67] Rather than delineate any previous or possible standards for evaluating candidates for high police rank, the *Talbert* court deferred to the city officials' pronouncements that Captain Miller's qualifications justified his promotion.[68] Furthermore, unlike the district

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[60] *See id.* at 929-30. In contrast to the longer period of history examined by the *Talbert* court, the *Arlington Heights* Court concentrated on the time immediately preceeding the challenged government action. *See* 429 U.S. at 269-70; 648 F.2d at 929-30. In *Arlington Heights*, the plaintiff challenged the denial of a re-zoning request which would have led to the construction of an integrated low-income housing development in a predominately white suburb of Chicago. *See* 429 U.S. at 254-59. By focusing on the period just before the beginning of the *Arlington Heights* controversy, the Supreme Court ignored the long-term patterns of housing that characterized the Village of Arlington Heights. *See id.* at 269-70. A more wide-ranging inquiry into the historical background of housing patterns in the *Arlington Heights* case could lead to an inference of continuing discriminatory intent as an underlying basis for the challenged decision. *See* Schwemm, *supra* note 48, at 1026.

[61] *See* 648 F.2d at 930-31.

[62] *See id.* at 930. The *Talbert* court noted that strict reliance on the candidates' rankings from the personnel assessment center would frustrate the requirement from the city charter that the number of candidates considered equal five more than the number of vacancies. *See id.* at 931; note 8 *supra.*

[63] *See* 648 F.2d at 930.

[64] *See id.* A consultant associated with the Richmond personnel assessment center testified at trial that, although candidates' rankings did indicate some differential in abilities, he would not recommend that the candidates' scores constitute the sole basis of a promotion decision. *See id.* n.2.

[65] *See id.* at 930.

[66] *See id.* Captain Talbert received a score 5.5 points higher than that received by Captain Miller. *See id.* at 927; text accompanying notes 13 & 14 *supra.*

[67] *See* 648 F.2d at 930-31.

[68] *See id.* at 931; note 14 *supra.*

court, the Fourth Circuit emphasized that Captain Miller had served as Acting Major Inspector for over a year and therefore had actual experience in the position.[69] The court inferred from the discussions of experience contained in the letter of recommendation written by the Chief of Police proved that Richmond's normal promotion procedure took experience into account.[70]

The *Talbert* court proceeded to examine the fourth factor called for by the Supreme Court, the administrative history of the challenged decision, as expressed by the contemporaneous statements of the officials involved.[71] In *Talbert*, the administrative history consisted solely of the contents of the letter of recommendation from the Chief of Police.[72] The Fourth Circuit did not analyze the letter and merely noted the contents without drawing any conclusions.[73]

Having proceeded through the examination called for by the Supreme Court, the Fourth Circuit determined that although the city officials had considered Miller's race, the city had pursued a legitimate interest and not the illegitimate purpose of invidious discrimination.[74] The legitimate end sought by the city entailed the practical needs of a police force serving a racially diverse city.[75] The court accepted the city's proposition that the effective and efficient execution of a police department's duties demands the public support created by an integrated police department.[76] This recognition of the legitimacy of taking race into con-

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[69] *See id.*

[70] *See id.* The *Talbert* court did not specify what might have constituted sufficient procedural deviation to justify an inference of discriminatory intent. *See id. See also* Arthur v. Nyquist, 573 F.2d 134, 144 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978) (procedural deviation giving white students easy ability to transfer to different schools implies discriminatory intent); Brinkman v. Gilligan, 583 F.2d 243, 253-54 (6th Cir. 1978), *aff'd*, 443 U.S. 526 (1979) (intent to segregate schools inferred from sudden change in attendance zones); *see generally* Note, *Proving Discriminatory Intent From a Facially Neutral Decision With a Disproportionate Impact*, 36 WASH. & LEE L. REV. 109 (1979) [hereinafter cited as *Disproportionate Impact*].

[71] *See* 648 F.2d at 931. The *Arlington Heights* court found contemporaneous statements of the officials involved in the challenged decision particularly probative of intent, although testimony about such statements by legislative officials would often prove unavailable because of the separation of powers doctrine. *See* 429 U.S. at 268.

[72] *See* 648 F.2d at 931; notes 13 & 14 *supra.*

[73] *See id.*

[74] *See id.*

[75] *See id.*; text accompanying note 27 *supra.*

[76] *See id. See also* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979) (effective police need community support generated by integrated police force). *See generally* Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413, 413-15 (1979) (racially diverse police force serves urban needs). Commentators have recognized that segregated police departments breed distrust and hostility among minority groups. *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS Report 9-11, 205 (New York Times ed. 1978) (blacks resent segregated police as symbol of white power structure); J. AHERN, POLICE IN TROUBLE: OUR FRIGHTENING CRISIS IN LAW ENFORCEMENT 30 (1972) (white police express racist attitudes); GOVERNOR'S SELECT

sideration in connection with the promotion of an individual further negated any inference of invidiously discriminatory intent. Therefore, the Fourth Circuit decided to reverse the trial court and remand the case for entry of a judgment in favor of the defendant.[77]

Although arguably reaching a desirable result, the *Talbert* opinion and its application of the discriminatory intent requirement merit criticism for both the method of application employed in the instant case and the inappropriateness of the intent test in any reverse discrimination controversy. The Fourth Circuit stated that the failure to promote one white individual had no adverse impact on the white race as a whole.[78] The impact standard employed by the *Talbert* court evolved from a case involving governmental action which adversely affected the rights of a class of citizens who historically suffered discrimination.[79] A simplistic conclusion that disparate treatment affecting only one individual does not burden his race ignores both the plaintiff's rights as an individual and the injury which may occur to the victim regardless of the absence of adverse impact on his class.[80] The historical investigation of the *Talbert* case similarly is unenlightening. The Fourth Circuit gave a cursory examination to Richmond's prior racial practices and found no previous policies aimed at discriminating against white policemen.[81] Such evidence will never exist, however, as most people are not discriminatorily disposed against members of their own race.[82] The obvious function of an historical analysis of this type is to identify current discriminatory actions based on long-held antipathy toward members of minority groups. The statement that white Americans have not suffered

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COMMISSION ON CIVIL DISORDER, STATE OF NEW JERSEY REPORT FOR ACTION 22-36 (1968) (white police hostile to black interests). Police efficiency should not, however, overwhelm all other considerations. *See* Baker v. City of St. Petersburg, 400 F.2d 294, 300 (5th Cir. 1968) (police efficiency does not outweigh constitutional rights).

[77] *See* 648 F.2d at 931-32. Although the *Talbert* court did not spell out the level of scrutiny used, the plaintiff's failure to establish discriminatory intent seems to have entitled the case to review under the lenient rational relation test. *See* note 42 *supra*. Under the rational relation analysis, a non-suspect classification will meet judicial approval if the classification might achieve a legitimate government objective. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); note 42 *supra*.

[78] *See* 648 F.2d at 929; text accompanying notes 50-51 *supra*.

[79] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 254-58 (1977) (denial of rezoning affected blacks).

[80] *See* Fullilove v. Klutznick, 448 U.S. 448, 529 (1980) (Stewart, J., dissenting) (equal protection is personal, not racial, right); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J., separate opinion) (equal protection individual right); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (fourteenth amendment guarantees personal rights).

[81] *See* 648 F.2d at 929-30.

[82] *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) [hereinafter cited as Ely]; *but see* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., dissenting) (minorities develop negative self-image based on racial stereotypes; G. ALLPORT, THE NATURE OF PREJUDICE 150-54 (1954); G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES 192-95, 227, 295 (4th ed. 1972).

past discrimination adds nothing to the inquiry involved in a reverse discrimination case. In fact, a broad historical review, as in the *Talbert* opinion,[83] will merely establish that the white majority consistently has dominated American society. Given the recent development of the reverse discrimination dilemma[84] a more relevant inquiry would focus on recent history and any evidence of other preferential treatment of minority groups. This type of examination would expose actual intent to discriminate on the grounds of race.

The Fourth Circuit's examination of the procedural history and contemporaneous comments involved in *Talbert* points out the inherent difficulties of divining underlying motive from the sketchy information available on after-the-fact review.[85] Absent detailed guidelines setting out specific procedure, differentiation between a valid exercise of government discretion and a decision which violates an individual's constitutional rights will prove nearly impossible. In *Talbert*, the final promotion decisions of the Richmond police force did not follow any specific guidelines.[86] Therefore, the Fourth Circuit had nothing to compare the challenged promotion decision against except the testimony of the city officials that the circumstances warranted the promotion of the black officer.[87] Also, contemporaneous statements seldom will produce probative evidence of discrimination if decisionmakers couch their words in neutral tones.[88]

Given the low probability that those implementing decisions having a reverse discrimination effect will harbor antipathy to whites,[89] the search for statements indicative of prejudicial attitude becomes pointless. In essence, reverse discrimination controversies do not present a mirror image of more traditional forms of discrimination, where racial bigotry underlies a denial of constitutional rights. Preferential treatment for the disadvantaged entails no inherent desire to damage the dominant majority. The preferential treatment of minorities does, however, damage the individual. Therefore, by requiring a showing of discriminatory intent on the part of the defendant, the Fourth Circuit effectively foreclosed any chance of success by a claimant alleging reverse discrimination.

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[83] *See* text accompanying notes 55-60 *supra.*

[84] *See* text accompanying notes 1-2 *supra.*

[85] *See* 648 F.2d at 929-32; text accompanying notes 55-73 *supra*; *see generally* Brest, Palmer v. Thompson: *An Approach to Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[86] *See* 648 F.2d at 927-29; text accompanying notes 7-11 *supra.*

[87] *See* 648 F.2d at 930. *Cf.* Dailey v. City of Lawton, 425 F.2d 1037, 1040 (10th Cir. 1970) (comparing denial of rezoning with previous zoning requests in area).

[88] *See Disproportionate Impact, supra* note 70, at 123; *but see* Griffin v. School Bd. of Prince Edward Co., 377 U.S. 218, 222 (1964) (express statement of discriminatory intent present).

[89] *See* text accompanying note 82 *supra.*

On a broader level, one may criticize the intent requirement in any equal protection litigation. The massive difficulties involved in ascertaining subjective discriminatory intent will present a substantial barrier to many equal protection claims.[90] The guiding principle in equal protection cases remains similar treatment for similarly situated citizens.[91] Since the injury to constitutional rights remains constant whether occasioned by discrimination, remedial intent, or mere insensitivity to inevitable results,[92] a better standard would hold decisionmakers responsible for the foreseeable consequences of their actions.[93] If a decision leads to an obvious result the courts should look to the consequnces of that result and the countervailing circumstances rather than the ill-defined purpose initially prompting the chosen course of action.[94] The discriminatory effect of a personally prejudicial decision remains, regardless of the possibility that a court may find an underlying bad intent. Unfortunately, the Supreme Court has rejected any approach prohibiting government action with foreseeably discriminatory consequences absent a showing of discriminatory intent.[95]

In connection with the entire reverse discrimination controversy, the difficulties involved in ascertaining discrimintory intent point to the necessity of developing more flexible levels of review for evaluating new forms of racial classifications. Rather than maintaining formalistic distinctions between compelling and merely legitimate governmental interests,[96] the Supreme Court should adopt a sliding scale of review which would weigh the interest sought against the injury suffered.[97] Although

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[90] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1031 (1978).

[91] *See* Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[92] *See* Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom*, Smuck v. Hobson, 408 F.2d 175 (1969) (government thoughtlessness injures as easily as discriminatory intent); *see also* Dixon, *supra* note 43, at 85 (lack of stigmatization of reverse discrimination victims does not alleviate practical injury).

[93] *See* Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 DICK. L. REV. 363, 373-74 (1980).

[94] *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (extremely difficult to prove subjective intent of decision maker); Note, *Discriminatory Purpose: What It Means Under the Equal Protection Clause*: Washington v. Davis, 26 DE PAUL L. REV. 650, 660 (1977).

[95] *See* Brennan v. Armstrong, 433 U.S. 672, 672-73 (1977). The Supreme Court fears that a foreseeable consequences approach would invalidate many essential, but foreseeably discriminatory, government actions, such as the imposition of regressive sales taxes. *See* Washington v. Davis, 426 U.S. 229, 248 (1976); note 47 *supra*; *see generally* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/DeJure Distinction*, 86 YALE L.J. 317, 328-32 (1976) (rejecting foreseeable consequences standard).

[96] *See* note 42 *supra*.

[97] *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting) (calling for sliding scale of review in equal protection cases); note 42 *supra*; *see generally* Greenawalt, *supra* note 42, at 219.

such inquiries are very subjective and prone to manipulation,[98] an intermediate level of review would allow a fairer and more open method of evaluating attempts to enhance the status of minorities. In *Talbert*, such a review would pit the benefits to the community arising from an integrated police force and the individual qualities of Captain Miller against the injury received by Captain Talbert as a result of the city's consideration of the candidates' race. However, given the court's recognition of the importance of an integrated police force[99] and Talbert's subsequent promotion to major,[100] the outcome of the case would not have differed.

The *Talbert* case presents an uncommon form of reverse discrimination litigation. The large majority of reverse discrimination claims arise in connection with specific Affirmative Action Programs called for preferential treatment of minorities.[101] The *Talbert* case, nonetheless, does evidence the confusion that exists in reverse discrimination litigation.[102]

The arguments for and against preferential treatment for minorities are many and varied.[103] Proponents stress our nation's history of racial hatred[104] and the necessity of forcefully remedying the current effects of past discrimination.[105] Also, some argue that only by taking race into account can we ever reach a non-racially oriented society.[106] Other critics

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[98] *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (sliding scale of review makes court superlegislature with improper policy making power); *see generally* Areen & Ross, *The* Rodriguez *Case: Judicial Oversight of School Finance*, 1973 SUP. CT. REV. 33 (1973); *The Supreme Court, 1972 Term—Equal Protection—Local Property Taxes as a Means of Financing Public Schools*, 87 HARV. L. REV. 105 (1973).

[99] *See* 648 F.2d at 931; text accompanying notes 73 & 74 *supra*.

[100] *See* 648 F.2d at 929; note 22 *supra*.

[101] *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 208-09 (1979) (approving voluntarily adopted Affirmative Action program); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 694 (6th Cir. 1979) (allowing Affirmative Action Plan in police employment); Morrow v. Crisler, 491 F.2d 1053, 1055 (5th Cir. 1974) (creating hiring quotas for state police after findings of past discrimination); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (endorsing judicially created hiring quotas); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J., separate opinion) (approving racial classifications after findings of past discrimination by competent judicial, legislative, or administrative bodies).

[102] *See* 648 F.2d at 926-32; text accompanying notes 37-38 & 46 *supra*.

[103] *See generally* Note, *Reverse Discrimination—A Summary of the Arguments With Further Consideration of its Stigmatizing Effect*, 16 WASHBURN L.J. 421 (1977).

[104] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 390 (1978) (Marshall, J., concurring in part and dissenting in part) (history of black subjugation demands remedial efforts); *id.* at 355-79 (Brennan, White, Marshall, Blackmun, J J., concurring in part and dissenting in part) (government has compelling interest in remedying past discrimination).

[105] *See* M. KING, WHY WE CAN'T WAIT 147 (1964) (equal opportunity achievable only after remedying past discrimination).

[106] *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

complain that reverse discrimination encourages racial thinking[107] and perpetuates stereotypes of inferiority.[108] Some also argue that preferential treatment of minorities could also lead to a discriminatory backlash,[109] eradicating many of the advances made in civil rights in the last quarter century.[110] More fundamentally, reverse discrimination undercuts the basic presumption that race is irrelevant in connection with equal treatment under the law.[111] The question of the ultimate benefits and disadvantages of benign racial preference remains in flux.

The Supreme Court must set forth more definitive guidelines on the proper weight which decisionmakers can afford race in an individual assessment and selection process. The Court has failed to adopt specifically any of the rationales put forth by the *Bakke* opinions.[112] The Circuit Courts remains divided on their conceptions of the relevance of race to proper government interests.[113] Absent clearer guidance from the Supreme Court, decisions such as *Talbert*, which relied on illogical requirements of discriminatory intent, will continue the uncertainty and indecision which mark reverse discrimination litigation.[114]

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[107] *See* 448 U.S. at 532 (Stewart, J., dissenting) (reverse discrimination encourages racial categorization and stereotypes); Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. CHI. L. REV. 775, 778 (1979) (reverse discrimination erases progress toward nonracial attitudes).

[108] *See* De Funis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) (preferential treatment brands minorities as inferior); Bell, *supra* note 38, at 4 (reverse discrimination entails group defamation).

[109] *See* Ely, *supra* note 82, at 736-37 (reverse discrimination leads to resentment of preferred minorities).

[110] *See id.* at 738-39.

[111] *See* Anderson v. Maryland, 375 U.S. 399, 403 (1964) (race constitutionally irrelevant); Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (Constitution properly color-blind).

[112] *See* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (refusing to adopt any of the *Bakke* opinions). Justice Powell's vote in *Bakke* did swing the decision in favor of compelling the admission of the plaintiff and may, therefore, have some precedential value. *See* Smith, *The Road Not Taken: More Reflections On the* Bakke *Case*, 5 S.L. REV. 23, 47-48 (1978). A single Justice, without majority support, cannot, however, announce any central meaning to a decision. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408 n.1 (1978) (Stevens, J., concurring in part and dissenting in part); *see generally* Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1976).

[113] *Compare* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 694 (6th Cir. 1979) (allowing reverse discrimination for purely remedial reasons) *with* Talbert v. City of Richmond, 648 F.2d 925, 928-29 (1981) (adopting Powell rationale from *Bakke* limiting remedial acts) *and* Associated Gen'l Contractors of Cal. v. San Francisco Unified School Dist., 616 F.2d 1381, 1386-87 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1981) (no constitutional duty to favor minorities).

[114] *See* Karst & Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7 (1979) (courts have not faced reverse discrimination issue squarely).

B. *Protection of Religious Group Members Under 42 U.S.C. § 1985(c)*

Section 1985(c) of Title 42 of the United States Code[1] provides a civil remedy for damages against any person who conspires to deprive another of equal protection of the laws or equal privileges and immunities under the laws.[2] Recently section 1985(c) has come under the scrutiny of the federal courts as a vehicle for an increasing number of federal claims,[3]

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[1] 42 U.S.C. § 1985(c) (1976). Section 1985(c) was originally enacted as part of the Civil Rights Act of 1871 (1871 Act). *See* Note, *Remedies for Statutory Violations Under Sections 1983 and 1985(c)*, 37 WASH. & LEE L. REV. 309, 309 n.2 (1980) [hereinafter cited as *Remedies*]. Section 5 of the fourteenth amendment gives Congress power to enact legislation to prevent denial of equal rights on the basis of race, color, or previous condition of servitude. U.S. CONST. amend. XIV § 5. *See* Lippe, *The Uneasy Partnership: The Balance of Power Between Congress and the Supreme Court in Interpretation of the Civil War Amendments*, 7 AKRON L. REV. 49, 49 (1973) [hereinafter cited as Lippe]. The Reconstruction era Congress passed the 1871 Act pursuant to § 5 of the fourteenth amendment to guarantee a forum where citizens could secure their federal rights. *See Remedies, supra*, at 321. The goal of the fourteenth amendment is to guarantee that no person be denied his rights on the basis of race. *See*, Lippe, *supra*, at 49-66. *See generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323-36 (1952). Congress intended the 1871 Act to prevent southern states from denying newly freed slaves their fourteenth amendment rights. *See* Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1285-86 (1953). The 1976 edition of the United States Code redesignated § 1985(3) as § 1985(c). *See* 42 U.S.C. § 1985(c) (1976). This article will refer to the section as § 1985(c).

[2] 42 U.S.C. § 1985(c) (1976). Justices Powell and Stevens have argued in separate concurring opinions that § 1985(c) protects only violations of fundamental rights derived from the Constitution and does not protect statutory rights. *See* Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378-85 (1979) (Powell, J., concurring and Stevens, J., concurring). The Supreme Court's majority opinion in *Great American Federal Savings & Loan Ass'n*, however, deliberately sidestepped the issue whether § 1985(c) creates a remedy for statutory rights other than rights derived from the Constitution. *See id.* at 370 n.6. Justice Powell criticized the majority in his concurring opinion for leaving federal courts in doubt regarding the scope of actions under § 1985(c), and would have made clear that § 1985(c) provides a remedy only for conspiracies which violate fundamental rights derived from the Constitution. *See id.* at 379, 381 (Powell, J., concurring). Justice Stevens expressed his belief that § 1985(c) was not intended to provide a remedy for the violation of statutory rights. *See id.* at 385 (Stevens, J., concurring). Justice Stevens argued that to hold otherwise would extend the scope of § 1985(c) to cover all rights arising from existing statutes. *See id.* Justice Stevens noted that private discrimination on the basis of sex is not prohibited by the Constitution, but rather is prohibited by a statute enacted almost a century after § 1985(c) was enacted. *See id.*; 42 U.S.C. § 2000e (1976) (unlawful to discriminate on the basis of sex). In dissent Justice White argued that § 1985(c) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution. *See* 442 U.S. at 388-89, n.5 (White, J., dissenting). Some lower courts have held that § 1985(c) protects statutory rights. *See* McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 879-80 (5th Cir. 1976), *modified*, 545 F.2d 919 (5th Cir. 1977) (en banc) (§ 1985(c) protects statutory right to vote in Indian tribal elections). *See generally* Note, *The Scope of Section 1985(3) Since* Griffin v. Breckenridge, 45 GEO. WASH. L. REV. 239, 243-44 (1977) [hereinafter cited as *Scope of Section 1985(3)*]; *Remedies, supra* note 1, at 314-20.

[3] *See* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635, 636 (1980) [hereinafter cited as *Class-Based Animus Requirement*]. No reported cases arose under § 1985(c) or its predecessor statute from the

forcing courts to reexamine its intended scope.[4] In *Griffin v. Breckenridge*[5] the United States Supreme Court determined the scope of the rights section 1985(c) protects.[6] The *Griffin* Court held that private conspiracies to interfere with civil rights motivated by racial animus were actionable under section 1985(c).[7] The Court, however, explicitly declined to decide whether section 1985(c) prohibited private conspiracies motivated by discriminatory intent other than racial bias.[8] Since *Griffin* did not outline the section's permissible constitutional bounds,[9] lower courts interpreting *Griffin* have demonstrated confusion regarding the scope of the rights and classes protected by section 1985(c).[10] In *Ward v. Connor*[11] the Fourth Circuit examined whether section 1985(c) protects the right of free religious association and membership in a particular religious sect.[12]

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date of the statute's enactment in 1871 until 1920. *See id.* at 636 n.6; Comment, *The Civil Rights Act: Emergence of An Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). By contrast, the 1974 edition of the United States Code Annotated and its 1980 supplement list under § 1985, 142 pages of case citations. *See* 42 U.S.C.A. § 1985 (1974 & 1980 Supp.). Many of these cases involved § 1985(c) actions. *See id. See generally Scope of Section 1985(3), supra* note 2, at 240-42; *Class-Based Animus Requirement, supra*, at 636-38; *Remedies, supra* note 1, at 309.

[4] *See* note 65 *infra*. *See generally Scope of Section 1985(3), supra* note 2, at 252-56; *Class-Based Animus Requirement, supra* note 3, at 638-39.

[5] 403 U.S. 88 (1971).

[6] *See id.* at 93.

[7] *See id.* at 102-03. In *Griffin v. Breckenridge* the Supreme Court enumerated the elements that § 1985(c) explicitly requires in a complaint. *See id.* The complaint must allege a conspiracy to deprive a person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws. *See id.* Moreover, the conspirators must commit an act furthering the object of the conspiracy, and the plaintiff must sustain injury to his person or property, or be deprived of a right or privilege of a United States citizen. *See id. See also* Comment, *Constitutional and Jurisdictional Problems in the Application of 42 U.S.C. § 1985(3)*, 52 B.U. L. REV. 599, 601-02 (1972); Comment, *The Deprogramming of Religious Sect Members: A Private Right of Action Under Section 1985(3)*, 74 NW. U. L. REV. 229, 233-34 (1979) [hereinafter cited as *Deprogramming of Religious Sect Members*]; note 30 *infra*. *Griffin* established that a § 1985(c) claim for relief must include facts supporting an allegation that defendants agreed to act in concert and committed an act in furtherance of this agreement. *See* 403 U.S. at 102-03. Lower courts have dismissed § 1985(c) claims solely for failure to allege in the complaint sufficient supporting facts. *See* Droysen v. Hansen, 59 F.R.D. 483, 484 (E.D. Wis. 1973) (conclusory allegations of conspiracy without any specification of agreement forming conspiracy are insufficient); El Mundo, Inc. v. Puerto Rico Newspaper Guild Local 225, 346 F. Supp. 106, 113 (D.P.R. 1972) (pleading of conclusory allegations insufficient). Additionally, the *Griffin* Court required the complaint show some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirators' action, and identify congressional power to justify extending § 1983(c) to cover the alleged private conspiracy. *See* 403 U.S. at 102, 104-06; text accompanying notes 30 & 31 *infra*.

[8] 403 U.S. at 102 n.9.

[9] *See* 403 U.S. at 107.

[10] *See* text accompanying note 69 *infra*.

[11] 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3570 (U.S. Jan. 18, 1982) (81-751).

[12] *See id.* at 46-47.

Ward is a member of the Unification Church[13] and a follower of Reverend Sun Myung Moon, the Church's founder and leader.[14] In 1978 Ward's parents convinced him to travel from New York City to his sister's home in Virginia Beach, Virginia for Thanksgiving dinner.[15] On the day after Thanksgiving instead of being driven to the airport for his return flight to New York, Ward was taken to and forcibly detained in the home of an acquaintance of Ward's family.[16] Ward's parents, relatives, and others moved Ward to a motel in Norfolk, Virginia, then to Pittsburgh, Pennsylvania.[17] Ward's family and family friends held him captive for thirty-five days and subjected him to verbal and physical abuse designed to "deprogram"[18] him from his devotion to the Unification Church and Reverend Moon.[19] The deprogrammers attempts to per-

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[13] *See id.* at 46. The Internal Revenue Service recognizes The Spirit Association for the Unification of World Christianity (Unification Church) as an organized religion. *See* Gillis, *Reverend Sun Myung Moon: "Heavenly Deception"?*, 12 TRIAL 22, 25 (Aug. 1976). The Unification Church claims to have 30,000 followers in the United States. *See id.* at 24. The Unification Church has described itself as based on a new revelation from God given through Reverend Moon to prepare the world for the return of Christ. *See id.* at 22. The Church claims as its sole mission the witnessing of the revelation and the laying of a foundation for the Kingdom of God on Earth. *See id.*; Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPPERDINE L. REV. 655, 703-04 (1980) [hereinafter cited as *Piercing the Religious Veil*].

[14] *See* Ward v. Connor, 495 F. Supp. 434, 435 (E.D. Va. 1980); *Piercing the Religious Veil, supra* note 13, at 703-04. Reverend Moon, a self-proclaimed prophet, seeks to establish a worldwide theocracy which would abolish the separation of church and state. *See Piercing the Religious Veil, supra* note 13, at 703-04. Moon's political and religious convictions merge in his vision of a victory over communism established in a final battle, instigated by God, involving the United States, Russia, China, North and South Korea, and Japan. *See id.* at 704. As the Unification Church's political arm, the Freedom Leadership Foundation which Moon established in the United States, seeks to promote his "Victory Over Communism" ideology. *See id.*

[15] *See* 495 F. Supp. at 435; Brief for Appellant at 3-4, Ward v. Connor, 657 F.2d 45 (4th Cir. 1981) [hereinafter cited as Brief for Appellant].

[16] *See* 495 F. Supp. at 435; Brief for Appellant, *supra* note 15, at 5.

[17] *See* 495 F. Supp. at 435; Brief for Appellant, *supra* note 15, at 5.

[18] *See* 657 F.2d at 46. "Deprogramming" typically involves a third party attempting to remove the effects of an individual's indoctrination into a cult's beliefs. *See Piercing the Religious Veil, supra* note 13, at 656 n.4. Deprogrammers, at the request of a parent or other close relative, will seize a member of a religious sect and hold him against his will. *See id.* at 670-71; LeMoult, *Deprogramming Members of Religious Sects*, 46 FORDHAM L. REV. 599, 603 (1978) [hereinafter cited as LeMoult]. Deprogrammers frequently encounter resistance and thus must resort to physical force to subdue the cultist. *See Piercing the Religious Veil, supra* note 13, at 656 n.4. Deprogramming involves isolation of the individual, with the deprogrammer subjecting the individual to an unrelenting discourse on why association with the cult should be terminated. *See id.* at 670-71. In this discourse the deprogrammer may use mental, emotional and even physical pressures to cajole the individual into renouncing his religious beliefs. *See* LeMoult, *supra* at 603. Deprogrammers charge fees of up to $25,000. *See id.* Ted Patrick, a renowned deprogrammer, claims to have deprogrammed 1,500 individuals. *See Piercing the Religious Veil, supra* note 13, at 670 n.66. Justification for deprogramming rests on the rationale that freedom of religion is impossible without freedom of thought, and that deprogramming makes freedom of thought possible

suade Ward to recant failed, and Ward ultimately escaped.[20] Ward filed eight separate causes of action in the United States District Court for the Eastern District of Virginia against his parents and those who aided in his detention.[21] Ward's suit included an action under section 1985(c) for a private conspiracy to deprive Ward of his right to free religious association and free travel among the states.[22]

The district court relied on the United States Supreme Court's decision in *Griffin v. Breckenridge* to dismiss Ward's section 1985(c) claim.[23] In *Griffin* a group of whites, mistaking several blacks for civil rights workers, stopped the blacks' automobile on a public highway and beat them.[24] The blacks brought a section 1985(c) action to recover compensatory and punitive damages.[25] The *Griffin* Court abandoned the principle that section 1985(c) reaches only conspiracies involving some degree of state participation.[26] Instead, *Griffin* held that section 1985(c) provides a remedy for injuries resulting from purely private, racially motivated

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for the deprogrammed cult member. *See* Robbins, *Religious Movements, The State and The Law: Reconceptualizing "The Cult Problem,"* 9 N.Y.U. REV. L. & SOC. CHANGE 33, 40 (1980). One deprogrammer who believes deprogramming is necessary to counter the effects of cult brainwashing has likened deprogramming to "fighting fire with fire." *See* T. PATRICK, LET OUR CHILDREN GO! 76 (1976).

[19] *See* 657 F.2d at 46, Brief for Appellant, *supra* note 15, at 6-14.

[20] *See* 495 F. Supp. at 435; Brief for Appellant, *supra* note 15, at 6-14.

[21] *See* 657 F.2d at 46; Brief for Appellee at 1, Ward v. Connor, 657 F.2d 45 (4th Cir. 1981) [hereinafter cited as Brief for Appellee]. In addition to the § 1985(c) private conspiracy allegation, Ward further alleged under the laws of Virginia, conspiracy, assault, battery, false imprisonment, invasion of privacy, intentional infliction of emotional distress, and grand larceny. *See* 495 F. Supp. at 436; Brief for Appellee, *supra*, at 1.

[22] *See* 657 F.2d at 46-47. In *Ward v. Connor* Ward named 33 individuals as defendants, including his parents, other relatives and non-relatives. *See* 495 F. Supp. at 436. Ward joined all 33 defendants in his 1985(c) conspiracy charge. *See id.* Ward sought injunctive relief and compensatory and punitive damages. *See* Brief for Appellee, *supra* note 21, at 1.

[23] *See* 495 F. Supp. at 436-47. *See also* 403 U.S. 88 (1971). Acting upon defendants' 12(b)(6) motion, the district court in *Ward* dismissed three counts of Ward's eight count indictment. *See* 657 F.2d at 46; note 21 *supra*; FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state claim upon which relief can be granted). The Fourth Circuit considered only the dismissal of Ward's allegation brought under § 1985(c) that the defendants engaged in a conspiracy to deprive Ward of his civil rights. *See* 657 F.2d at 46-47; text accompanying notes 59-63 *infra*.

[24] *See* 403 U.S. at 89-91.

[25] *See id.* at 89, 92.

[26] *See id.* at 96. In Collins v. Hardyman, 341 U.S. 651 (1951) the United States Supreme Court dismissed a cause of action brought under § 47(3) of Title VIII of the United States Code (current version at 42 U.S.C. § 1985(c)) because the action did not allege that the conspiracy of the defendants involved any state officials, or that the defendants acted under color of state law. *See id.* at 655. In *Collins* a political club meeting was disrupted by American Legion members who threatened club members with violence. *See id.* at 653-55. The *Collins* Court held that the plaintiff club members had not alleged any deprivation which Congress could properly regulate, since the first amendment prohibits only federal and state deprivation of equal protection. *See id.* at 659-60.

conspiracies to deprive a citizen of equal protection of the laws.[27] The *Griffin* Court cautioned, however, that while section 1985(c) prohibits private conspiracies the section does not constitute a general federal tort law.[28] To prevent the statute from becoming a general federal tort law, the Supreme Court imposed two conditions which limit the statute's availability to plaintiffs.[29] First, the Court required that the plaintiffs show some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[30] Second, the Court mandated that the plaintiffs identify congressional authority to justify extending section 1985(c) to cover the alleged private conspiracy.[31]

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[27] 403 U.S. at 102-03. In *Griffin* the Court reviewed the state action requirement announced in *Collins v. Hardyman* and concluded the language of § 1985(c) does not require that the state initiate the action working the deprivation of equal protection. *See* 403 U.S. at 96-97. The *Griffin* Court noted that the legislative history preceding adoption of § 1985(c) as originally introduced does not suggest that liability would not be imposed for purely private conspiracies. *See id.* at 99-101. The *Griffin* Court thus concluded that Congress-intended § 1985(c) to reach private actions. *See id.* at 101. *See generally* Note, *Civil Rights—Federal Civil Rights Act § 47(3) Permits Civil Action Only Against Persons Acting Under Color of State Law*, 100 U. PA. L. REV. 121, 122 (1951); Note, *A Federal Remedy Against Private Class Discrimination Under 42 U.S.C. § 1985(3) (1970)*—Griffin v. Breckenridge, *403 U.S. 88 (1971)*, 47 WASH. L. REV. 353, 357 (1972) [hereinafter cited as *Private Class Discrimination*].

[28] 403 U.S. at 101-02. Only three federal statutes allow civil actions for damages. *See* 42 U.S.C. §§ 1983, 1985, 1986 (1976). Section 1983 grants an action to any person deprived under color of law of a right, privilege, or immunity secured by the United States Constitution or laws. *Id.* § 1983. The first subsection of § 1985 deals with conspiracy to prevent a federal officer from performing his duties. *Id.* § 1985(c). The second part of § 1985 prohibits conspiracies to obstruct justice. *Id.* § 1985(b). Section 1986 authorizes a civil action for damages against anyone who, having power or authority to do so, knowingly fails to prevent the commission of one of the wrongs specified in § 1985. *Id.* § 1986. *See* 25 U. MIAMI L. REV. 780, 781 n.5 (1971). In finding that § 1985(c) is not a general federal tort law the Supreme Court in *Griffin* relied on legislative history. *See* 403 U.S. 101-02. The Court determined that supporters of § 1985(c) as originally introduced did not intend the statute to apply to all tortious, conspiratorial interferences with the rights of others. *See id.* at 101.

[29] *See* 403 U.S. at 102, 104.

[30] *Id.* at 102. The class-based animus requirement of *Griffin* requires a plaintiff to allege a conspiratorial purpose to deprive the plaintiff, as a member of a specific class of persons, of his rights in order to state a cause of action under § 1985(c). *See id.* This conspiratorial purpose requirement necessitates a showing, not of a specific intent to deprive, but rather of an underlying discriminatory intent to treat classes of citizens differently. *See id.* at n.10; *Deprogramming of Religious Sect Members, supra* note 7, at 234. Thus, § 1985(c) contains no specific requirement of wilfulness but focuses on invidiously discriminatory animus. *See* 403 U.S. at 102 n.10.

[31] *See* 403 U.S. at 104. The *Griffin* Court justified congressional authority to enact § 1985(c) by identifying congressional power to protect constitutional rights and those rights considered among the rights and privileges of national citizenship. *See id.* at 105-06. The specific constitutional right the *Griffin* Court construed as the basis of congressional authority for the action of § 1985(c)'s protection was the right to be free from slavery or involuntary servitude under the thirteenth amendment. *See id.* at 105; U.S. CONST. amend. XIII. The *Griffin* Court recognized the right of interstate travel as among the rights and privileges of national citizenship and as another source of congressional authority. *See* 403

The district court in *Ward* found that section 1985(c) did not protect against private conspiracies motivated by religious, rather than racial prejudice.[32] The district court viewed the *Griffin* class-based animus requirement to include discrimination on the basis of immutable characteristics such as race, national origin and sex.[33] The district court reasoned that Ward voluntarily joined the Unification Church and, unlike members of a racial class, could presumably leave the Church if he desired.[34] Additionally, the district court held that regardless of the animus requirement of *Griffin*, the defendants lacked the requisite religious bias.[35] The district court viewed the defendants' activities as motivated not by an intolerance of Ward's religious convictions, but by concern for the well-being of a family member.[36] Finally the district court held that Ward alleged no constitutional authority to support a section 1985(c) claim under *Griffin*.[37] The district court acknowledged that Ward alleged deprivation of the right to travel from state to state, but found that the gravamen of his complaint was interference with his first amendment rights of freedom of religion and association.[38] Stating that the first

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U.S. at 105-06; Twining v. New Jersey, 211 U.S. 78, 97 (1908) (right to pass freely from state to state a right and privilege of national citizenship). The *Griffin* Court noted in identifying these two sources of congressional power that it did not imply the absence of other constitutional sources. *See* 403 U.S. at 107; note 2 *supra*. *See generally Scope of § 1985(3), supra* note 2, at 242-43; *Remedies, supra* note 1, at 318.

[32] 495 F. Supp. at 438.

[33] *See id.* at 437. The district court in *Ward* cited Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974) in discerning the *Griffin* class-based animus requirement. 495 F. Supp. at 437. In *Bellamy* the plaintiff sued his former employer under 42 U.S.C. §§ 1985(3), 1986, and 2000e-2 for reinstatement and damages, alleging that he was fired for belonging to the Ku Klux Klan. *See* 368 F. Supp. at 1026. The district court found that membership in the Ku Klux Klan did not constitute membership in a class protected under § 1985(c) because the members of the Ku Klux Klan did not possess discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national original and sex. *See id.* at 1028. *See generally* Note, *Civil Rights: Private Discrimination*, 33 WASH. & LEE L. REV. 473, 488 (1976) [hereinafter cited as *Private Discrimination*].

[34] *See* 495 F. Supp. at 437.

[35] *See id.*

[36] *See id.* The district court in *Ward* acknowledged that courts have recognized a cause of action under § 1985(c) for plaintiffs who have been victims of conspiracies motivated by religious bias. *See id.* The district court, however, relied on two cases to support its finding that the defendants lacked the necessary bias because they were concerned only for Ward's welfare. *See* 495 F. Supp. at 438; Styn v. Styn No. 79-3468, slip op. at ____, (N.D. Ill. Feb. 7, 1980); Weiss v. Patrick, 453 F. Supp. 717, 724 (D.R.I.), *aff'd*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979). Both *Styn* and *Weiss* concerned suits brought under § 1985(c) by religious cult members alleging deprivation of civil rights by family members and others who attempted to deprogram the cult members. *See* No. 79-3468, slip op. at ____; 453 F. Supp. at 718-21. Both courts found that the familial concern the parents demonstrated did not support a showing of invidiously discriminatory animus. *See* No. 79-2468, slip op. at ____; 453 F. Supp. at 724; note 62 *infra*.

[37] 495 F. Supp. at 438.

[38] *See id.*; text accompanying notes 59-63 *infra*.

amendment protects against only governmental interference with these rights, the district court concluded that without an allegation of state action in the conspiracy, Ward's section 1985(c) complaint lacked the required constitutional authorization.[39] Ward appealed the district court's dismissal of his section 1985(c) claim to the Fourth Circuit.[40]

The Fourth Circuit reversed the district court's dismissal of Ward's section 1985(c) complaint.[41] The *Ward* court held that religious discrimination falls within the ambit of section 1985(c),[42] and that Ward and other Unification Church members constituted a class entitled to the protection of the statute.[43] The Fourth Circuit further held that Ward's allegation that the defendants interfered with his right to interstate travel had a sufficient constitutional basis to support Ward's section 1985(c) claim.[44]

The Fourth Circuit relied on a footnote from *Griffin* to conclude that section 1985(c) protects religious groups.[45] In the footnote, the Supreme Court cited congressional testimony preceding enactment of the statute from which section 1985(c) originated.[46] The testimony states that the statute would prohibit a conspiracy formed against an individual based on his religious affiliation.[47] The Fourth Circuit reasoned that although the *Griffin* Court did not decide whether section 1985(c) applied exclusively to cases where racial bias is a motivating factor of a

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[39] *See* 495 F. Supp. at 438. The district court concluded that Ward's complaint was deficient without an allegation of state interference on the basis of Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974). *See* 495 F. Supp. at 438. The *Bellamy* court conceded that state action is not required for application of § 1985(c), yet declared that in the case before the court the § 1985(c) claim required some degree of state involvement. *See* 508 F.2d at 506. The *Bellamy* court reasoned that the first amendment right of freedom of association is protected through the due process clause of the fourteenth amendment against state interference, but not against interference by private persons. *See id.* at 505-07; NAACP v. Alabama, 357 U.S. 449, 460 (1958) (freedom of association assured by due process clause of fourteenth amendment). Thus, under *Bellamy*, freedom of association was constitutionally protected only against state interference. *See* 508 F.2d at 507; note 33 *supra*; *Private Discrimination*, *supra* note 33, at 486-87.

[40] *See* 657 F.2d at 46-47.

[41] *Id.* at 49.

[42] *Id.* at 48.

[43] *Id.*

[44] *Id.*

[45] *See id.* at 47-48; 403 U.S. at 102 n.9.

[46] *See* 403 U.S. at 102 n.9. *See also* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13; note 1 *supra*.

[47] *See* 657 F.2d at 48; Cong. Globe, 42d Congress, 1st Sess. 567 (1871). The *Griffin* Court cites and the *Ward* court quotes the remarks of Senator Edmunds of Vermont made during debates preceding passage of the Civil Rights Act of 1871. *See* 403 U.S. at 102 n.9; 657 F.2d at 48; Cong. Globe, 42d Congress, 1st Sess. 567. Senator Edmunds stated that if a conspiracy was formed against someone because he was, for example, a Democrat, or a Catholic, or a Methodist, then the legislation would provide a cause of action for redress. *See* Cong. Globe, 42d Congress, 1st Sess. 567 (1871). *See also* 403 U.S. at 102 n.9; 657 F.2d at 78.

conspiracy,[48] the Court's reference to the testimony indicated that the Supreme Court did not intend such a limitation.[49] The Fourth Circuit in *Ward* responded to the district court's failure to find a class-based animus by determining that the complaint sufficiently charged that the conspiracy was based on animosity towards Ward's chosen religious organization, rather than on familial relations.[50] The Fourth Circuit did not question the district court's assumption that parental concern motivated the conspiracy, but nevertheless observed that Ward's complaint sufficiently alleged that the defendants' hostility towards members of the Unification Church motivated the conspiracy.[51] Thus, the Fourth Circuit found Ward's action met *Griffin's* first requirement that plaintiffs show a class-based invidiously discriminatory animus behind the conspirators' actions.[52]

The Fourth Circuit also found that Ward's action met *Griffin's* second requirement that plaintiffs identify congressional authority to justify extending section 1985(c) to cover the defendants' conspiracy.[53] The Supreme Court recognized constitutional authority to reach the conspiracy alleged in *Griffin* in section two of the thirteenth amendment[54] and in the right of interstate travel.[55] The Fourth Circuit stated that the thirteenth amendment could not serve as constitutional authority to support Ward's section 1985(c) claim because Ward is not a member of the Negro race.[56] The *Ward* court reasoned, however, that constitutional

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[48] *See* 403 U.S. at 102 n.9. The *Griffin* Court failed to identify any rights or classes protected by § 1985(c) other than the thirteenth amendment right to be free from slavery and the right of interstate travel. *See id.* at 105-06. The *Griffin* Court noted it did not have to find the section constitutional with all its applications to uphold the constitutionality of § 1985(c). *See id.* at 104; note 31 *supra.*

[49] *See* 657 F.2d at 48.

[50] *See id.* at 49.

[51] *See id.* at 48. The Fourth Circuit in *Ward* did not decide whether parental concern or class-based animus motivated the conspiracy. *See id.* The *Ward* court held only that Ward's allegation of discriminatory motive was sufficient to support a § 1985(c) claim. *See id.*; text accompanying note 62 *infra.*

[52] *See* 657 F.2d at 48; text accompanying note 30 *supra.*

[53] *See* 657 F.2d at 48; text accompanying note 31 *supra.*

[54] *See* 403 U.S. at 105. The *Griffin* Court held that creation of a statutory cause of action for black victims of racially discriminatory conspiracies aimed at depriving them of basic rights is within Congress' powers to legislate against the badges and incidents of slavery, under § 2 of the thirteenth amendment. *Id. See Private Class Discrimination, supra* note 27, at 361; note 31 *supra.*

[55] *See* 403 U.S. at 106. Although not an explicit constitutional right, the right of interstate travel, is among the rights and privileges of national citizenship. *See id.*; note 31 *supra.*

[56] 657 F.2d at 48. In *Ward*, § 2 of the thirteenth amendment did not apply as a source of congressional power to reach the conspiracy because Ward did not allege membership in a racial class. *See id.* at 47. Congressional power to reach the badges and incidents of slavery appears unavailable where groups which do not share the heritage of slavery are involved. *See* Note, *Federal Remedy to Redress Private Deprivations of Civil Rights*, 85 HARV. L. REV. 95, 104 (1971).

power to reach the conspiracy derived from Ward's charge that a purpose of the conspiracy was to deprive Ward of his right to travel from state to state.[57] Thus, the court held Ward's allegation sufficient to support his cause of action.[58]

The Fourth Circuit's decision in *Ward* highlights the district court's faulty analysis of the defendants' motion to dismiss. In considering the defendants' motion the district court did not construe Ward's section 1985(c) complaint in the light most favorable to Ward.[59] The district court inappropriately looked beyond the mere sufficiency of Ward's complaint when it sought to discern the gravamen of the complaint.[60] By contrast, the Fourth Circuit held only that Ward's allegation of discriminatory motive was sufficient to support a section 1985(c) claim.[61] Additionally, the district court in determining that the defendants' class-based animus was insufficient to support the section 1985(c) claim imputed a motivation behind the conspiracy based on defendants' familial relationship with Ward, rather than on defendants' abhorence of the Unification Church.[62] The cases which the district court cited to support its finding

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[57] *See* 657 F.2d at 48.

[58] *See id.*

[59] *See* FED. R. CIV. P. 12(b)(6). For purposes of a motion to dismiss made under Rule 12(b)(6), a complaint must be construed in the light most favorable to the plaintiff. *See* Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (for purposes of dismissal motion complaint's allegations taken as admitted, complaint to be liberally construed in favor of plaintiff); Walker Process Equip., Inc. v. Food Mech. & Chem. Corp., 383 U.S. 172, 174-75 (1965) (material allegations of counterclaim taken as admitted); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (complaint not to be dismissed unless appellant could prove no facts to support his claim). *See generally* C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE § 1357 n.46 (1969).

[60] *See* 495 F. Supp. at 438.

[61] *See* 657 F.2d at 48.

[62] *See* 495 F. Supp. at 437-38. The analysis the district court adopted in *Ward* that finds no discriminatory motive in a conspiracy because the conspiracy is based on concern for a loved one has been criticized as misreading *Griffin*. *See Deprogramming of Religious Sect Members*, *supra* note 7, at 241. The plaintiff under the *Griffin* standard must allege in a § 1985(c) action a conspiratorial purpose to deprive the plaintiff, as a member of a class, of his rights. *See* 403 U.S. at 102 n.10. Thus, in a deprogramming situation, even though defendants believe they are helping the plaintiff their personal concern about the plaintiff does not destroy the class-based nature of their animus if hostility towards the plaintiff's religious group causes their concern. *See id.*; Baer v. Baer, 450 F. Supp. 481, 490-91 (N.D. Cal. 1978) (plaintiff demonstrated sufficient class-based animus in action against family members for deprogramming). *But see* Styn v. Styn No. 79-3468, slip op. at ____ (N.D. Ill. Feb. 7, 1980) (deprogramming attempt motivated by concern for family member not class-based animus); Weiss v. Patrick, 453 F. Supp. 717, 723-24 (D.R.I.), *aff'd*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (deprogramming attempt motivated by material concern not class-based animus). Courts generally have required that class-based animus be directed against plaintiff as a member of a class, not as an individual. *See Scope of § 1985(3)*, *supra* note 2, at 252. *See, e.g.*, Crabtree v. Brennan, 466 F.2d 480, 481 (6th Cir. 1972) (non-tenured teacher's suit dismissed for not alleging class-based bias); Jacobson v. Industrial Foundation of the Permian Basin, 456 F.2d 258, 259 (5th Cir. 1972) (insufficient class alleged to support membership); Schoonfield v. Mayor, 399 F. Supp. 1068, 1086 (D. Md. 1975), *aff'd*

that section 1985(c) offered Ward no remedy were rendered on the merits of the actions and not in response to a motion to dismiss.[63] Thus, the district court in *Ward* improperly scrutinized the substantive issues of Ward's action, instead of confining its inquiry to the sufficiency of Ward's complaint.

In addition to improperly ruling upon the defendants' motion to dismiss, the district court adopted a narrow view of the scope of section 1985(c) that other federal courts have not accepted, and which runs counter to the clear implication of the Supreme Court's decision in *Griffin*.[64] Despite the narrow holding in *Griffin*, lower federal courts have concluded that section 1985(c) actions are not limited to classes defined by race,[65] and have extended coverage of section 1985(c) to religious groups.[66] Even those federal courts which denied section 1985(c) claims

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sub nom. Schoonfield v. Baltimore, 544 F.2d 514 (4th Cir. 1976) (facts alleged did not show class-based discrimination); Doyle v. Unicare Health Servs. Inc., 399 F. Supp. 69, 75 (N.D. Ill. 1975), *aff'd*, 541 F.2d 283 (7th Cir. 1976) (no membership in class alleged); Meyer v. Curran, 397 F. Supp. 512, 520 (E.D. Pa. 1975) (complaint dismissed for failure to allege class-based animus).

[63] *See* Styn v. Styn, No. 79-3468, slip op. ____ (Feb. 7, 1980, N.D. Ill.) (slip opinion); Weiss v. Patrick, 453 F. Supp. 717, 722 (D.R.I.), *aff'd*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); note 36 *supra*.

[64] *See* 495 F. Supp. at 437; note 47 *supra*; text accompanying notes 65 & 66 *infra*.

[65] *See* Curran v. Portland Super. School Comm., 435 F. Supp. 1063, 1085 (D. Maine 1977) (class based on sex). Section 1985(c) prohibits conspiracies motivated by sex-based animus. Reichardt v. Payne, 396 F. Supp. 1010, 1018 (N.D. Cal. 1975), *modified sub nom.* Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (sex bias is sufficiently class-based to come within § 1985(c)); Pendrell v. Chatham College, 370 F. Supp. 494, 501 (W.D. Pa. 1974) (same); Stern v. Massachusetts Indemnity & Life Ins. Co., 365 F. Supp. 433, 443 (E.D. Pa. 1973) (same). A section 1985(c) cause of action exists in conspiracies motivated by invidiously discriminatory intent directed towards supporters of a particular political candidate. Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) (supporters of a political candidate protected by § 1985(c)); Means v. Wilson, 522 F.2d 833, 839-41 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (same). *See also* Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 (9th Cir. 1975) (assuming without deciding that legality of residence status creates a class cognizable under *Griffin*); Glasson v. City of Louisville, 518 F.2d 899, 912 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (persons critical of government officials and policies); Westberry v. Gilman Paper Company, 507 F.2d 206, 215 (5th Cir.), *opinion withdrawn and vacated as moot*, 507 F.2d 215 (5th Cir. 1975) (member of group of environmentalists); Smith v. Cherry, 489 F.2d 1098, 1100-01 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974) (voters who were deceived as to actual effect of their vote).

[66] *See* 657 F.2d at 48; Marlowe v. Fisher Body, 489 F.2d 1057, 1059, 1064-65 (6th Cir. 1973) (member of Jewish faith); Action v. Gannon, 450 F.2d 1227, 1232 (8th Cir. 1971) (en banc) (Catholic worshippers); Baer v. Baer, 450 F. Supp. 481, 491 (N.D. Cal. 1978) (same); Mandelkorn v. Patrick, 359 F. Supp. 692, 694 (D.D.C. 1973) ("Children of God" member). *See also* Jackson v. Associated Hospital Service of Philadelphia, 414 F. Supp. 315, 324 (E.D. Pa. 1976), *aff'd*, 549 F.2d 795 (3d Cir.), *cert. denied*, 434 U.S. 832 (1977) (no cause of action under § 1985(c) absent readily discernible class of plaintiffs whose religious exercise had been infringed upon); Western Telecasters, Inc. v. California Federation of Labor, 415 F. Supp. 30, 33 (S.D. Cal. 1976) (discrimination based on religion may provide necessary animus for § 1985(c) action) *citing with approval*, Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973), *aff'd on other grounds* 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974)

have done so not on the basis that section 1985(c) fails to protect members of religious groups, but rather on the basis of plaintiff's failure to demonstrate a sufficient invidiously discriminatory, class-based animus.[67] Although the *Griffin* opinion is narrowly confined, the Fourth Circuit correctly followed the inference of the *Griffin* Court's citation to legislative history, as well as the precendent of other federal courts in holding that section 1985(c) extends to religious group members.[68]

The *Griffin* Court's lack of explicit guidance has caused confusion among the lower courts, resulting in an expansion of the range of classes eligible to bring suit in federal court under section 1985(c).[69] Since *Griffin*, the Supreme Court has not further explained the rights and classes that section 1985(c) protects.[70] Generally, however, the Court's trend has been to limit access to the federal court system.[71] By extending coverage

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(class-based, invidiously discriminatory animus refers to odious class discrimination such as discrimination based on religion). *But see* Styn v. Styn, No. 79-3468, slip op. at ____, (N.D. Ill. Feb. 7, 1980) (slip opinion) (no class-based religious animus present); Weiss v. Patrick, 453 F. Supp. 717, 724 (D.R.I.), *aff'd*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (absence of class-based religious animus). *See* note 36 *supra*.

[67] *See* Styn v. Styn, No. 79-3465 at ____; Weiss v. Patrick, 453 F. Supp. at 724; note 36 *supra*.

[68] *See* text accompanying notes 47-49 *supra*.

[69] *See* Selzer v. Berkowitz, 459 F. Supp. 347, 350 (E.D.N.Y. 1978) (*Griffin* created more confusion than it resolved); note 65 *supra*. Federal courts have agreed that failure to allege any class-based animus is a fatal defect to a § 1985(c) action. *See* McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 928 (5th Cir. 1977), *modified*, 545 F.2d 919 (5th Cir. 1977) (en banc) (class-based bias must be alleged to sustain § 1985(c) claim); Jackson v. Cox, 540 F.2d 209, 210 (5th Cir. 1976) (complaint in § 1985(c) action failed to allege class-based invidiously discriminatory intent); Timson v. Wright, 532 F.2d 552, 553 (6th Cir. 1976) (no allegation of racial or class animosity in complaint alleging § 1985(c) claim); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 74 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976) (no allegation of class-based discriminatory motive in complaint alleging § 1985(c) violation); Glasson v. City of Louisville, 518 F.2d 899, 911 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (must be some racial, or class-based discriminatory animus behind conspirators' action); Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) (no cause of action under § 1985(c) because no allegation of racial or class-based invidiously discriminatory animus); Hamilton v. Chaffin, 506 F.2d 904, 914 n.23 (5th Cir. 1975) (§ 1985(c) action requires some racial or class-based invidiously discriminatory animus); Thomas v. Economic Action Comm., 504 F.2d 563, 564-65 (5th Cir. 1974) (plaintiff failed to state § 1985(c) claim by not alleging denial of equal protection of the law); Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) (complaint in § 1985(c) action must allege conspiracy to deprive class of persons equal protection of laws).

[70] *See* 657 F.2d at 48. In Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), the Supreme Court declined the opportunity to define the specific federal rights which § 1985(c) protects. *See id.* at 378; note 2 *supra*; *Remedies*, *supra* note 1, at 310.

[71] *See Remedies*, *supra* note 1, at 316. In cases where federal and state courts both have jurisdiction, the Supreme Court tends to defer jurisdiction to state courts, and deny access to federal courts when feasible. *See* Paul v. Davis, 424 U.S. 693, 697-99 (1976). *See generally* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977). The Supreme Court has confirmed this trend in Great American Federal Savings & Loan Ass'n v. Novotny with regard to § 1985(c). *See* 442 U.S. 366, 378 (1979); *Remedies*, *supra* note 1, at 316. Although the trend of the Supreme Court has been to limit access to federal courts, the

of section 1985(c) to religious groups, the *Ward* decision has established in the Fourth Circuit a new class of plaintiffs with access to the federal courts.[72] Unanswered by the *Ward* decision, however, is the question of whether the class must allege a private conspiracy to violate rights in addition to first amendment rights to enjoy section 1985(c)'s protection.[73] Thus, access to federal courts in the Fourth Circuit may be qualified by the restriction that plaintiffs allege a private conspiracy to deprive them of more than just religious rights.[74] Nevertheless, in reversing the district court to allow Ward's section 1985(c) suit the Fourth Circuit correctly confirmed a right of access to the federal judicial system which the Supreme Court only implied.

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Supreme Court's decision in *Griffin* greatly expanded the protection of § 1985(c) by dispensing with the "state action" requirement previously deemed essential. *See* Note, *State Action No Longer A Requisite Under 42 U.S.C. § 1985(3)*, 3 SETON HALL L. REV. 168, 169 (1971); text accompanying note 27 *supra*.

[72] *See* 657 F.2d at 48. Before *Ward*, the Fourth Circuit declined to decide whether § 1985(c) proscribed conspiracies motivated by invidious intent other than racial bias. *See* Rodgers v. Tolson, 582 F.2d 315, 317 (4th Cir. 1978) (class of political and philosophical opponents to town commissioners); Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1976) (employment discrimination based on sex); Hughes v. Ranger Fuel Corp., 467 F.2d 6, 10 (4th Cir. 1972) (victims of assault and battery).

[73] *See* 657 F.2d at 48. The Fourth Circuit in *Ward* did not have to consider whether first amendment rights derived through the fourteenth amendment establish sufficient authority to extend § 1985(c)'s protection against violations of these rights. *See id.* at 48 n.5. The *Ward* court found sufficient constitutional authority in Ward's allegation that he was deprived of the right to travel from state to state. *See id.* at 48. The Fourth Circuit noted its earlier decision involving first and fourteenth amendment rights and § 1985(c) in Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974), and acknowledged the question was troublesome. *See id.* at 48 n.5; note 39 *supra*.

[74] *See* 657 F.2d at 48. At least one circuit has found in the first and fourteenth amendments sources of constitutional authority sufficient to satisfy the *Griffin v. Brechenridge* requirement that a source of congressional authority be found to support extension of § 1985(c) protection. *See* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc). *See also* 403 U.S. at 104. In *Action*, the Eighth Circuit en banc declared that § 1985(c) reached purely private conspiracies to interfere with first amendment rights of freedom of assembly and worship through § 5 of the fourteenth amendment. *See* 450 F.2d at 1235. Thus while the facts of *Ward* did not require the Fourth Circuit to consider an extension of § 1985(c) as the Eighth Circuit postulated, the *Action* decision suggests that the scope of § 1985(c) may encompass protection of rights of religious freedom without requiring association with other constitutional rights. *See Private Discrimination, supra* note 33, at 486 n.79.