

SECTION 1985(3): A VIABLE ALTERNATIVE TO TITLE VII FOR SEX-BASED EMPLOYMENT DISCRIMINATION

I. INTRODUCTION

Although the United States has been committed for more than a decade to the eradication of sex-based employment discrimination, it remains a pervasive problem. There is continuing disparity in earning power between men and women¹ that is partly due to the underrepresentation of women in higher paying occupations,² and reflects a need for vigorous efforts to overcome the effects of sex discrimination.

Congress enacted Title VII³ of the Civil Rights Act of 1964—which forbids employment discrimination on the basis of sex,⁴ race, color, re-

1. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, *Monthly Labor Review* 36 (June, 1977) [hereinafter cited as *Monthly Labor Review*]. In 1975, women earned approximately 40% less than their male counterparts. While the average man's income increases two and a half times after the teen years and reaches its peak between ages 35 and 54, the average woman's earnings increase less than twice after the teen years and stabilize between the ages of 35 and 54 at about 50% of the average man's income. *Id.*

2. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 24 *Employment and Earnings* 8 (Table 1) (January, 1977). Although women account for more than 40% of the labor force, only 9.2% of all lawyers and only 12.8% of all physicians are women. *Monthly Labor Review*, *supra* note 1, at 38.

3. 42 U.S.C. §§ 2000e-2000e-17 (1970 & Supp. V 1975). Section 2000e-2(a) makes it an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." See generally Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1 (1976); Katz, *Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process*, 28 HASTINGS L.J. 877 (1977); Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69 (1977); Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 GA. L. REV. 717 (1976); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); Wells, *Sex Discrimination and Title VII*, 43 U.M.K.C. L. REV. 274 (1975); Winslow, *Sex Discrimination in Employment: Current Federal Practice*, 24 DRAKE L. REV. 515 (1975); *Symposium—The Second Decade of Title VII: Refinement of the Remedies*, 16 WM. & MARY L. REV. 433 (1975); Comment, *Title VII Seven Years After*, 32 MONT. L. REV. 229 (1971); Note, *Sex Discrimination in Employment: What has Title VII Accomplished for the Female?*, 9 U. RICH. L. REV. 149 (1974).

4. As originally proposed, Title VII did not apply to sex discrimination. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 2 (1963), reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2391. The

ligion, or national origin—to check widespread and blatant employment discrimination.⁵ Despite the success of Title VII suits in obtaining significant back pay awards and spurring affirmative action programs,⁶ the burdensome and inflexible procedures of Title VII,⁷ its inadequate remedies,⁸ and its limited coverage⁹ have led victims of employment discrimination to seek alternative methods of redress.¹⁰

Section 1981,¹¹ which guarantees to all persons the same rights as “white persons” to make and enforce contracts, has been used to combat racially motivated employment discrimination, but has been held inapplicable to sex-based discrimination.¹² Section 1983¹³ provides a civil action for deprivations of rights secured by the Constitution or federal statutes under color of state law, and can be used to remedy sex-based employment discrimination if the litigant can prove state

prohibition against sex discrimination was later proposed by the opponents of the bill to aid in the bill's defeat. The only Congressman initially supporting inclusion of sex discrimination within Title VII voted against the final bill. 110 CONG. REC. 2804-05 (1964). See Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 677.

5. Recognizing the need to grant the Equal Employment Opportunity Commission (EEOC) authority to obtain enforcement of its orders, Congress amended Title VII by enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 7, 86 Stat. 103. For the legislative history, see H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137-38. As amended, Title VII establishes a five-member Equal Employment Opportunity Commission authorized to investigate and conciliate discrimination charges, sets forth an extensive procedure for the filing and processing of claims, grants the EEOC the power to sue if conciliation fails, and details remedies available to a complainant. 42 U.S.C. §§ 2000e-4, 2000e-5 (Supp. V 1975).

6. See note 33 *infra*.

7. See notes 20-30 *infra* and accompanying text.

8. See notes 31-39 *infra* and accompanying text.

9. See note 40 *infra*.

10. When the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 7, 86 Stat. 103, was passed, the average woman earned 57.9% as much as the average man. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS (1972). In 1975 the average woman's earnings represented only 60% of the average man's and women constituted two-thirds of all workers earning less than \$5000. *Monthly Labor Review*, *supra* note 1, at 40.

11. 42 U.S.C. § 1981 (1970) reads: “All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens”

12. See note 59 *infra*.

13. 42 U.S.C. § 1983 (1970) reads: “Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law”

action.¹⁴

For the victim of sex discrimination who can neither allege nor prove state action, section 1985(3)¹⁵ provides the only viable alternative to Title VII. Section 1985(3) creates a cause of action against any person who conspires to deprive another "of the equal protection of the laws or of equal privileges and immunities under the laws."¹⁶ Since the Supreme Court held in *Griffin v. Breckenridge*¹⁷ that a section 1985(3) racial discrimination claim did not require state action, this section has become a popular remedy for sex-based employment discrimination.¹⁸

Griffin, however, left unanswered the questions whether state action, although not required for race discrimination claims, is necessary to reach sex-based employment discrimination under section 1985(3); whether the managers of a single business entity can conspire; and, whether sex discrimination is sufficiently class-based to activate section 1985(3). After examining these questions, which have been inconsistently answered by the lower courts, this Note concludes that section

14. Section 1985(3), enacted to enforce the fourteenth amendment, also has been interpreted to require state action. See notes 71-121 *infra* and accompanying text.

15. 42 U.S.C. § 1985(3) (1970) reads:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

16. To state a cause of action under § 1985(3), a plaintiff must allege that 1) defendants conspired for the purpose of depriving plaintiff of equal protection of the laws or of equal privileges and immunities under the laws; 2) the conspirators' actions were motivated by some racial or other class-based invidiously discriminatory animus; and 3) plaintiff suffered injury to person or property or was deprived of his rights or privileges as a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Sykes v. California*, 497 F.2d 197 (9th Cir. 1974); *Jones v. Bales*, 58 F.R.D. 453 (N.D. Ga.), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973). For a general discussion of pleading under § 1985(3), see Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258 (1977).

17. 403 U.S. 88 (1971).

18. See, e.g., *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167 (E.D. Pa. 1976); *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974).

1985(3) provides a valuable method to achieve the goals of Title VII while avoiding its inadequacies.

II. THE INADEQUACIES OF TITLE VII

In accord with a congressional preference for voluntary resolution of employment discrimination charges,¹⁹ Title VII establishes extensive procedures to be followed by the complainant and the Equal Employment Opportunity Commission (EEOC) in processing a complaint. A complainant must file a charge with the EEOC within 180 days of the alleged discriminatory practice.²⁰ The EEOC then determines whether there is reasonable cause for complaint,²¹ attempts to achieve a conciliatory agreement, and may sue the employer if no agreement is reached.²² Although the ultimate enforcement of Title VII lies with the EEOC, the statute provides for a sixty day deferral of charges to state agencies.²³ Title VII also allows any aggrieved individual to bring suit after the prescribed period for EEOC action has elapsed.²⁴ The median

19. The legislative history of the Act stresses the EEOC's conciliatory role and views recourse to the courts as extraordinary. 110 CONG. REC. 14190 (1964) (remarks of Sen. Morse); *id.* at 13088, 14443 (remarks of Sen. Humphrey).

20. 42 U.S.C. § 2000e-5 (Supp. V 1975). Although the purpose of Title VII's 180 day filing requirement is to avoid faded memories and lost evidence, *see* Note, *Limitation Periods for Filing a Charge with the EEOC Under Title VII of the Civil Rights Act of 1964*, 56 B.U.L. REV. 760, 764 (1976), the principal result of the requirement has been to bar plaintiffs from joining parties or adding claims to the initial EEOC complaint. Casey & Slaybod, *Procedural Aspects of Title VII Litigation: Pitfalls for the Unwary Attorney*, 7 U. TOL. L. REV. 87, 93-94 (1975); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1202-03 (1970) [hereinafter cited as *Developments—Employment Discrimination*].

21. *Id.* § 2000e-5(b). The EEOC has 120 days to determine whether the charge is based on reasonable cause.

22. *Id.* § 2000e-5(f). If it finds reasonable cause for the charge, the EEOC has 30 additional days to achieve a conciliatory agreement and may sue the employer if no timely agreement is reached.

23. *Id.* § 2000e-5(c), (d). *See* EEOC Regulations, 29 C.F.R. 1601.12 (1976). Deferral is mandatory if the state fair employment practices agency operates under a statute similar to Title VII and has enforcement powers analogous to those of the EEOC.

24. *Id.* § 2000e-5(f)(1). If the EEOC dismisses the complaint, fails to achieve voluntary compliance, or fails to file suit within 180 days of determining that the complaint is based on reasonable cause, it must issue the complainant a "right-to-sue" letter which entitles him to institute suit within ninety days.

Theoretically, a court should be deprived of jurisdiction under Title VII if the complainant or the EEOC fails to satisfy any procedural requirement. In practice, however, courts will dismiss a complaint for lack of jurisdiction only if the complainant fails to file with the EEOC within the requisite period. *See, e.g.*, *Williams v. Norfolk & W. Ry. Co.*, 530 F.2d 539 (4th Cir. 1975); *De Gideo v. Sperry-Univac Co.*, 415 F. Supp. 227 (E.D. Pa. 1976); *Kinnan v. Central Tel. & Tel. Co.*, 401 F. Supp. 1273 (W.D. Va. 1975). Courts rarely require EEOC compliance with statutory procedures before allowing a litigant to institute suit because of the agency's case backlog and inability

time period for resolution of an EEOC charge is currently thirty-two months.²⁵

If a discrepancy arises between the EEOC charge and the complaint, a defendant can move to dismiss the suit on grounds that the complaint defeats Title VII's purpose of informal grievance resolution because defendant had no notice of the additional allegation and thus no opportunity to conciliate the matter.²⁶ Courts that accept this argument, in effect, bind the plaintiff to a charge filed long before she enlisted an attorney's help or knew the full extent of the discrimination she suffered.²⁷

Even though the EEOC has been reluctant to defer charges to state agencies,²⁸ the deferral scheme has been criticized as causing needless

to process charges within the statutory period. *See, e.g.,* Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); Antonopoulos v. Aerojet-Gen. Corp., 295 F. Supp. 1390 (E.D. Cal. 1968); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

The EEOC's backlog of cases has risen from 6,133 charges at the close of its first fiscal year to in excess of 100,000 charges in March, 1975. Much of its inability to process charges within the statutory period is attributed to its insufficient operating budget and failure to maintain its staff at the authorized level. One year after the EEOC obtained power to file suit, the Office of the General Counsel had 105 vacancies out of 270 positions. In February, 1975, there were still vacancies in more than 14% of the authorized positions. *See* Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831 (1976). For other criticisms of the EEOC, *see generally* Blumrosen, *Developments in Equal Employment Opportunity Law 1976*, 36 FED. B.J. 55, 60 (1977); Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME LAW. 46 (1973).

25. *See* Peck, *supra* note 24, at 848 n.103. Although the EEOC completed 7,000 successful conciliations in 1974 which provided \$111,000,000 in benefits to over 50,000 employees, the EEOC admits that these figures represent little more than a drop in the bucket. Address of Lowell W. Perry, Chairman of the EEOC, September 11, 1975, *cited in* Casey & Slaybod, *supra* note 20, at 87.

Moreover, the EEOC admitted that the exclusive reliance placed on voluntary methods of negotiation to eliminate employment discrimination was misplaced. In 1973, the EEOC achieved 2,279 successful settlements out of a total of 4,970 cases in which conciliation was attempted. Peck, *supra* note 24, at 852.

26. For cases dismissing added claims, *see* EEOC v. Hickey-Mitchell, 372 F. Supp. 1117 (E.D. Mo. 1973) (added claim of sex discrimination dismissed because not within the scope of the EEOC charge); Fix v. Swinerton & Walberg Co., 320 F. Supp. 58 (D. Colo. 1970) (added claim of religious discrimination dismissed because EEOC had no opportunity to investigate such claim).

For a case dismissing parties not joined in the original EEOC charge, *see* Mickel v. South Carolina State Employment Serv., 377 F.2d 239 (4th Cir.) (added party dismissed on ground that its omission from the EEOC charge prevented any voluntary conciliation), *cert. denied*, 389 U.S. 877 (1967). *But see* Chastang v. Flynn & Emrich Co., 365 F. Supp. 957 (D. Md. 1973).

27. *See* Casey & Slaybod, *supra* note 20, at 93-94.

28. According to EEOC regulations, 29 C.F.R. 1601.12 (1976), when a complainant files with the EEOC without first filing with the state fair employment practices agency, the EEOC must refer the charge to the state or local agency. *See* Shawe, *Employment Discrimination—The*

duplication of federal efforts and delaying ultimate relief. Because it is impossible to resolve a claim within sixty days, the deferral period does not spur vigorous enforcement of state antidiscrimination statutes.²⁹ Furthermore, defendants have no incentive to settle cases at the state level during the deferral period because such settlement does not preclude a federal suit.³⁰

Title VII remedies are inadequate and fail to deter future employment discrimination.³¹ The statute authorizes courts to grant injunctions, affirmative relief such as reinstatement or hiring, and "any other equitable relief as the court deems appropriate,"³² however, back pay reduced by interim earnings is the only monetary relief commonly awarded under Title VII.³³

Back pay awards are insufficient to compensate plaintiffs for the delay, emotional investment, and expense entailed in litigation,³⁴ and provide plaintiffs with little incentive to prosecute Title VII suits.³⁵ Although the successful litigant can obtain attorney's fees, such grants have not been "sufficiently generous to induce attorneys to undertake the associated risk, to cover the extensive trial preparation costs, and to compensate for the long and arduous Title VII litigation."³⁶ The statute

Equal Employment Opportunity Commission and the Deferral Quagmire, 5 BALT. L. REV. 221 (1975), who argues that the EEOC has been reluctant to delegate portions of its work to state agencies and has attempted to evade the deferral regulations because of the inconsistency of state antidiscrimination laws.

29. See *Developments—Employment Discrimination*, *supra* note 20, at 1215. See generally Sape & Hart, *supra* note 3.

30. See 1 EML. PRAC. GUIDE (CCH) § 1952, at 1628 (1976).

31. See generally Peck, *supra* note 20, at 1253-55; *Symposium*, *supra* note 3, at 510-19; Note, *Employment Discrimination Litigation, The Availability of Damages*, 44 U.M.K.C. L. REV. 497 (1976).

32. 42 U.S.C. § 2000e-5(g) (Supp. V 1975) reads:

If the court finds the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

33. See, e.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *vacated and remanded*, 422 U.S. 405 (1975).

Commentators agree that the possibility of significant damage awards would encourage victims of employment discrimination to initiate Title VII actions. See generally *Symposium*, *supra* note 3, at 510-19; *Developments—Employment Discrimination*, *supra* note 20, at 1260.

34. See *Developments—Employment Discrimination*, *supra* note 20, at 1253.

35. See Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 492 (1968).

36. *Developments—Employment Discrimination*, *supra* note 20, at 1255.

is silent about money damages and courts have generally disallowed both compensatory³⁷ and punitive³⁸ damages, reasoning that Congress' failure to include damages within the specific remedies of Title VII indicates an intent to disallow this kind of relief.³⁹

III. ALTERNATIVES TO TITLE VII

The strict procedural requirements and limited coverage of Title VII⁴⁰ compelled victims of racial and sex-based employment discrimination to seek alternative remedies.⁴¹ Relying on the Supreme Court's opinion in *Jones v. Alfred H. Mayer Co.*,⁴² victims of racial discrimination pursued relief under section 1981.⁴³ In *Jones*, petitioner relied on section 1982,⁴⁴ derived from the 1866 Civil Rights Act⁴⁵ and the thir-

37. Although compensatory damages generally refer to damages which compensate the injured for his injury, some courts have given this term a wider meaning under Title VII. See *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (reimbursement for pension rights from forced early retirement); *Bradshaw v. Zoological Soc'y of San Diego*, 10 F.E.P. Cas. 1268 (S.D. Cal. 1975) (general damages for mental anguish); *Hunter v. United Air Lines*, 10 F.E.P. Cas. 787 (N.D. Cal. 1975) (interest on back pay and refund of union dues).

38. Punitive damages have become an important remedy for willful discrimination under other civil rights statutes. See *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir.) (§ 1981), cert. denied, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967) (§§ 1983, 1985); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965) (§ 1983). Courts, however, have disallowed punitive damages under Title VII. See *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), vacated and remanded, 431 U.S. 951 (1977); *Opara v. Modern Mfg. Co.*, 12 F.E.P. Cas. 378 (D. Md. 1975); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), appeal dismissed and remanded, 497 F.2d 180 (1974); *Howard v. Mercantile Commerce Trust Co.*, 10 F.E.P. Cas. 662 (N.D. Ga. 1973).

39. See *Jiron v. Sperry Rand Corp.*, 10 F.E.P. Cas. 730 (D. Utah 1975); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973); *Hayes v. Seaboard Coastline R.R.*, 46 F.R.D. 49 (S.D. Ga. 1968). *Contra*, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Taylor v. Ford Motor Co.*, 8 F.E.P. Cas. 253 (W.D. Mo. 1974).

40. When it passed, Title VII excluded employers with 24 or less employees, private clubs, religious associations, and state and local governments from its prohibitions. 42 U.S.C. §§ 2000e-2000e-15 (1970). These exclusions were calculated to cover over 92% of all employers and 60% of all employees in the United States. See 110 CONG. REC. 13090 (1964) (remarks of Sen. Humphrey).

41. See Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972).

42. 392 U.S. 409 (1968). See generally Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 449 (1971); Note, *Section 1981 & Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

43. 42 U.S.C. § 1981 (1970). Text quoted in note 11 *supra*. See note 41 *supra*.

44. 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

45. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, reenacted by § 18 of The Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 8, 16 Stat. 140.

teenth amendment, to challenge respondent's racially motivated refusal to sell property. The Court scrutinized the legislative history of section 1 of the 1866 Civil Rights Act, and concluded that the Act prohibited all racially motivated deprivations of the rights to contract and to purchase property.⁴⁶ In *Young v. International Telephone & Telegraph Co.*,⁴⁷ the Third Circuit considered the common origin of sections 1981 and 1982 and held section 1981 applicable to racially motivated exclusionary employment practices.⁴⁸

Use of section 1981 as a remedy for private employment discrimination evoked the argument that Title VII was intended to be the exclusive remedy for employment discrimination.⁴⁹ The Supreme Court rejected this interpretation of Title VII in *Alexander v. Gardner-Denver Company*⁵⁰ and *Johnson v. Railway Express Agency*.⁵¹ In *Alexander*, the Court held that the submission of a discriminatory discharge claim to arbitration pursuant to a collective bargaining agreement did not preclude a subsequent Title VII suit on the same racial discrimination charge.⁵² The Court noted Congress' "general intent to accord parallel or overlapping remedies against discrimination,"⁵³ and concluded that "[t]he clear inference [from the legislative history] is that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination."⁵⁴

46. 392 U.S. at 426.

47. 438 F.2d 757 (3d Cir. 1971). *Accord*, *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971).

48. 438 F.2d at 760 ("In the context of the Reconstruction it would be hard to imagine to what contract right [other than employment] the Congress was more likely to have been referring. Certainly the recently emancipated slaves had little or nothing other than their personal services about which to contract.")

49. *Smith v. North American Rockwell*, 50 F.R.D. 515 (N.D. Okla. 1970). *But see* *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

Commentators argued that Title VII did not repeal the older civil rights statutes. *See* *Larson, supra* note 41, at 65-67; Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223.

50. 415 U.S. 36 (1974).

51. 421 U.S. 454 (1975).

52. 415 U.S. at 36.

53. *Id.* at 47. The Court cited 42 U.S.C. §§ 1981 and 1983 for support, and noted that Congress had provided several forums for consideration of employment discrimination claims without requiring that submission of a claim to one forum precluded submission to others. *Id.* (citing 42 U.S.C. § 2000e-5(b) (Supp. II 1972) (EEOC); 42 U.S.C. § 2000e-5(c) (Supp. II 1972) (state and local agencies); 42 U.S.C. § 2000e-5(f) (Supp. II 1972) (federal courts)).

54. 415 U.S. at 48-49.

In *Johnson*, the Court noted the independence of Title VII and section 1981 as remedies for private employment discrimination and held that the timely filing of a Title VII charge with the EEOC did not toll the statute of limitations applicable to a section 1981 action on the same facts.⁵⁵ Despite the comprehensive scope of Title VII,⁵⁶ the Court concluded that Title VII did not implicitly repeal section 1981 because they were neither coextensive in coverage⁵⁷ nor in remedies.⁵⁸ The same reasoning supports the conclusion that Title VII does not preempt section 1985(3) as a remedy for private employment discrimination.

Courts have refused to extend section 1981 protection to sex-based employment discrimination.⁵⁹ Thus, in *League of Academic Women v. Regents of the University of California*,⁶⁰ the court held that reenactment of section 1981 subsequent to passage of the fourteenth amendment did not indicate congressional intent to provide a remedy for sex discrimination.⁶¹ Dictum in the recent case of *Runyon v. McCrary*⁶²

Nothing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA and Railway Labor Act. The procedures set up in Title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices Of course, Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction

110 CONG. REC. 7207 (1964) (remarks of Sen. Clark). The Senate also defeated an amendment that would have made Title VII the exclusive federal remedy for most unlawful employment practices. See *id.* at 13650-52.

55. 421 U.S. at 462-67.

56. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Id.* at 459.

57. *Id.* at 460 (Title VII inapplicable to certain employees covered by § 1981).

58. *Id.* at 461 (neither punitive nor compensatory damages are available under Title VII; both kinds of damages have been allowed under § 1981). For a thorough discussion of this line of reasoning, see Larson, *supra* note 41, at 65-67; Note, *supra* note 49, at 1230-36.

59. *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974); *League of Academic Women v. Regents of the Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972).

Plaintiffs attempting to invoke § 1981 to combat sex discrimination argue (without success) that § 1981, originally enacted pursuant to the thirteenth amendment reveals congressional intent to confer the rights of white citizens on all persons, and that white citizens referred only to white males, the only persons with significant rights in 1870, thereby according women, along with blacks, protection under § 1981. *Rackin v. University of Pa.*, 386 F. Supp. 992, 1008 (E.D. Pa. 1974).

60. 343 F. Supp. 636 (N.D. Cal. 1972).

61. *Id.* at 639.

[T]here is nothing in the history of the Act to suggest that Congress envisioned any sex-

supports the holding in *League of Academic Women*. In *Runyon*, the Supreme Court held that section 1981 prohibits racially discriminatory private school admissions and indicated that section 1981 applies only to racial discrimination.⁶³

Because courts are unwilling to extend section 1981 to sex discrimination, section 1985(3)⁶⁴ provides the only alternative to Title VII to redress private sex-based employment discrimination. Section 1985(3) creates a cause of action against any person who conspires to deprive another "of the equal protection of the laws or of equal privileges and immunities under the laws." By suing under section 1985(3) the plaintiff can avoid the procedural requirements and delay inherent in obtaining Title VII relief,⁶⁵ and can control the progression of her suit. Because the appropriate state statute of limitations governs the filing of section 1985(3) suits, the plaintiff has a longer filing period than under Title VII.⁶⁶ In addition, most district courts disallow punitive and compensatory damages in Title VII suits,⁶⁷ but both kinds of damages have been awarded in actions under other portions of the Civil Rights Acts.⁶⁸ Punitive damages have been awarded under section 1983,⁶⁹ and the common constitutional derivation of the Civil Rights Acts supports

ual differences when it established the white citizen standard. The statute was obviously aimed at racial problems and inequalities relating to both black males and females The Fourteenth Amendment certainly is not a mandate that every statute must be read to outlaw all forms of discrimination.

Id.

62. 427 U.S. 160 (1976). *Runyon* is commented on in Note, *Section 1981 and the Thirteenth Amendment After Runyon v. McCrary—On the Doorstep of Discriminatory Private Clubs*, 29 STAN. L. REV. 747 (1977). See also Note, *May Desegregation Remedies Infringe the Rights of Innocent Whites? The Implications of Runyon v. McCrary for Reverse Discrimination*, 1978 WASH. U.L.Q. 211; 1977 DET. C.L. REV. 401.

63. 427 U.S. at 167. In outlining the questions the case did not raise, the Court stated it "do[es] not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." *Id.*

64. 42 U.S.C. § 1985(3) (1970). Text quoted in note 15 *supra*.

65. See notes 20-30 *supra* and accompanying text.

66. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962). Courts have held that the appropriate statute of limitations is that applicable to tort actions. *Hileman v. Knable*, 391 F.2d 596 (3d Cir. 1968); *Mulligan v. Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Wilson v. Sharon Steel Corp.*, 399 F. Supp. 403 (W.D. Pa. 1975). Some courts have used state statutes of limitations for contract actions, *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420 (E.D. Pa. 1974), while others have applied a statute of limitations for liability created by statute, *Ney v. California*, 439 F.2d 1285 (9th Cir. 1971); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Nevels v. Wilson*, 423 F.2d 691 (5th Cir. 1970).

67. See notes 37-39 *supra* and accompanying text.

68. 42 U.S.C. § 1988 (1970) provides that the laws of the United States shall be applied in

their award under 1985(3) as well.⁷⁰

IV. SHOULD SECTION 1985(3) BE APPLIED TO PRIVATE SEX-BASED DISCRIMINATION?

Section 1985(3), enacted pursuant to section 5 of the fourteenth amendment,⁷¹ was originally part of the Ku Klux Klan Act of 1871⁷² which provided civil and criminal remedies for denial of constitutional rights to newly emancipated slaves. The legislative history of section 1985(3) fails to establish whether or to what extent Congress intended it

vindicating civil rights so far as they are appropriate but where they "are not adapted to the object or are deficient," state law is to apply.

In *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965), the court found federal common law determined whether punitive damages were allowable under the civil rights statutes:

We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection of the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought.

Id. at 86.

69. *Id.* The court supported its decision with analogous awards for deprivation of other civil rights, stating:

While a deprivation of a right to vote and deprivation of personal liberty caused by an illegal arrest and wrongful incarceration are, of course, not identical, nonetheless the decisions cited above provide a useful and persuasive analogy. We are of the view that the same principles of the federal common law relating to damages in the cases cited are equally applicable in all Civil Rights cases.

Id. at 88. *See* *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919) (illegal arrest and incarceration). The *Basista* court found an additional analogy in voting rights, citing *Nixon v. Herndon*, 273 U.S. 536 (1927). 340 F.2d at 88.

70. *See* B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 638 (1976).

71. U.S. CONST. amend. XIV, § 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

72. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes, Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13-14 (1871) (current version at 42 U.S.C. § 1985(3) (1970), text quoted in note 15 *supra*).

Sec. 2. That if two or more persons within any State or Territory of the United States . . . conspire together . . . or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . . each and every person so offending shall be deemed guilty of a high crime . . . And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy

Id.

to reach private conspiracies.⁷³ Congress was uniformly committed to eradicating Klan activities,⁷⁴ but it was sharply divided over whether section 1985(3) prohibited all private discrimination.⁷⁵

As originally introduced, section 1985(3) forbade conspiracies to deny a person his rights, privileges, or immunities under the Constitution or laws of the United States "which would under any laws of the United States . . . constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery."⁷⁶ Some members of Congress feared that this first version of the bill would subvert state enforcement of criminal laws.⁷⁷ To avoid this problem, the statute's language was amended to add the phrase "equal protection" and to provide for civil rather than criminal penalties.⁷⁸

73. The following commentators conclude that Congress intended § 1985(3) to reach the acts of private individuals: R. HARRIS, *THE QUEST FOR EQUALITY* 44-52 (1960); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 111 (1966); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy*, 26 IND. L.J. 361 (1951); Note, *Federal Civil Action Against Private Individuals for Crimes Involving Civil Rights*, 74 YALE L.J. 1462 (1965). *Contra*, Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

74. *See* CONG. GLOBE, 42d Cong., 1st Sess., app. 260 (1871) (remarks of Sen. Holman); *id.* app. 216 (remarks of Sen. Thurman).

75. One faction thought § 1985(3) should protect the rights of national citizenship. *Id.* at 475-76 (remarks of Rep. Dawes), 382-83 (remarks of Rep. Hawley), app. 83-85 (remarks of Rep. Bingham). Another faction argued that § 1985(3) should cover private conspiracies which deprive persons of fourteenth amendment rights if the state has been lax in protecting those rights. *Id.* at 607-08 (remarks of Rep. Pool), 485 (remarks of Rep. Cook). A third faction believed that § 1985(3) should apply to all private conspiracies which deprive persons of constitutional rights regardless of the state's attempt to remedy such deprivations. *Id.* at 487 (remarks of Rep. Tyner), 334 (remarks of Rep. Hoar).

76. *Id.* at 317.

77. *Id.* at 382.

78. Representative Shellabarger introduced the amendment and explained why the qualifying word "equal" had been added:

The change which the amendment proposes to make in section two of the original bill as reported by the committee, so far as it relates to disputed grounds, so far as it is not confined to infractions of right which are clearly independent of the fourteenth amendment, referable to and clearly sustainable by the old provisions of the constitution, is to be found in those portions of the section which are contained in the part beginning at line twenty-five The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights shall be within the scope of the remedies of this section.

Id. at 478 (emphasis in original).

One commentator argues that "the addition of the word 'equal' was a term of *limitation* only in the sense that Congress wished to avoid subverting the entire criminal jurisdiction of the state." Note, *supra* note 73, at 1469 (emphasis in original).

Sections 1981 and 1982, enacted pursuant to the thirteenth amendment, prohibit private racial discrimination.⁷⁹ Section 1985(3), enacted to enforce the fourteenth amendment, has been interpreted to require state action.⁸⁰ Section 5 of the fourteenth amendment, however, arguably grants Congress affirmative legislative authority⁸¹ to assure all citizens minimal equality. This interpretation sanctions the use of section 1985(3) to combat sex-based private conspiracies to interfere with constitutional or statutory rights.

The Court first considered whether section 1985(3) reached private conspiracies in *Collins v. Hardyman*.⁸² Members of an activist political club that opposed the Marshall Plan brought an action under 8 U.S.C. § 47(3), the predecessor of section 1985(3), alleging that defendants had conspired to disrupt club meetings and thereby deprive members of

79. See notes 43-47 *supra* and accompanying text.

80. See, e.g., *Ferrer v. Fronton Exhibition Co.*, 188 F.2d 954 (5th Cir. 1951); *Love v. Chandler*, 124 F.2d 785 (8th Cir. 1942).

81. For cases holding that § 5 is affirmative, see *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 383 U.S. 745 (1966) (Brennan, J., concurring); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). For cases holding that § 5 is strictly remedial, see *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). See generally R. HARRIS, *supra* note 73, at 53; Cox, *supra* note 73; Kurland, *The Supreme Court, 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 148 (1964).

For arguments that congressional power under § 5 is purely remedial, see Avins, *supra* note 73; Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 497-500 (1974).

These conflicting interpretations of the scope of § 5 power were espoused by Justices Bradley (remedial) and Harlan (affirmative) in the Civil Rights Cases, 109 U.S. 3 (1883). The Court struck down the 1875 Civil Rights Act because the Act exceeded congressional power to counteract state imposed denials of equal protection. Justice Harlan, in dissent, argued:

[T]he power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the provisions of this article" of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions, authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure, and protect that right.

Id. at 46-47 (Harlan, J., dissenting) (emphasis in original).

See generally Note, *The Reach of 42 U.S.C. § 1985(3): Sex Discrimination as a Gauge*, 25 CLEV. ST. L. REV. 331, 332-39 (1976) [hereinafter cited as *Sex Discrimination as a Gauge*].

A recent article suggests that liberty of contract, the doctrinal basis of the Civil Rights Cases, is now discredited and the state action theory of the Civil Rights Cases should fall as well. Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Basis of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 362-63 (1977).

82. 341 U.S. 651 (1951).

their first amendment rights.⁸³ Although plaintiffs carefully avoided framing their complaint in fourteenth amendment terms,⁸⁴ Justice Jackson held that state action was an element of every section 1985(3) claim because of the fourteenth amendment's state action requirement.⁸⁵ He also noted that the extension of section 1985(3) to private conspiracies would raise serious constitutional issues.⁸⁶

In dissent, Justice Burton argued that section 1985(3) was addressed to individuals rather than state officials,⁸⁷ and that to read a state action requirement into section 1985(3) would render section 1983 meaningless.⁸⁸ Plaintiffs were not seeking redress of their fourteenth amendment rights,⁸⁹ and, he noted, Congress had the power to protect rights existing independent of the fourteenth amendment.⁹⁰

The Court again disagreed, in *United States v. Guest*,⁹¹ whether Congress had power under section 5 to punish purely private conspiracies through the use of 18 U.S.C. § 241,⁹² the criminal counterpart of section 1985(3). Six defendants who allegedly murdered a black army colonel in route to a new duty station were indicted for conspiring to deprive black citizens of their right to equal utilization of state operated public facilities, streets, and highways.⁹³ Writing for the Court, Justice Stewart reasoned that because the indictment charged a conspiracy to

83. *Id.* at 651.

84. *Id.* at 655.

85. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of "equal protection" or of "equal privileges and immunities" than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.

Id. at 661. For a criticism of Justice Jackson's opinion, see Note, *supra* note 73, at 1469.

86. 341 U.S. at 659. The constitutional problems he noted were the breadth of Congress' power under and apart from the fourteenth amendment, the preservation of the states' reserved powers, and the nature of the rights of national, as distinguished from state, citizenship.

87. *Id.* at 663-64. "When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms." *Id.* at 664 (citing § 1983).

88. *Id.*

89. *Id.* at 663.

90. *Id.* at 664. Even though he did not define the source of congressional power, Justice Burton was the first Supreme Court Justice to recognize that § 1985(3) could protect federally created or constitutional rights not derived from the fourteenth amendment. Compare *Collins, with Griffin v. Breckenridge*, 403 U.S. 88 (1971).

91. 383 U.S. 745 (1966).

92. 18 U.S.C. § 241 (1970).

93. 383 U.S. at 747 n.1.

deprive blacks of equal protection of the laws, section 241 would cover the conspiracy only if there were state action. Although it contains no explicit state action requirement, Justice Stewart concluded that section 241 "does not purport to give substantive, as opposed to remedial, implementation to any rights secured by [the equal protection] clause [of the fourteenth amendment]," and must require state action.⁹⁴ The Court then found sufficient state involvement to sustain the indictment.⁹⁵

Justice Clark, joined by Justices Black and Fortas, concurring, upheld the indictment on the ground that section 241, enacted pursuant to Congress' section 5 power, reaches private conspiracies to inhibit fourteenth amendment rights.⁹⁶ In a second concurrence, Justice Brennan, joined by the Chief Justice and Justice Douglas, went even further and argued that section 241 protects rights which are "secured" by the Constitution.⁹⁷

In *Griffin v. Breckenridge*,⁹⁸ the Supreme Court held that section 1985(3) applied to a purely private conspiracy which deprived plaintiffs of their thirteenth amendment right to be free from the incidents of slavery and their right to interstate travel. Black plaintiffs brought a

94. *Id.* at 754-55.

95. *Id.* at 756. Noting that the involvement of the state need not be exclusive or direct, Justice Stewart found that the indictment alleged that part of the conspiracy was achieved by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." *Id.*

For a criticism of Justice Stewart's opinion and an argument that the state involvement in *Guest* was so ill-defined that the finding of state action mocked the notion that state action is a viable limitation upon the fourteenth amendment, see Note, *The Troubled Waters of Section 1985(3) Litigation*, 1973 LAW & SOC. ORD. 639, 663 (1972).

96. 383 U.S. at 761 (Clark, J., concurring). Justice Clark stated: "I believe . . . that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762.

97. *Id.* at 782. Justice Brennan argued that § 241 protects rights which emanate from the Constitution. The right of equal access to public highways emanates from the fourteenth amendment, and § 5 empowers Congress "to determine that punishment of private conspiracies interfering with the exercise of [a fourteenth amendment right] is necessary to its full protection." *Id.* Justice Harlan also concurred, but he specifically stated that § 241 did not apply to private conspiracies. *Id.* at 762-63. See generally Cox, *supra* note 73. For a criticism of the concurring opinions in *Guest*, see Nichol, *An Examination of Congressional Powers Under § Five of the 14th Amendment*, 52 NOTRE DAME LAW. 175, 183 (1976); Note, *Private Interference with an Individual's Civil Rights: A Redressable Wrong Under § Five of the Fourteenth Amendment?*, 51 NOTRE DAME LAW. 120, 134-36 (1975).

98. 403 U.S. 88 (1971). *Griffin* is commented on in: 23 BAYLOR L. REV. 277 (1971); 40 FORDHAM L. REV. 635 (1972); 85 HARV. L. REV. 95 (1971); 3 SETON HALL L. REV. 168 (1971); 1972 U. ILL. L.F. 199; 25 U. MIAMI L. REV. 780 (1971); 47 WASH. L. REV. 353 (1971).

section 1985(3) action against two white defendants who had detained their automobile and assaulted them believing that one plaintiff was a civil rights worker.⁹⁹ Writing for a unanimous court, Justice Stewart determined that neither the language,¹⁰⁰ legislative history,¹⁰¹ nor companion provisions¹⁰² precluded the application of section 1985(3) to private conspiracies. The Court concluded that Congress had power under the thirteenth amendment¹⁰³ and the right to travel¹⁰⁴ to reach the alleged private conspiracy through section 1985(3).¹⁰⁵ Justice Stewart noted the similarity between the language of section 1985(3) and section 1 of the fourteenth amendment,¹⁰⁶ which had been held to require state action,¹⁰⁷ but said:

A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.¹⁰⁸

99. 403 U.S. at 90-91.

100. *Id.* at 96-98. Unlike the language of § 1983, that of § 1985(3) does not require that defendants conspire "under color of state law," and the Court concluded that § 1985(3) which speaks of "two or more persons conspiring or going into disguise on the highway or the premises of another" encompasses private conduct. *Id.* at 96.

101. *Id.* at 99-102.

102. The Supreme Court noted that there are three possible forms of a state action limitation on § 1985(3): action under color of state law, interference with or influence upon state authorities, or a private conspiracy so massive that it supplants state authorities. Section 1983, the first clause of § 1985(3), and § 3 of the 1871 Civil Rights Act, respectively, deal with each of these possibilities. *Id.* at 98-99.

103. *Id.* at 105. Congress was authorized by § 2 of the thirteenth amendment to determine the badges and incidents of slavery, legislate against them, and impose liability on private persons who violate the legislation. *Id.*

104. *Id.* at 105-06. The Court found defendants' conspiracy denied plaintiffs their right to interstate travel, a right of national citizenship which Congress has power to protect from private as well as public interference. *Id.*

Presumably, any right of national citizenship is within the aegis of § 1985(3). Rights of national citizenship include: the right to vote in a federal election, *Ex parte Yarbrough*, 110 U.S. 651 (1884); the right to protection while in the custody of federal officers, *Logan v. United States*, 144 U.S. 263 (1892); the right to inform federal officials of federal law violations, *In re Quarles*, 158 U.S. 532 (1895); and the right to travel from state to state, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). This view accords with the legislative history of § 1985(3). See CONG. GLOBE, 42d Cong., 1st Sess., app. 189 (1871) (remarks of Mr. Williard).

105. 403 U.S. at 104 (1971). See generally Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239 (1977).

106. 403 U.S. at 96.

107. *Id.* at 97.

108. *Id.*

The Court recognized Congress' broad affirmative legislative authority to protect voting rights under section 5 of the fourteenth amendment in *Katzenbach v. Morgan*.¹⁰⁹ The Court upheld section 4(e) of the Voting Rights Act of 1965¹¹⁰ which invalidated New York's literacy requirement for certain Puerto Ricans as a prerequisite for voting.¹¹¹ The Court concluded that section 5 was "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."¹¹²

In *Oregon v. Mitchell*,¹¹³ the Court upheld a ban on literacy tests and durational residency requirements for voting in presidential elections under the Voting Rights Act Amendments¹¹⁴ as a valid exercise of Congress' section 5 power.¹¹⁵ Courts have also found that section 5 enables Congress to regulate an individual's activities that prevent the states from protecting fourteenth amendment rights.¹¹⁶ One commentator has argued that it is unreasonable to hold that Congress has power to legislate against private conspiracies that prevent a state from granting its citizens equal protection of the laws, but to deny Congress the power to legislate against purely private infringements of those rights.¹¹⁷

Lower courts have taken inconsistent positions on whether state action is an element of a section 1985(3) cause of action for deprivation of

109. 384 U.S. 641 (1966).

110. 42 U.S.C. § 1973 (1970).

111. 384 U.S. at 643.

112. *Id.* at 651. In analyzing the case, Professor Cox has said that *Morgan* "left no doubt that section 5 of the fourteenth amendment gives Congress power to deal with conduct outside the scope of section 1 and within the reserved power of the states where the measurement is a means of securing the state's performance of its fourteenth amendment duties, regardless of past compliance or violations." Cox, *supra* note 73, at 103.

113. 400 U.S. 112 (1970).

114. Pub. L. No. 91-285, § 6, 84 Stat. 314, 316, 318 (codified in 42 U.S.C. §§ 1973aa-1, 1973bb-1 (1970)).

115. 400 U.S. at 118. Section 5, however, did not empower Congress to lower the voting age in state and local elections. *Id.* Justices Douglas, Brennan, White, and Marshall dissented from the Court's holding that nothing in the Constitution authorizes Congress to lower the voting age in state and local elections. *Id.* at 135 (Douglas, J., dissenting); *id.* at 229 (Brennan, White, Marshall, JJ., dissenting).

116. *United States v. Price*, 383 U.S. 787 (1966) (Congress has power to punish private individuals who joined with local officials in murdering civil rights workers); *Ex parte Riggins*, 134 F. 404 (N.D. Ala. 1904) (Congress has power under the fourteenth amendment to impose criminal sanctions for interference with states according to its prisoners due process of law).

117. *See Cox, supra* note 73, at 112.

fourteenth amendment rights.¹¹⁸ The court, in *Milner v. National Institute of Health*,¹¹⁹ ingeniously avoided the state action controversy. Plaintiff alleged she was fired from her job for obtaining a divorce and that the Institute did not similarly discriminate against divorced men. Although the court held that state action was required in a 1985(3) suit alleging a private conspiracy to deprive persons of fourteenth amendment rights,¹²⁰ it sustained plaintiff's claim because her dismissal violated Title VII which creates a federally protected right to be free from sex-based employment discrimination.¹²¹

118. The Seventh Circuit has held that state action is required to sustain a § 1985(3) claim because the fourteenth amendment only prohibits state imposed discrimination while the Fifth and Eighth Circuits have held that Congress has power under § 5 to enforce fourteenth amendment rights against private conspiracies. *See e.g.* *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (8th Cir. 1974); *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975).

In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the court dismissed a lawyer's allegations that defendant conspired to deprive him of office space in violation of § 1985(3) because state action was required. Writing for the court, Judge (now Justice) Stevens said that the omission of "under color of state law" from § 1985(3) merely alleviates plaintiff's proof that defendant's conduct arose under the guise of state law. A plaintiff must still plead and prove state action if he claims he was deprived of fourteenth amendment rights because "section 1 of [the fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* at 194 n.9 (quoting *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

In *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971), the Eighth Circuit relied on the concurring opinions in *Guest* and held that § 1985(3) could be used against civil rights demonstrators who had continually interfered with the church services of a white parish. The court concluded that the fourteenth amendment protects the first amendment rights of freedom of worship and assembly and that Congress had power to protect these rights from private interference under § 5 of the fourteenth amendment. Although *Griffin* left the door open for a reexamination of *Guest*, the court did not believe the Supreme Court would reject the views of the concurring justices in *Guest* because the fourteenth amendment and § 1985(3) were too closely connected as to date of passage, authorship, and purpose. *Id.* at 1236. In *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975), the Fifth Circuit followed the Eighth Circuit's reasoning in *Action* and held that § 1985(3) affords a civil remedy without regard to state action for a conspiracy to deprive persons of the equal treatment of the laws. Although the case was dismissed as moot on a rehearing en banc, the substance of the original opinion was not rejected. *Id.* at 216.

See generally Comment, *Constitutional and Jurisdictional Problems in the Application of 42 U.S.C. § 1985(3)*, 52 B.U.L. REV. 599 (1972); Comment, "State Action" in the Seventh Circuit, 59 MARQ. L. REV. 809 (1976); Comment, *Expansion of Remedies Under 42 U.S.C. § 1985(3)*, 37 Mo. L. REV. 525 (1972); Note, *supra* note 97; 54 N.C.L. REV. 677 (1976).

119. 409 F. Supp. 1389 (E.D. Pa. 1976). *See generally* *Sex Discrimination as a Gauge*, *supra* note 81, at 365-69.

120. 409 F. Supp. at 1394.

121. *Id.* at 1394-95. *Accord*, *Local 1, Teamsters Union v. International Bhd. of Teamsters*, 419 F. Supp. 263 (E.D. Pa. 1976); *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167 (E.D. Pa. 1976). In *Local 1*, plaintiffs sought to enjoin the Executive Board of the Teamsters from directing a merger of Local 1 into another local. Plaintiffs sued under § 1985(3) alleging that the forced merger violated their first and fourteenth amendment rights, and that it was an unlawful retali-

Milner's holding clearly comports with the Supreme Court's analysis in *Griffin*¹²² that section 1985(3) prohibits private conspiracies that deprive persons of rights secured by the Constitution or valid federal laws. Because Title VII is a constitutional exercise of Congress' commerce power¹²³ which is intended to prohibit employment discrimination, the section 1985(3) action brought in *Milner* was proper. This approach is also consistent with *United States v. Waddell*,¹²⁴ in which the Supreme Court held that section 241¹²⁵ prohibited a private conspiracy that deprived plaintiff of his right, secured by federal statute, to homestead.¹²⁶

Although section 241, unlike section 1985(3), expressly covers private conspiracies that deprive persons of rights secured by federal statutes, case law under section 241 can be used to extend section 1985(3)'s coverage. The criminal and civil portions of the civil rights statutes have generally been considered in *pari materia*.¹²⁷ Extending section 1985(3)'s civil protections to rights secured by federal statute is an

tion by Teamsters President Fitzsimmons for the Local's political differences with the International. Rejecting the constitutional arguments, the court held that the deprivation of the right to express views contrary to the leadership of the International was cognizable under § 1985(3) because that right was protected by § 101 of the Labor Management Relations Disclosure Act. 29 U.S.C. § 411 (1976).

122. See notes 98-108 *supra* and accompanying text.

123. See *Weiner v. Cuyahoga Community College Dist.*, 15 Ohio Misc. 289, 238 N.E.2d 839, *aff'd*, 19 Ohio St. 2d 35, 249 N.E.2d 907, *cert. denied*, 396 U.S. 1004 (1968); S. REP. NO. 872, 88th Cong., 2d Sess. 12 (1964), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2366.

At the outset a formidable obstacle to a favorable decision on S.1732 appeared to be an 1883 decision by the U.S. Supreme Court holding unconstitutional an 1875 statute providing criminal penalties for denials of service by public facilities or accommodations on account of race, color, or religion. This 1875 law was expressly based on the 14th amendment, but the Supreme Court could not find the requisite "State action" in denials of service by privately owned establishments. There is a large body of legal thought that the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished. That question, however, was not before the committee for the instant measure is based on the commerce clause.

Id.

124. 112 U.S. 76 (1884). See generally *Sex Discrimination as a Gauge*, *supra* note 81, at 366-67.

125. 18 U.S.C. § 241 (1970). In *United States v. Bathgate*, 246 U.S. 220 (1918), the Supreme Court limited the scope of § 241 to protection of personal rights to avoid its being construed as a general federal tort law. "The right or privilege to be guarded [under § 241], as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudicable one common to all, that the public shall be protected against harmful acts, which is here relied on." *Id.* at 226-27. Compare *Bathgate*, with *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

126. 112 U.S. at 79, 89.

127. See *In re Estelle*, 516 F.2d 480, 486 (5th Cir. 1975); *Wiltsie v. California Dep't of Commerce*, 406 F.2d 515 (9th Cir. 1968); *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958).

insignificant federal intrusion into private relationships that are already protected by its criminal counterpart.

Despite the logic of *Milner*,¹²⁸ the Fourth Circuit, in *Doski v. Goldseker*,¹²⁹ held that a plaintiff may not use section 1985(3) to enforce her Title VII right to be free from sex-based employment discrimination. Plaintiff alleged that several of the defendant company's male employees had conspired to fire her because of her sex in violation of Title VII. The court noted that although *Johnson v. Railway Express Agency*¹³⁰ held litigants could concurrently pursue remedies for racial employment discrimination under Title VII and section 1981, Title VII preempted all other remedies for sex discrimination.¹³¹ The court reasoned from the legislative history of Title VII and *Alexander v. Gardner-Denver Company*¹³² that Congress intended the older civil rights statutes to protect only those rights which existed prior to Title VII. Because there was no preexisting right to be free from sex-based discrimination, plaintiff was foreclosed from a section 1985(3) remedy.

The Fourth Circuit's interpretation of the legislative history of Title VII and its reading of *Alexander v. Gardner-Denver Company* are inaccurate. Both statements pertain only to a litigant's election of remedies and not to the *sources* of rights which may be protected by section 1985(3) and other civil rights statutes.¹³³ The *Milner* rule¹³⁴ is more consistent with the judicial approval of concurrent remedies for employment discrimination.

Section 1985(3) can and should be used to combat private sex-based employment discrimination. A plaintiff seeking relief under section 1985(3) must surmount two additional hurdles: she must establish conspiracy and class-based animus.

V. THE SINGLE ENTITY RULE

Conspiracy is an essential element of a section 1985(3) cause of ac-

128. See notes 119-27 *supra* and accompanying text.

129. 539 F.2d 1326 (4th Cir. 1976).

130. See notes 55-58 *supra* and accompanying text.

131. 539 F.2d at 1334.

132. 415 U.S. 36 (1974). The *Doski* court quoting *Alexander*, stated: "Title VII was designed to supplement, rather than supplant, *existing laws*," 539 F.2d at 1334 (quoting 415 U.S. at 48-49), and that the legislative history of Title VII indicated that: "neither the provisions regarding the individual's right to sue under Title VII nor any other provision of this bill, are meant to affect *existing rights* granted under other laws." *Id.*

133. See notes 50-54 *supra* and accompanying text.

134. See notes 49-58, 119-27 *supra* and accompanying text.

tion.¹³⁵ A criminal conspiracy is a “combination of two or more persons to accomplish some criminal or unlawful purpose, . . . or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.”¹³⁶ Many lower courts have dismissed section 1985(3) suits for employment discrimination reasoning that a corporate or business defendant and its agent cannot conspire; because the agent’s actions are imputed to the principal, the necessary plurality for a conspiracy is lacking.¹³⁷ The single entity rule—that a corporation is a single “person” and cannot conspire with itself—has some support in criminal law;¹³⁸ it was substantively developed in the civil law in *Nelson Radio & Supply Co. v. Motorola*,¹³⁹ an antitrust case. Many courts blindly adhere to the single entity antitrust rule in employment discrimination litigation.¹⁴⁰

135. See notes 15-16 *supra* and accompanying text.

136. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842). See generally W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 454 (1972).

137. See e.g. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Rubenstein v. University of Wis. Bd. of Regents*, 422 F. Supp. 61 (E.D. Wis. 1976); *Chambliss v. Foote*, 421 F. Supp. 12 (E.D. La. 1976), *aff'd per curiam*, 562 F.2d 1015 (5th Cir. 1977); *Rushton v. Shea*, 419 F. Supp. 1349 (D. Del. 1976); *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264 (M.D. Pa. 1976); *Jones v. Tennessee Eastman Co.*, 397 F. Supp. 815 (E.D. Tenn. 1974); *Girard v. 94th St. & 5th Ave. Corp.*, 396 F. Supp. 450 (S.D.N.Y. 1975); *Cole v. University of Hartford*, 391 F. Supp. 888 (D. Conn. 1975).

138. See *Union Pac. Coal Co. v. United States*, 173 F. 737 (8th Cir. 1909); *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 P. 620 (1911). *Contra*, *Mininsohn v. United States*, 101 F.2d 477 (3d Cir. 1939); *State v. Parker*, 158 A. 797 (Conn. 1932).

See *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 951-53 (1958). A corporation’s criminal intent is imputed from the intent of its agent. Thus, the rationale for the single entity rule is that there is no plurality of human minds and no mutual encouragement. A combination between an agent and the corporation may have greater antisocial effects than the act of an individual; however, the essence of conspiracy is still concerted *human* action. Under this view, conspiracy would exist when two or more agents of a single entity are involved.

When a corporation acts through more than one person to accomplish an antisocial end, the increased likelihood of success, potentially more serious effects of the contemplated offense, and the danger of further unlawful conduct which are the essence of conspiracy rationales are present to the same extent as if the same persons combined their resources without incorporation. Society is benefited by viewing a corporation as a single legal entity only when it acts for proper ends. The policy should not be construed as requiring treatment of the group as an individual when it plans antisocial activities. In addition, to apply these agency principles to criminal conspiracy would allow corporate agents to act *inter sese* with relative impunity, fearing only a corporate fine, the burden of which may not affect them, should the object of the conspiracy be punished. On the other hand conspirators not operating within a corporate framework might under similar circumstances face imprisonment.

Id. at 953.

139. 200 F.2d 911 (5th Cir. 1952).

140. See note 137 *supra*.

In *Nelson Radio*, plaintiff charged defendant Motorola with violating section 1 of the Sherman Act by conspiring with its officers and directors to restrain trade through the use of agreements with Motorola distributors that forbade them from selling any product manufactured by defendant's competitors.¹⁴¹ The case was dismissed because the complaint failed to allege the requisite conspiracy for a section 1 violation. A careful reading of the opinion reveals that the court held only that a corporation could not conspire with itself to restrain trade in its own products. The conspiracy which plaintiff had alleged was simply a business decision made by the corporation's manager as to the nature and extent of the market the corporation would serve.¹⁴² Section 1 of the Sherman Act, said the court, was not meant to regulate such ordinary intracorporate decisions.¹⁴³

The rule is inapposite in employment discrimination cases because sex-based hiring decisions are unrelated to the corporation's operations, assets, profitability, or growth. Rarely, if ever, will two or more business entities conspire to deny employment to women because of their sex. Such an agreement is more likely to exist among members of a single business entity who should be liable for conspiring in violation of section 1985(3). The single entity rule frustrates the purpose of section 1985(3) to redress deprivations of federally protected rights.

Some courts have developed an exception to the single entity rule to

141. 200 F.2d at 912.

142. [I]t appears plain to us that the conspiracy upon which plaintiff relies consists simply in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products. Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or markets to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act.

Id. at 914.

143. *Id.* An alternative basis for the holding in *Nelson Radio* is that § 1 of the Sherman Act is not aimed at a single corporation acting through its agents but at two or more corporations conspiring. To hold that a corporation can conspire with itself under § 1 of the Sherman Act would render § 2 of the Act superfluous as § 2 prohibits individual acts which monopolize or are an attempt to monopolize trade. Under this theory, there is no reason for extending the single entity rule beyond antitrust cases. *See* 28 N.Y.U.L. REV. 1170-71 (1953). *See also* *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942). The single entity rule is especially appropriate in antitrust actions. The purpose of the antitrust laws is to maintain competition. In turn, competition fosters price stability and assures the best possible market performance. To achieve these purposes, it is usually unnecessary to regulate purely intracorporate decisions; competition will direct these decisions to socially desirable ends. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 20-21 (1977).

avoid its hardship. In *Dupree v. Hertz Corp.*,¹⁴⁴ the court held that a conspiracy under section 1985(3) can exist among the officers and directors of a single corporation if the corporation is large, has repeatedly engaged in discriminatory practices, and if the plaintiff is not challenging a formally adopted corporate policy.¹⁴⁵ This rationale, however, is unsatisfactory because several isolated acts of discrimination by a single business entity would not amount to a conspiracy.¹⁴⁶ Further, this rationale would neither apply to small corporations nor to the implementation of a formal corporate policy throughout a large corporation.

There is no reason to uphold the single entity rule in section 1985(3) actions; the *Dupree* exception allows most intracorporate conspiracy to continue unchecked. Public policy requires that the eradication of sex-based employment discrimination not be frustrated by the single entity rule.¹⁴⁷

VI. SEX DISCRIMINATION IS CLASS-BASED AND INVOLVES INVIDIOUSLY DISCRIMINATORY ANIMUS

Section 1985(3) requires an intent to deprive a person of equal protection or of equal privileges and immunities.¹⁴⁸ In *Griffin v. Breckenridge*, the Court held that "class-based, invidiously discriminatory animus"¹⁴⁹ satisfies the intent requirement.¹⁵⁰ The Court found that section 1985(3) prohibits racial discrimination,¹⁵¹ but it did not decide whether sex discrimination involves class-based, invidiously discriminatory animus.¹⁵² Several lower courts have held, without

144. 419 F. Supp. 764 (E.D. Pa. 1976). *Accord*, *Jackson v. University of Pittsburgh*, 405 F. Supp. 607 (W.D. Pa. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974).

145. 419 F. Supp. at 766.

146. *See* B. SCHLEI & P. GROSSMAN, *supra* note 70, at 634.

147. *See* note 173 *infra* and accompanying text.

148. 42 U.S.C. 1985(3) (1970) provides in pertinent part: "If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . ." (emphasis added).

149. 403 U.S. 88, 102 (1971). "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring . . . the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Id.*

150. The Court distinguishes this intent standard from willfulness. *Id.*

151. *Id.* at 103.

152. The Court did, however, refer to a portion of the congressional debate on § 1985(3) which indicates that the statute may cover class-based conspiracies which are not racially motivated. *Id.* at 102 n.9.

We do not undertake in this bill to interfere with what might be called a private conspir-

explanation, that sex discrimination activates section 1985(3).¹⁵³

These lower courts were correct in holding that sex discrimination involves class-based, invidiously discriminatory animus.¹⁵⁴ Like race, sex generally bears no relation to an employee's ability to perform a job.¹⁵⁵ Although racial discrimination in employment may involve more overt hostility than sex-based discrimination, an employer's conduct need not be motivated by hatred to be actionable under section 1985(3).¹⁵⁶ An employment decision based on stereotypic class attributes rather than personal qualifications provides the requisite intent; sex discrimination premised upon archaic notions of a woman's proper societal role should therefore activate section 1985(3).¹⁵⁷

acy growing out of a neighborhood feud of one man or a set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against a man because he was a Democrat . . . or because he was a Catholic, or because he was a Vermonter . . . then this section could reach it.

CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (remarks of Sen. Edmunds).

153. *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167 (E.D. Pa. 1976); *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975). See Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977). Professor Calhoun argues that judicial refusal to extend § 1985(3) to private sex discrimination makes less sense than the refusal to apply §§ 1981 and 1982 to sex discrimination because § 1985(3) contains no language which would invite an interpretation restricting it to race discrimination. She also notes the Court's inclusion of state supported sex discrimination in § 1983 as suggestive that the Court would not disapprove construing § 1985(3) to encompass sex discrimination. See *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974).

154. As in the Negro problem, most men have accepted as self-evident, until recently, the doctrine that women had inferior endowments in most of those respects which carry prestige, power, and advantages in society, but that they were, at the same time, superior in some other respects. The arguments, when arguments were used, have been about the same: smaller brains, scarcity of geniuses and so on. The study of women's intelligence and personality has had broadly the same history as the one we record for Negroes.

G. MYRDAL, *AN AMERICAN DILEMMA* 1077 (1944).

155. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Title VII permits sex-based employment discrimination if sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise. EEOC guidelines provide that the bona fide occupational qualification exception is applicable only to job situations that require specific physical characteristics necessarily possessed by one sex, e.g., employment of actors, actresses, or fashion models. 29 C.F.R. 1604.2. See *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 545-46 (1971) (Marshall, J., concurring).

156. See note 149 *supra* and accompanying text.

157. If our women are, to be emancipated from subjection to the law which God has imposed upon them, if they are to quit the retirement of domestic life, where they preside in stillness over the character and destiny of society; . . . if, in studied insult to the authority of God, we are to renounce in the marriage contract all claim to obedience, we shall soon have a country over which the genius of Mary Wolstonecraft would delight to preside, but from which all order and all virtue would speedily be banished. There is no form of human excellence before which we bow with profounder deference than that which appears in a delicate woman, . . . and there is no deformity of human character

Although section 1985(3) does not require that discriminatory animus be directed toward a suspect class,¹⁵⁸ judicial determination that a class is suspect involves recognizing that discrimination against that class is inherently invidious.¹⁵⁹ Consequently, the criteria of suspectness may aid in determining whether sex discrimination should activate section 1985(3).¹⁶⁰ The Court has held that a class is suspect if its members exhibit an immutable, readily identifiable characteristic, if it has been subjected to a history of purposeful discrimination, and if it has been relegated to a position of political powerlessness.¹⁶¹ Women as a class satisfy all three criteria,¹⁶² but the Supreme Court has never ex-

from which we turn with deeper loathing than from a woman forgetful of her nature, and clamorous for the vocation and rights of men.

G. MYRDAL, *supra* note 154, at 1074 (quoting A. BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 223-25 (1857)).

158. See note 149 *supra* and accompanying text.

159. *Harrison v. Brooks*, 519 F.2d 1350 (1st Cir. 1975).

160. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). See generally Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 S. CT. REV. 1; Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971); Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971).

161. *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

Professor Michelman suggests that suspect classifications embody three characteristics: 1) a general ill-suitedness to the advancement of any proper governmental objective; 2) a high degree of adaptation to uses which are oppressive in the sense of systematic and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence; 3) a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19-20 (1969).

162. The history of discrimination against women and their inferior status is well documented by statutes and case law. Women could not hold office, serve on juries, sue in their own name, or hold or convey property. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973). Nor could they engage in prestigious careers. See *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (state law prohibiting women from practicing law held constitutional). In *Bradwell*, Justice Bradley decreed: "[T]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141 (Bradley, J., concurring). See generally L. KANOWITZ, *WOMEN AND THE LAW* 5-6 (1969).

Women were politically powerless without the right to vote. Thomas Jefferson once commented that, "were our state a pure democracy there would still be excluded from our deliberations . . . women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." M. GRUBERG, *AMERICAN WOMEN IN POLITICS* 4 (1968).

Discrimination against women was believed to benefit women as well as society:

In this country we believe that the general good requires us to deprive the whole female sex of the right of self-government. They have no voice in the formation of the laws which dispose of their persons and property . . . We treat all minors much in the same way. . . . Our plea for all this is, that the good of the whole is thereby most effectually promoted . . .

licitly recognized sex as a suspect class.¹⁶³

The Court has historically deferred to gender-based legislative classifications.¹⁶⁴ Recently, however, the Court has scrutinized gender-based classifications under a standard "more deferential than the 'strict scrutiny' exercised in challenges to suspect classifications and impingements of fundamental interests, but more exacting than the 'rational basis' test traditionally applied to economic and social welfare legislation."¹⁶⁵

In 1971 the Court held, in *Reed v. Reed*,¹⁶⁶ that an Idaho statute preferring males for appointment as administrators of estates violated the fourteenth amendment. Although the Court framed the issue in deferential language,¹⁶⁷ it rejected the stated legislative purpose and found that sex discrimination for the purpose of administrative convenience is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."¹⁶⁸ Using similar reasoning, a plurality of the Court held gender-based classifications suspect and subject to strict scrutiny in *Frontiero v. Richardson*.¹⁶⁹ After *Frontiero* the Court re-

G. MYRDAL, *supra* note 154, at 1074 (quoting A. BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 223-25 (1857)).

163. See generally Comment, *Equal Protection of the Laws: Sex is not a Suspect Classification*, 27 U. FLA. L. REV. 288 (1974). See notes 164-73 *infra* and accompanying text.

164. Under the rational relationship test, the statute's classifications must bear a rational relationship to its stated purpose to withstand constitutional scrutiny. See *Hoyt v. Florida*, 368 U.S. 57 (1961) (statute exempting all women from jury service held constitutional, but case is qualified by *Taylor v. Louisiana*, 419 U.S. 522 (1975)); *Goessaert v. Cleary*, 335 U.S. 464 (1948) (Michigan statute forbidding women from bartending unless they were related to a male owner upheld under the equal protection clause); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (statute limiting women to a 10-hour work day held to have a rational basis: "[H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of men."); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (law forbidding women from practicing law held to have a rational basis).

165. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 177 (1977). See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 18-25 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

166. 404 U.S. 71 (1971). See generally Ginsburg, *supra* note 160.

167. 404 U.S. at 76. The issue was "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to [the] state objective."

168. *Id.* See generally *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 118-19 (1972).

169. 411 U.S. 677 (1973) (administrative convenience did not justify a federal statute which gave servicemen housing allowances upon listing their wives as dependents, but allowed servicewomen similar benefits only upon proof that their husbands were actually dependent).

treated from strict scrutiny¹⁷⁰ and established an intermediate standard of review in *Craig v. Boren*,¹⁷¹ stating that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives.”¹⁷²

Congress has legislatively determined that sex-based employment discrimination is invidious by including sex discrimination within the prohibitions of Title VII and by enacting the Equal Rights Amendment. The strong congressional policy against sex-discrimination,¹⁷³

170. *Stanton v. Stanton*, 421 U.S. 7 (1975), *aff'd on rehearing*, 429 U.S. 501 (1977) (Court found no rational basis for Utah statute requiring divorced husbands to support their sons until age 21 but their daughters only until age 18); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (claim by male naval officer that federal statute according women a 13 year tenure before mandatory discharge for lack of promotion discriminated against men rejected under rational relationship test); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (claim that California disability insurance excluding pregnancy benefits discriminated against women rejected on grounds that the challenged classification was not “based on gender as such”); *Kahn v. Shevin*, 416 U.S. 351 (1974) (Florida statute granting widows but not widowers an annual \$500 property tax exemption has rational basis).

171. 429 U.S. 190 (1976). *Craig* is commented on in: 42 MO. L. REV. 470 (1977); 29 U. FLA. L. REV. 583 (1977).

172. 429 U.S. at 197. The Court invalidated an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and females under 18. Writing for the majority, Justice Brennan found that Oklahoma statistics showing .18% of young females as compared with 2.0% of young males had been arrested for drunk driving failed to demonstrate that the statute’s gender-based classification substantially served the state’s goal of promoting traffic safety. “[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection clause.” *Id.* at 204.

The Court invoked the *Craig* test in *Califano v. Goldfarb*, 430 U.S. 199 (1977), to invalidate a provision of the Social Security Act that granted survivor’s benefits to all widows, but only to widowers who derived at least half their support from their wives.

173. Congress’ concern over sex discrimination is evidenced in the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-26, 86 Stat. 103 (codified in scattered sections of 5, 28, 42 U.S.C.).

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread and, is regarded by many as either morally or physiologically justifiable.

This Committee believes that women’s rights are not judicial diversions. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. REP. NO. 238, 92d Cong., 1st Sess. 4-5 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2140-41.

and judicial recognition of sex-based classifications as functionally suspect¹⁷⁴ show that charges of sex discrimination should trigger section 1985(3).

The lax definition of "class" adopted by some lower courts in section 1985(3) claims adds further support for its use to remedy sex discrimination. Without discussing whether defendant's actions were motivated by "reverse" discriminatory animus, the Eighth Circuit, in *Action v. Gannon*,¹⁷⁵ upheld a section 1985(3) claim by whites alleging deprivation of first amendment rights. In *Westberry v. Gilman Paper Co.*,¹⁷⁶ the Fifth Circuit found that environmental activism could give rise to sufficient "class-based, invidiously discriminatory animus behind the alleged actions of the conspirators" to evidence subject matter jurisdiction . . . under 1985(3).¹⁷⁷ Although these decisions may extend the *Griffin*¹⁷⁸ analysis too far, courts that are willing to accept jurisdiction in these circumstances should find sex discrimination clearly actionable under section 1985(3).

VII. CONCLUSION

Equal employment opportunity—the right to choose an occupation—is necessary to develop self-respect, participation, and social responsibility.¹⁷⁹ While Title VII has remedied much sex-based employment discrimination, its procedures have simultaneously frustrated many legitimate claims.¹⁸⁰ The Supreme Court has held that victims of employment discrimination may pursue alternative remedies to Title VII.¹⁸¹ Section 1985(3) is such an alternative and may be used to

174. See Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 (1977).

175. 450 F.2d 1227 (8th Cir. 1971).

176. 507 F.2d 206 (5th Cir. 1975). See note 118 *supra*.

177. 507 F.2d at 210. *But see* *Kimble v. D.J. McDuffy, Inc.*, 445 F. Supp. 269 (E.D. La. 1978) (no class-based animus found for class of oil industry personal injury claimants under 42 U.S.C. § 1985(2)). *Kimble* conflicts with *Westberry's* broad construction of a § 1985(3) class. It should not hamper § 1985(3)'s use in sex discrimination cases because *Kimble* defines a class as a group with inherent common characteristics.

178. See notes 148-52 *supra* and accompanying text.

179. Professor Karst envisions the fourteenth amendment as a guarantor of equal citizenship and defines equal citizenship to include three overlapping values: respect, participation, and responsibility. He argues that women will realize equal citizenship only if the traditional patriarchal stereotype of "woman's role" is abolished and that to the extent that stereotype is embodied in the law or is socially imposed, "the principle of equal citizenship presumptively requires intervention by the courts." Karst, *supra* note 174, at 55.

180. See notes 20-27 *supra* and accompanying text.

181. See notes 50-58 *supra* and accompanying text.

combat sex-based employment discrimination.

If the Supreme Court ultimately holds that Congress has power under section 5 of the fourteenth amendment to extend fourteenth amendment prohibitions to private conduct, section 1985(3) will clearly apply to sex discrimination claims.¹⁸² Even if the Court adheres to a restrictive interpretation of section 5, the litigant may avoid the state action problem by arguing that section 1985(3) protects the federally created Title VII right to be free from sex-based employment discrimination.¹⁸³

Because courts and legislators have endeavored to eradicate sex-based employment discrimination, it should activate section 1985(3).¹⁸⁴ Courts have a duty to see that legitimate section 1985(3) claims are not dismissed because of the single entity rule or a narrow construction of intent.¹⁸⁵ Section 1985(3) should play a significant role in ending sex-based employment discrimination.

Celine Ellett Duke

182. See Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 113-17; Note, *supra* note 95, at 675.

183. See notes 119-27 *supra* and accompanying text.

184. See notes 135-47 *supra* and accompanying text.

185. See notes 166-73 *supra* and accompanying text.

